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April J. Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave NW
Suite CC-5610 (Annex C)
Washington DC 20580

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

Dear Secretary Tabor:

Foley & Lardner LLP ("Foley & Lardner" or "we") is pleased to submit the following comments to the Federal Trade Commission (the "Commission" and, together with the Department of Justice Antitrust Division, the "Agencies'") regarding the proposed revisions to the Hart-Scott-Rodino ("HSR") Coverage, Exemption, and Transmittal Rules, Project No. P239300 (the "Proposed Rulemaking"), published in the *Federal Register* on June 29, 2023 (the "NPRM").[1]

Foley & Lardner is a law firm with over 1,000 attorneys across four countries, including 22 offices in the United States. In May 2023, *The American Lawyer* reported Foley & Lardner to be the 47th largest law firm in the United States based on revenue. Among many other services, Foley & Lardner's Antitrust & Competition practice group routinely prepares premerger notification filings for clients under the HSR Act. We also regularly represent clients in Agency reviews of mergers and acquisitions, both during initial thirty-day HSR waiting periods as well as in more fulsome, "Second Request" investigations. Our clients have included public and private companies, nonprofits, insurance carriers, startups, natural persons, trusts, family offices, and private equity funds, both foreign and domestic. We have particular focuses on the manufacturing, healthcare, life sciences, innovative technology, and energy sectors.

We begin with some general observations about the HSR Act before we turn to our specific comments on the Proposed Rulemaking. For the Agencies' benefit, our specific comments follow the order of the "Proposed Instructions Outline" sections of the NPRM and the subsections within.[2] Finally, these comments are solely our own. No client has engaged or compensated us to

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

[2] 88 Fed. Reg. at 42,184-86.

prepare these comments, and the views expressed herein do not necessarily reflect those of our clients.

1. Opening Comments

We appreciate that the Agencies are undertaking a comprehensive review of the HSR Act's premerger filing requirements. There is no doubt that the HSR system can be improved, and we are grateful that the Proposed Rulemaking finds ways to reduce certain filing burdens, most notably by streamlining the revenue reporting requirements.

Before we turn to our specific comments, we offer three observations about the HSR premerger notification process generally. First, the current HSR system does an exceptionally good job of providing the Agencies the information they need to screen for potentially anticompetitive mergers. The NPRM does not identify a single transaction whose competitive effects the Agencies may have ever missed due to any shortcomings in the current HSR system. This is not surprising, because false negatives under the current HSR system are exceedingly rare. Dating back to 2000, we are aware of only seven HSR-reportable transactions the Agencies have challenged after the expiration of the waiting period.[3] In four of those seven transactions, notwithstanding the expiration of the HSR waiting period, the Agencies successfully identified potential competitive issues and opened an investigation before the acquisition closed.[4] In the fifth transaction, the buyer's HSR form allegedly omitted required documents and thus was deficient, prompting a $4 million civil penalty.[5] In the sixth transaction—a merger between hospitals located seven miles from each other—the geographic overlap would have been self-evident from the HSR filing, but then-prevailing economic theory predicted no competitive effects. Finally, in the seventh case, two large merging parties had a $20 million overlap that may have slipped through the HSR cracks. Therefore, dating back to 2000, we are aware of only a single instance where a requirement to provide additional information in the HSR filing might conceivably have made a difference to the

[3] The transactions that we are aware of are *Facebook/Instagram*, *Facebook/WhatsApp*, *Chicago Bridge & Iron/Pitt-Des Moines*, *Deere/Precision Planting*, *Hearst/Medi-Span*, *Evanston Northwestern/ENH Medical*, and *Parker-Hannifin/CLARCOR*.

[4] In *Facebook/Instagram*, the Commission conducted a Second Request, but ultimately allowed the transaction to close. In *Facebook/WhatsApp*, the Commission reportedly conducted a preliminary investigation, leading to a warning letter from the Bureau of Consumer Protection. In *Chicago Bridge & Iron/Pitt-Des Moines*, the Commission opened its investigation approximately one week after the expiration of the HSR waiting period, before the transaction had closed. And in *Deere/Precision Planting*, the Department of Justice challenged the transaction before it had closed, and the parties ultimately abandoned the transaction.

[5] In *Hearst/Medi-Span*, the acquiring entity allegedly failed to submit relevant Item 4(c) documents and subsequently provided an amended HSR filing to include the required documents. The acquiring person agreed to pay a civil penalty of $4 million and ultimately divested the acquired business and paid $19 million in disgorgement.

Agencies. But there have been 39,962 Second Request-eligible HSR filings made since FY2000.[6] Thus, by our count, the current HSR system's "false negative" rate is just 0.0025%.

Second, for all its success in giving the Agencies an effective screen, the overwhelming majority of transactions subject to HSR review pose no competitive issues whatsoever. In FY2021, the most recent year for which data is publicly available, the Agencies received HSR filings for 3,413 Second Request-eligible transactions.[7] Out of these, the Agencies issued Second Requests in 65—a rate of 1.9%. Over a longer timespan, covering the ten-year period from FY2012 through FY2021, the Agencies received a total of 18,873 Second Request-eligible HSR filings, and issued Second Requests in 518 of them—a rate of 2.7%.[8] Thus, as Chair Khan put it in a recent interview, "we're really talking about a very, very, very, *very* small slice of overall deal activity that ends up being affected by merger investigations and merger enforcement."[9] Also notably, out of these same 18,873 Second Request-eligible HSR filings from FY2012-FY2021, the Agencies granted "early termination" in 9,682 of them—a rate of 51%, which undoubtedly would have been higher but for the current moratorium on early termination grants. In short, any effort the Agencies undertake to reform the HSR reporting requirements must recognize the reality that the overwhelming majority (over 97%) of HSR-reportable transactions are determined not to warrant an in-depth investigation, and that a majority (at least 51%) are so plainly nonproblematic that the Agencies can clear them on cursory review.

Third, some parts of the current HSR form can be very burdensome to address. These filings sometimes take *hundreds* of hours to prepare. But with some hard work and the assistance of experienced HSR counsel, the current HSR form can generally be completed without jeopardizing the timing or success of the transaction. This is important, because a large number of HSR filings are made by relatively small companies. Companies with as little as $22.3 million in total assets can be required to make HSR filings.[10] HSR filings are routinely made by companies in bankruptcy,[11] by nonprofits,[12] and by myriad companies with limited budgets and a need to close their deal quickly. HSR filings can even be required in transactions like open-market purchases, where the acquired

[6] The historical numbers provided in these comments are taken from "Appendix A" to the Agencies' *Hart-Scott-Rodino Annual Reports* to Congress for Fiscal Years 2021, 2011, and 2002.

[7] A "Second Request-eligible" HSR filing means an HSR filing where an Agency is authorized to request additional information. For example, HSR filings for transactions that were subsequently found to be non-reportable are excluded from this category.

[8] This rate has been remarkably consistent over time. Measured back to FY2000, the Agencies have received a total of 39,692 Second Request-eligible HSR filings, but have issued Second Requests in 1,139 of them—a rate of 2.9%.

[9] *See* "FTC chair Lina Khan discusses need for regulations on big business," CBS NEWS (July 27, 2003), at 6:30, *available at* https://www.youtube.com/watch?v=8R9H7Pf6bKI.

[10] *See* 15 U.S.C. § 18a(a)(2)(B); Revised Jurisdictional Thresholds, 88 Fed. Reg. 5,004 (Jan. 26, 2023).

[11] *See generally* 11 U.S.C. § 363(b)(2).

[12] *See generally* 16 C.F.R. § 801.2(f)(3).

side may otherwise have no involvement in the transaction, may not benefit from the transaction, and only learns of its obligation to file HSR upon being notified by the buyer.[13] All of these companies need the HSR process to be timely, efficient, and achievable without unnecessarily bringing large numbers of people "under the tent" for an important, nonpublic deal.[14]

In sum, where the current HSR system falls short is not in its 0.0025% rate of false negatives, but in its 97% rate of false positives—the overwhelming majority of HSR-reportable transactions that are either competitively harmless or affirmatively procompetitive, but nevertheless are burdened by HSR's costs. We respectfully submit that the Agencies should focus any HSR reform efforts on reducing these false positives. One such area on which to focus is the Agencies' invitation to "exempt, from the requirements of [the HSR Act], classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws."[15] The Agencies also should resume the heretofore longstanding practice of granting early termination for transactions the Agencies determine to be nonproblematic.[16]

Instead, the NPRM proposes to expand the burdens of all HSR filings by a factor of almost four (in the Commission's estimate, which we consider low). Therefore, while we see the potential value of some elements of the Proposed Rulemaking, there are many parts that would significantly increase the complexity, expense, and burden of HSR filings, requiring information that no reasonable company maintains in the ordinary course of business, and which in some respects may exceed the burdens required to comply with a Second Request, potentially undermining the speed and confidentiality of important deals. All in an effort to make "more effective [and] efficient"[17] a program that already works 99.9975% of the time.

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[13] *See generally* 16 C.F.R. §§ 801.30 & 803.5(a).

[14] In the case of publicly traded companies, risks of insider trading or deal rumors heighten these concerns about bringing individuals "under the tent" about a potential transaction.

[15] 15 U.S.C. § 18a(d)(2)(B). The Statement of Chair Khan, joined by Commissioners Slaughter and Bedoya, regarding the Proposed Rulemaking comments that "[t]he House Report for the HSR Act estimated that the statute would 'requir[e] advance notice' for approximately 'the largest 150 mergers annually.' Today, the agencies often receive more than 150 filings per month." *Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules*, Commission File No. P239300 (June 27, 2023).

[16] *See generally* 15 U.S.C. § 18a(b)(2). On February 4, 2021, the Agencies announced a "temporary suspension" of the practice of granting early termination for HSR waiting periods. *See* Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021). The press release cited three factors to justify the suspension—the "transition to the new Administration," the "unprecedented volume of HSR filings for the start of a fiscal year," and the "pandemic"—and stated that the suspension was anticipated to be "brief." It is now over two-and-a-half years later, and all three factors cited in the press release have long ago subsided.

[17] Fed. Trade Comm'n, Press Release, "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review" (June 27, 2023).

2. Comments on Proposed "Ultimate Parent Entity Information" Section

Annual Reports and Audit Reports. We offer two modest revisions to the proposed instructions for the submission of annual reports and audit reports (collectively, "Annual Reports"). First, for Natural Person UPEs who file as acquired persons, the instructions should only require the most recent Annual Reports for the highest-level entity the Natural Person controls *that includes the assets or entities being sold*. Second, as a general matter, persons filing notification should not be required to provide Annual Reports for *entities that have less than $10 million in total assets*, unless that entity's revenues contribute to a NAICS overlap or any overlap identified in the Horizontal Overlap Narrative.

The reason for our proposed modifications is that certain UPEs—especially natural persons—sometimes own small, competitively irrelevant top-level entities, such as real estate holding companies or small family or charitable trusts, for which it can be difficult to collect annual reports. Given their *de minimis* size, our experience is that Annual Reports for entities with less than $10 million in total assets are hardly ever relevant to the Agencies' analysis of the competitive effects of the transaction being reported. In the rare instances where such an Annual Report might be relevant, our proposed requirement for submitting Annual Reports for entities that contribute to a NAICS code or horizontal overlap would ensure that the Agencies are provided a copy of that Annual Report.

Organizational Chart for Funds and MLPs. We disagree with the proposal to require acquiring persons organized as funds or master limited partnerships to "provide an organizational chart sufficient to identify and show the relationship of all entities that are affiliates or associates." In our experience, it is surprisingly rare for companies or funds to maintain these sorts of organizational charts in the ordinary course of business. Moreover, to the extent these sorts of organizational charts sometimes do exist in the ordinary course of business, they are very often incomplete, out-of-date, oversimplified, or so complicated as to be functionally useless.

We would suggest that this proposed instruction be limited to providing organizational charts that *already exist in the ordinary course of business*. We would also suggest that the proposed instruction be limited to identifying a fund or master limited partnership's affiliates or associates *whose revenues contribute to a NAICS overlap or any overlap identified in the Horizontal Overlap Narrative*.

Identification of Other Types of Interest Holders that May Exert Influence. We suggest removing or revising the proposed instruction to disclose *creditors* of the acquiring entity or its affiliates. We disagree with the NPRM's claim that "some credit arrangements permit the creditor to exercise rights and influence similar to those of equity holders."[18] We do not understand

[18] 88 Fed. Reg. at 42,189.

what sorts of arrangements this claim is referencing, but in the vast majority of credit arrangements, the creditor's rights and financial incentives are distinctly different than those of equityholders.

At most, we would suggest that this proposed instruction be limited to requiring the identification of any creditors *that are financing 50% or more of the value of the transaction being reported, measured based on the HSR size-of-transaction test*.

Identification of Officers and Directors. We have four separate concerns about the proposal to require certain information about officers, directors, and board observers. First, HSR filings are only supposed to require the submission of information that 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."[19] The proposal to require information about officers and directors seems directed at law-enforcement interests that go beyond an analysis of the "acquisition" being reported, into the enforcement of Section 8 of the Clayton Act ("Section 8"). Section 8 is important, of course. But Congress did not see fit to include Section 8 in the scope of the HSR Act.

Second, even if it were proper to use HSR filings to police Section 8, the proposed instruction goes beyond the text of Section 8. As the NPRM recognizes, Section 8 applies neither to "board observers"[20] nor to unincorporated entities.[21] Nevertheless, the proposed instruction would require the provision of detailed information about board observers, and about officer- or director-equivalent individuals at noncorporate entities. The proposed instruction also requires information about officers' and directors' service at other companies *over the last two years*. This historical information is irrelevant to Section 8, which only prohibits serving as an officer or director of two competing corporations "at the same time,"[22] and which explicitly includes a one-year grace period for interlocks that only become impermissible in the middle of an officer or director's term.[23]

Third, this proposed instruction would impose a significant burden on many filers. The NPRM assumes "that this information should be known to or readily accessible by the filing parties, and in some cases already collected as part of an incorporated entity's antitrust compliance program."[24] But this assumption does not match our experience. Many companies do not keep a central list of all the officers, directors, *and* board observers, for itself *and* for each of its

[19] 15 U.S.C. § 18a(d)(1).

[20] 88 Fed. Reg. at 42,190 ("Board observers are not subject to the Section 8 ban on interlocking directorates. . . .").

[21] 88 Fed. Reg. at 42,189 n.34 ("Section 8 does not technically apply to unincorporated entities. . . .").

[22] 15 U.S.C. § 19(a)(1).

[23] 15 U.S.C. § 19(b).

[24] 88 Fed. Reg. at 42,190-91.

subsidiaries. And even in those cases where the information is regularly kept, the information that companies actually keep is often very different than what the proposed instruction would require. For instance, companies do not typically keep historical information about the *other companies* that their officers, directors, and board observers have served *dating back over the prior two years*. Instead, this information would need to be collected manually, potentially at great burden, from a wide swath of individuals across a corporate hierarchy—including individuals who may not even know about the transaction being reported. These difficulties would be even worse for multinational organizations, given that each jurisdiction around the world has its own set of laws about officers, directors, and board observers.[25]

Finally, for purposes of Section 8, an "officer" is narrowly defined to mean "an officer elected or chosen by the Board of Directors."[26] For HSR, in contrast, the Commission's Premerger Notification Office considers an "officer" to include not only persons elected by the board, but also (i) persons whose positions are designated by an entity's bylaws or articles of incorporation, (ii) persons appointed by an entity's President, Chief Executive Officer, or Board Chair, where the entity's bylaws give said person the power to name additional officers,[27] and (iii) for "unincorporated entities" like LLCs or partnerships that might not have a classic board or officers, the vague phrase "individuals exercising similar functions." Given these complexities, it can be a serious challenge to identify each and every HSR "officer" at a given entity with any confidence or precision—especially those "officers" who were not even involved in the transaction at issue. The proposed instruction therefore would transform HSR filings into an expensive and burdensome exercise of determining, for each entity in a corporate family, each individual who could potentially meet the Premerger Notification Office's definition of "officer," and *then* determining for *each such individual* any other arguably "officer"-level positions those persons could conceivably have held at *any other* organization *over the past two years*.

3. Comments on Proposed "Transaction Information" Section

Narrative Describing Transaction Rationale. We consider the proposed requirement to "[i]dentify and explain each strategic rationale for the transaction discussed or contemplated by the filing person, or any of its officers, directors, or employees" to be impractical and unnecessary. This requirement calls for information ("discuss or contemplated" rationales) that may be evolving,

[25] In some countries, for instance, local law requires that certain directors be residents of that country. In those cases, an organization might appoint individuals from a local law firm or service provider to serve as the resident directors. These resident directors sometimes hold additional director titles at dozens or even hundreds of other companies.

[26] 15 U.S.C. § 19(a)(4).

[27] *See generally* ABA Section of Antitrust Law, *Premerger Notification Practice Manual* (5th ed. 2015), Int. No. 176; PNO Informal Interpretation No. 1610002 (Oct. 12, 2016).

that may have changed by the time of filing, and that may very well differ across the various personalities and business roles that span a large organization.

We would compare this proposed instruction to Specification 20(c) of the Commission's Model Second Request, which shows the interrogatory the Commission considers to be necessary and justified in an in-depth investigation. In full, Model Specification 20(c) requests "a detailed description of the reasons for the Proposed Transaction and the benefits, costs, and risks anticipated as a result of the Proposed Transaction."[28] There is no requirement to identify rationales that were "*discussed or contemplated*," if for instance those rationales were based on inaccurate information or have changed. At most, we would suggest that this instruction be limited to requiring a *brief* description of the *primary* strategic rationale for the transaction.

We would also suggest that this item be limited to the *acquiring person*. The buyer's strategic rationales are not always known to the seller. Also, the acquiring person's strategy is the most competitively relevant. The seller's rationale for a transaction is often no more than obtaining cash to distribute to investors or to use for unrelated business purposes.

Diagram of the Transaction. Given the complexities of many modern mergers and acquisitions, we understand the potential value to the Agencies of seeing a transaction diagram or, as they are often known, a "step chart." As a general matter, our experience confirms the NPRM's observation that "[s]uch diagrams are *often* prepared by companies in the ordinary course of business for other purposes, such as for transaction diligence requirements."[29] We note, however, that transaction diagrams are not *always* prepared in the course of deals. Moreover, even when these diagrams are prepared, it is not uncommon for them to be incomplete, oversimplified, preliminary and subject to change, out-of-date, or otherwise inaccurate. We would also note that step charts are often prepared with tax considerations in mind, so these diagrams tend to focus on persnickety details that may be important for tax reasons but which are immaterial for purposes of analyzing competitive effects and, from time to time, sometimes include detailed tax advice that is protected by the attorney-client privilege or otherwise commercially sensitive. Therefore, we would suggest that this proposed instruction be modified to require the submission of the *most recent diagram of the transaction, but only to the extent that such a diagram already exists and is not materially inaccurate*. We would also suggest that the instructions be modified to permit parties to redact, omit, or simplify any diagram, to exclude information that relates solely to tax considerations.

Expansion of Transaction Agreements to be Produced and *Production of Other Agreements Between the Acquiring and Acquired Persons.* We understand the potential value to the Agencies of reviewing "other agreements negotiated in conjunction with the transaction" as well as certain pre-existing contracts in place between the acquiring and acquired persons. But we are

[28] Federal Trade Commission, *Model Second Request* (rev. Oct. 2021), Specification 20(c).

[29] 88 Fed. Reg. at 42,192 (emphasis added).

concerned that, as written, the proposed instruction would capture *clean-team agreements* and confidentiality agreements that include similar antitrust safeguards, which might have unintended effects. Such a rule may well cause some parties—such as parties to deals with *de minimis* overlaps—to forgo using clean-team agreements entirely, on the thinking that including a clean-team agreement in the HSR filing would signal a larger competitive concern than actually exists. Relatedly, to avoid signaling a competitive concern in the HSR filing, the proposed instruction might cause some parties to substitute written clean-team agreements with *oral* agreements. Between these two effects, the proposed instruction could lead to a general deterioration in the prevalence, rigor, and formality of clean-team processes.

With respect to the proposed instruction for "Transaction-Specific Agreements," we would suggest a modest revision to the proposed instruction that "If there is no definitive agreement executed, provide a copy of the most recent draft agreement or term sheet that provides sufficient detail about the scope of the entire transaction that the parties intend to consummate. See § 803.5." We believe this proposed instruction exceeds the requirements of revised § 803.5 which, as proposed, merely requires that "[i]f a definitive agreement is not provided, the affidavit must attest that a term sheet or draft agreement that describes with specificity the scope of the transaction that will be consummated has been submitted with the executed letter of intent or agreement in principle."[30] We have no objection to the proposed revision to § 803.5 as drafted—except to note that the phrase "will be consummated" should instead say *the parties intend to consummate*—which we anticipate will typically be satisfied through the production of an agreed-upon term sheet. Even if a term sheet is provided, however, the wording of the proposed instruction to the HSR form would arguably require the production of "the most recent draft agreement" as well, exceeding the requirements of proposed § 803.5. Additionally, as a practical matter, the "most recent draft agreement" is often slanted to reflect the views of the most recent party to circulate a draft of the purchase agreement, such that the "most recent draft" is not necessarily representative of what the definitive agreement will ultimately become.

In addition, the proposed instruction for "Other Agreements Between the Parties" goes farther than is necessary to screen for potential competitive effects. The proposed instruction would capture *de minimis* contracts that have no competitive significance, but which may be highly burdensome and expensive to identify and compile. The proposed instruction might arguably capture *purchase orders*, which are "contracts" in a legal sense but relate only to a single, non-recurring transaction, and may be voluminous and burdensome to collect. The proposed instruction would also require the production of agreements between the acquired and acquiring person, even if the agreement is unrelated to that portion of the acquired person that is being acquired in the transaction.

[30] 88 Fed. Reg. at 42,210.

Accordingly, at most, we would suggest that the proposed instruction for "Other Agreements Between the Parties" be modified to requiring the production of three categories of pre-existing contracts between the acquiring person and the *acquired entity or assets*: (i) noncompete agreements in effect within one year of filing, (ii) nonsolicitation agreements in effect within one year of filing, and (iii) supply or license agreements that generated annual revenue of $10 million or more within one year of filing. We would also suggest that the instruction be modified to clarify that *purchase orders* do not need to be produced, nor do contracts that have *expired or terminated* before the filing date.

Provision of a Transaction Timeline. We would compare the proposed requirement for a "detailed timetable for the transaction"—including "[i]dentify[ing] all provisions in the agreement that govern the extension of these deadlines [for closing or terminating the agreement] and explain[ing] the conditions for extending deadlines and how long they may be extended"—to Specification 20(a) of the Commission's Model Second Request. In relevant part, Model Specification 20(a) simply requests "a timetable for the Proposed Transaction, [and] a description of all actions that must be taken prior to consummation of the Proposed Transaction."[31] The requirement proposed in the NPRM for HSR Act filings is broader and more onerous than the interrogatory that Agency Staff actually require in in-depth investigations.

At most, we would suggest that this instruction be limited to requiring a *brief* description of the timetable for the transaction and a *brief* description of any termination fees, break fees, ticking fees, or similar arrangements.

4. Comments on Proposed "Business Documents" Section

Production of Certain Documents of the Supervisory Deal Team Lead(s). We offer propose two modest changes to the proposed expansion of the document-search obligations to include "supervisory deal team lead(s)." The term "supervisory deal team lead(s)" is neither defined nor self-explanatory. Significantly, the NPRM gives two different descriptions of who a "supervisory deal team lead(s)" might be: "the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue," or the individual(s) who "have responsibility for preparing or supervising the assessment of the transaction and [are] involved in communicating with the individuals, such as officers or directors, that have the authority to authorize the transaction."[32] Respectfully, these are two very different standards, as the person who functionally leads the day-to-day process might be totally different from the person who is responsible for supervising the assessment of the transaction. We would also note that the person

[31] Federal Trade Commission, *Model Second Request* (rev. Oct. 2021), Specification 20(a).

[32] 88 Fed. Reg. at 42,194.

who functionally leads the day-to-day process of a transaction is sometimes a lawyer, operating in a primarily legal capacity under the attorney-client privilege.

Given these concerns, we would propose that the instructions be modified to change "supervisory deal team lead(s)," plural, to "supervisory deal team lead," singular. And we would propose that the term "supervisory deal team lead" be expressly defined to mean *the individual with primary responsibility for supervising the assessment of the transaction.*

Production of Certain Drafts. We strongly disagree with the proposal to require *drafts* of Transaction-Related Documents, where the drafts "were sent to an officer, director, or supervisory deal team lead(s)." We believe this instruction would impose a tremendous burden on parties, would create unreasonably large HSR filings, and will not be helpful for the Agencies.

We routinely see situations where Transaction-Related Documents are prepared not by third-party advisors or subordinate employees, but instead are prepared *by* officers, directors, or supervisory deal team leads.[33] In these situations, it is not at all uncommon for the authors to prepare *dozens* (or more) of discrete drafts as part of the drafting process. To take a typical example, one officer or supervisory deal team lead might begin a presentation on a given morning, emailing a copy to a colleague. That colleague might add a few more slides that afternoon, flipping it back to the officer or lead. The same back-and-forth might continue over the course of a week. Then, after a week of drafting, the officer or supervisory deal team lead might circulate a draft to a much larger team, which in turn prompts a series of revisions, markups, and comments, all of which are routed back to the officer or supervisory deal team lead. In these sorts of scenarios—which, to reiterate, happen all the time—the proposed instruction on drafts would require filers to expend significant burdens to produce dozens or even hundreds of iterative drafts, none of which will have any practical value to the Agencies.

In terms of the burden to filing parties, the proposed instructions on drafts would increase costs and burdens dramatically. The proposed instruction will transform what is already a difficult process of identifying relevant Transaction-Related Documents (which *already* includes a rule for collecting certain drafts) into a significant effort to capture, deduplicate, organize, and prepare privilege logs for interminable numbers of iterative drafts. The proposed instruction could potentially increase the size of at least some HSR filings by a factor of ten or twenty.

In terms of the value to the Agencies, we disagree with the NPRM's statement that drafts will reveal "highly relevant, probative, or candid statements about the competitive impact not

[33] From time to time, we have seen isolated situations where Transaction-Related Documents are prepared in the first instance by third-party advisors, who then provide semi-formal, interim drafts to officers, directors, or supervisory deal team leads for use at a major meeting or discussion. We understand these situations to be the driver of the Proposed Rulemaking's revised instruction on drafts. Our experience, however, is that these situations are the exception, not the rule.

reflected in the final version of the document."[34] In our experience, it is far more common for draft documents to include minor edits, incomplete thoughts, dummy slides, and placeholders, none of which indicate anything other than sausage-making. We also believe the proposed instructions on drafts would produce such a large volume of documents that it would be difficult for the Agencies' Staffs to meaningfully review each draft during the initial, thirty-day HSR waiting period. It is also our experience that the Agencies' Staffs typically do not request drafts of Item 4(c) documents in preliminary investigations during the initial thirty-day waiting period. Indeed, even when a party produces all of its drafts as part of substantially complying with a Second Request, it is exceedingly rare for Agency Staff to deliberately use a draft document as a deposition exhibit, let alone at trial. Our experience is that Agency Staff rightly recognize such draft documents to be of low probative value.

In practical terms, we believe that the proposed instructions on drafts would have serious deleterious impacts on the ability of companies to perform mission-critical analyses of potential transactions. A rule requiring the submission of draft Transaction-Related Documents could have the effect of discouraging people to ask legal questions or say anything unconventional or outside-the-box. Additionally, we anticipate that the proposed instruction on drafts might cause some risk-adverse businesses to remove officers, directors, and supervisory deal leads from the document-drafting process—a result that would produce lower-quality decision-making on matters of significant business consequence.

Finally, we see two significant problems with the alternative approach identified in the NPRM, whereby parties would collect draft documents but not submit them unless requested by Agency Staff, in which case the party would have to submit the drafts within 48 hours to retain the initial waiting period.[35] First, we believe this alternative approach is inconsistent with the plain language of the HSR Act, which only gives the Agencies a single opportunity to make a request for additional information that extends the HSR waiting period.[36] If an Agency made a request for draft documents that had the effect of extending the HSR waiting period, then *that* would be the Second Request. Second, we believe this alternative approach would not lessen the burdens on filing parties in any appreciable way.

In summary, we strongly urge the Commission to maintain the longstanding practice of only requiring draft Transaction-Related Documents in cases where (i) the draft was shared with the board or (ii) the draft document was not "finalized" by the time of the HSR filing. We would support an explicit instruction codifying this longstanding practice. We believe that this longstanding practice achieves the best balance between minimizing the burden on filing parties,

[34] 88 Fed. Reg. at 42,194.

[35] 88 Fed. Reg. at 42,195.

[36] 15 U.S.C. §§ 18a(e)(1)(A) & 18a(e)(2).

ensuring that Agency Staff have a sufficient documentary record to screen for transactions that require an in-depth investigation, and giving space to businesspeople to prepare business documents.

Organizational Chart of Authors and Certain Recipients of Documents. We disagree with the proposed instruction that would require an organizational chart showing the authors and certain recipients of Transaction-Related Documents and Periodic Plans and Reports. In our experience, many companies do not maintain these sorts of personnel charts in the ordinary course of business. And to the extent these sorts of organizational charts sometimes exist, they are very often incomplete, out-of-date, materially incorrect, or oversimplified, or they exist in a technical format that is not readily convertible to a documentary attachment.

Separately, we have two concerns with the proposed instruction to "indicate on the organizational chart(s) the individuals whose files were searched for documents responsive to these Instructions." First, we believe the proposed instruction does not reflect the process by which Transaction-Related Documents are typically identified in the majority of HSR filings. Rather than running Second Request-style "searches" through custodial "files," in many deals Transaction-Related Documents instead are identified through targeted self-collection, directed and overseen by legal counsel. And in the minority of deals where true "searches" are performed to identify Transaction-Related Documents, these searches are most often performed by collecting some subset of a custodian's *emails* (or some other subset of a custodian's files), aided by a targeted self-collection, rather than searching through *all* of a custodians' potential files. Therefore, as a practical matter, we believe that in the majority of HSR filings, the technically correct response to the proposed instruction would be "None."

Second, we believe a disclosure rule would disincentivize companies to err on the side of over-collection. For instance, under the current system, companies will sometimes, in an abundance of caution, check with a number of low-ranking non-officers to confirm that they do not have relevant Transaction-Related Documents. But if the company were required to disclose that all of these persons were searched, then a risk-adverse company might instead elect not to search those persons' files, out of concern that the large number of custodians might be a red flag to the Agencies or that Agency Staff might later seek to add the individuals as custodians in a Second Request.

Former Item 4(d)(iii): Production of Certain Documents Regarding Synergies and Efficiencies. We understand that former Item 4(d)(iii)—the production of certain documents regarding synergies and efficiencies—is proposed to remain in much its current form (albeit potentially expanded to include supervisory deal leads and the new rule for drafts). We respectfully take this opportunity to express our general view that former Item 4(d)(iii) often imposes an unnecessary burden in preparing HSR filings. Non-problematic deals often produce efficiencies, but because the underlying transaction is not problematic, the efficiencies in these transactions are

irrelevant to the Agencies' analysis.[37] Nevertheless, it is often a significant burden to identify the documents that relate to potential synergies or efficiencies—and these burdens will increase greatly if Item 4(d)(iii) is expanded to include supervisory deal team lead(s) and drafts. With respect to drafts, it is very much our experience that synergy analyses are often refined continuously throughout a transaction process; we regularly encounter synergy analyses that undergo many *dozens* of iterations before they are finalized.

Beyond all of these concerns, we also believe that former Item 4(d)(iii) is inconsistent with the Agencies' proposed treatment of the efficiencies defense in the proposed revised *Merger Guidelines*. Under the proposed *Merger Guidelines*, the Agencies would only credit efficiencies claims where, among other requirements, the claims are "not dependent on the subjective predictions of the merging parties or their agents" and the efficiencies will not "merely benefit the merging firms."[38] To be clear, we respectfully disagree with these suggested standards. But if the Agencies choose to adopt these standards in the *Merger Guidelines*, then in fairness the Agencies should repeal Item 4(d)(iii). Almost by definition, every Item 4(d)(iii) document reflects as least in part the "subjective predictions of the merging parties or their agents."[39] And many more Item 4(d)(iii) documents reflect efficiencies that might solely benefit the merging parties, *e.g.*, documents showing administrative savings that will be used to pay down debt or increase returns to investors.

5. Comments on Proposed "Competition Analysis" Section

Narrative Describing Horizontal Overlaps and *Narrative Describing Supply Relationships.* We have three overarching concerns with the proposed instructions on both the Horizontal Overlap Narrative and the Supply Relationship Narrative. First, as a practical matter, our experience is that the only people who are eligible by law to certify an HSR filing[40] often lack the personal knowledge necessary to opine about things like the relevant product market definition or the competitive effects of a transaction. It is unfair to require these persons to certify under pain of perjury the accuracy of a complex factual determination that is not within their personal knowledge.

Second, the proposed Horizontal Overlap Narrative would require the merging parties to identify their competitive sales; their top-ten customers; and any "planned products or services"

[37] Even in transactions that are potentially problematic, our experience is that Agency Staff typically use the initial thirty-day HSR waiting period to answer the threshold question of whether the transaction may potentially harm competition. Documents about potential efficiencies tend not to become important until later in the investigation process.

[38] *See* U.S. Dep't of Justice and Fed. Trade Comm'n, Draft *Merger Guidelines* (released July 19, 2023) § IV.3.

[39] To our knowledge, no court has ever rejected an efficiencies defense solely because it was based on the parties' "subjective predictions." Therefore, to be clear, we believe that at least some of the documents that are currently captured by Item 4(d)(iii) are competent evidence of legitimate transaction efficiencies, which the Agencies should continue to consider in good faith.

[40] *See* 16 C.F.R. § 803.6(a) (specifying the individuals who are eligible to make an HSR filing certification).

under development by the other party to the transaction. The proposed Supply Relationship Narrative would require the merging parties to identify each party's sales to the other party's competitors. But this sort of detailed, competitively sensitive business intelligence is often very deliberately kept away from the parties' business executives. In a sell-side filing, for example, the executive who signs the HSR form may very well have no idea as to which segments of the business being sold compete with the buyer. Or, in a buy-side filing, the executive who signs the HSR form might know generally that the target competes with the buyer in two broad product segments, but might not know that the target competes with the buyer in a third, niche product segment, and certainly might not know that the target "plan[s]" to compete with the buyer in a fourth segment. Therefore, the proposed Horizontal Overlap Narrative and Supply Relationship Narrative would, at best, force certain filing parties to employ antitrust safeguards to collect the relevant information and, at worst, might actually result in parties sharing or inferring certain competitively sensitive information with or about one another.

Third, the HSR form should not require parties to take an affirmative position on issues—the definition of the relevant markets and any competitive effects in those markets—for which the Agencies carry the burden of proof.[41] Congress has assigned to the Agencies the responsibility for articulating relevant markets and potential competitive effects, and it is inconsistent with the statutory scheme for the Agencies to reassign this burden to the parties, especially when the facts at issue might be ambiguous or subject to reasonable differences of opinion.[42]

In addition to these overarching concerns, we also have a number of specific concerns about the proposed Horizontal Overlap Narrative and Supply Relationship Narrative.

- The proposed requirements to provide historical sales information and top customers should be limited to sales and customers *from U.S. operations*. As drafted, the instructions would call for the production of sales and customer information on a global basis, rather than being

[41] *See generally United States v. Baker Hughes Inc.*, 908 F.2d 981, 983 (D.C. Cir. 1990) ("[T]he ultimate burden of persuasion [in a case under Section 7 of the Clayton Act] . . . remains with the government at all times."); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) ("The FTC bears the burden of proof and persuasion in defining the relevant market."); *id.* at 123 ("The FTC has the burden of showing that the challenged transactions will result in undue concentration in the market." (quotation omitted)).

[42] In 1976, in the first-ever proposed rulemaking under the HSR Act, the Commission initially proposed a requirement to "name the five (5) most significant competitors" for certain overlapping SIC codes. *See* Proposed Rulemaking, Mergers and Acquisitions, 41 Fed. Reg. 55,488 (Dec. 20, 1976), at 55,499. After a round of notice and comment, however, the Commission abandoned the proposal on the grounds that this sort of antitrust interrogatory was improper to include in the HSR form, because "Congress . . . intended that the reports [required by the HSR Act] would consist of data and documents reasonably available to reporting companies." Premerger Notification; Reporting and Waiting Period Requirements, 42 Fed. Reg. 39,040 (Aug. 1, 1977), at 39,043.

focused on the information that is most relevant to determining whether the proposed transaction will have anticompetitive effects in the United States.

- The proposed requirement to provide historical sales information should be limited to providing this information as expressed in *dollars*, rather than in *units*. In many industries, such as healthcare or professional services, the concept of "units" is arbitrary and can be significantly burdensome to try to quantify (*e.g.*, estimating the total number of healthcare "units" that a hospital system performs over the course of a year).

- The proposal to require top-ten customers *for each customer category* should be eliminated. Take, for example, a company that provides construction services to both "commercial" and "residential" customers; the company's top-ten commercial customers may each represent more than $10 million in revenue, but its top-ten residential customers may each represent less than $100,000 in revenue. Under these circumstances, it would be anomalous to require a top-ten list for both categories. Additionally, in some industries, there may not necessarily be ten different customers for certain customer categories (*e.g.*, "government" or "military").

- The proposed requirement to provide a "description, including duration, of any non-compete or non-solicitation agreement applicable to employees or business units related to the product or service" is unrealistic. A single company might have hundreds or even thousands of discrete agreements in place with its employees, customers, or vendors that contain non-compete or non-solicitation-related terms, each with slightly different parameters and durations. It is exceedingly rare for companies to have summary information about these agreements readily available. More to the point, there is nothing inherently improper or even suspect about having such agreements under current law.

In summary, we believe that the proposed Horizontal Overlap Narrative and Supply Relationship Narrative requirements seek information that merging parties often do not know—including some information that the merging parties *should* not know about the other. We consider it improper to require this information of filing parties, and we do not believe that the HSR Act envisions any such burden. At the very most, we would suggest that the proposed Horizontal Overlap Narrative and Supply Relationship Narrative requirements be converted into *voluntary* items; that they be limited to information within the *knowledge, information, or belief* of the person filing; and that they be limited to requesting information about *U.S.* sales, expressed solely *by dollars* (not by units), and top-ten *U.S.* customers, *across all categories, excluding overlaps or customers that represented less than $1 million in revenue in the most recent year*. Finally, the Supply Relationship Narrative should be limited to products, services, or assets that one party has sold, licensed, or supplied to the other party, or to the other party's competitors, *that represented more than $10 million in U.S. revenue during the past fiscal year*.

Narrative Describing Labor Markets. We disagree with the proposed requirements to submit information about "Largest Employee Classifications," "Geographic Market Information for

Each Overlapping Employee Classification," and "Worker and Workplace Safety Information." While we certainly recognize that the Agencies analyze some transactions for potential labor effects, we do not see how these proposed requirements would advance that end. The NPRM cites the two past Agency enforcement actions in which labor effects were seriously at issue.[43] In both of those enforcement actions, there was at least one NAICS code overlap between the parties' revenues; therefore, all indications are that the Agencies would have been alerted to the possibility of a competitive overlap in those matters based on Item 5(a) of the current HSR form.

Tellingly, in one of the two past enforcement actions cited in the NPRM, the Commission ultimately *did not* allege a harm to labor markets, because half of the Commissioners voting on the matter concluded that the evidence did not support such a charge.[44] In the other action cited, the Antitrust Division's challenge to *Penguin Random House/Simon & Schuster*, the labor markets at issue did not relate to the merging parties' *employees*, but rather to the independent *authors* for whose works the merging parties competed.[45] We therefore do not consider either action to support the Proposed Rulemaking.

Finally, the proposed "Largest Employee Classifications" and "Geographic Market Information for Each Overlapping Employee Classification" requirements together call for extraordinarily specific information that no reasonable company maintains in the ordinary course of business. As proposed, the Commission would have filers combine two unrelated government classification systems—the Bureau of Labor Statistic's Standard Occupational Classification system and the Department of Agriculture's Economic Research Service's "Commuting Zones" system—even though these systems were adopted for unrelated purposes and were never designed to be used, either individually or in combination, in HSR filings. Simply put, we are aware of no companies that keep data in the format envisioned in the instructions, and the proposed instruction would in many cases be massively burdensome and expensive to compile.

Finally, we believe that the proposed instructions for the Geographic Market Information for Each Overlapping Employee Classification item may include a drafting error. The proposed instruction calls for "the five largest 6-digit SOC codes in which both parties (the acquiring person and the acquired entity) employ workers." However, we believe that the Commission's intent was to *limit* the Geographic Market Information for Each Overlapping Employee Classification instruction *to any of the five 6-digit SOC codes identified in the "Largest Employee Classifications" item that represent an overlap between the parties*.

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[43] 88 Fed. Reg. at 42,197 n.47.

[44] *See Concurring Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding Lifespan Corp. and Care New England Health System*, FTC File No. 2110031 (Feb. 17, 2022) ("Where the evidence supports such a challenge, we support bringing one. Here, we do not agree that it does.").

[45] *See generally* Complaint, *United States v. Bertelsmann SE & Co. KGaA*, Case No. 1:21-cv-2886 (D.D.C. filed Nov. 2, 2021), ¶ 33.

6. Comments on Proposed "Controlled Entity Overlaps" Section

Provision of Geolocation for Certain Locations of Operations. We disagree with the proposed requirement to provide data about "latitude and longitude (each in degrees up to at least five decimal places)" for certain establishments that generate NAICS code overlaps. Our experience is that exceedingly few businesses maintain geolocation data in the ordinary course of business. Instead, geolocation data would have to be manually generated based on the street-city-state address information that typically is maintained in the ordinary course of business and is already reported in Item 7 for certain NAICS code overlaps. We therefore respectfully disagree with the NPRM's expectation that filing persons are in the "best position to validate the accuracy of the locations through more precise latitude and longitude reporting."[46]

Alternatively, if the Commission adopts the proposed requirement to provide geolocation data, then the Commission should drop the longstanding requirement that merging parties include information about the *county* of their overlapping establishments. In our experience, county information is generally not maintained in the ordinary course of business, but instead must be manually generated based on the address information that is maintained in the ordinary course of business. Because there is no reason to require geolocation data and county information, we would propose that at least one of these requirements be abandoned.

7. Comments on Proposed "Prior Acquisitions" Section

Identification of Additional Prior Acquisitions. We understand the concerns expressed in the NPRM that Item 8 of the current HSR form fails to pick up certain potentially relevant prior acquisitions. However, we raise two comments with respect to the proposed changes to this item.

First, we believe the Commission should keep in place the current instruction that allows parties to exclude acquisitions that had *less than $10 million in total assets and annual net sales in the year prior to acquisition*. In our experience, this instruction is quite helpful in eliminating the reporting of a large number of extremely small transactions that are competitively insignificant—whether standing alone or in conjunction with other transactions—and which are often challenging to obtain reliable historical records about (especially given the proposal to expand the look-back period from five years to ten). In many industries, it is common for companies to make a large number of very small, competitively insignificant acquisitions. For instance, over the course of a decade, an oil-and-gas company might make dozens of small mineral rights purchases from individual landowners, or a timber company might acquire dozens of small plots of forest, each of which comprise substantially all the assets of an operating unit. In our experience, the current exclusion for acquisitions of businesses with less than $10 million in total assets and annual net sales strikes a good balance between ensuring the Agencies receive the information that they need,

[46] 88 Fed. Reg. at 42,201.

without requiring the collection of information that can be extremely burdensome to collect but irrelevant to the Agencies' analysis. To the extent the Agencies may be concerned about acquisitions of nascent research and development firms, the instructions could make the $10 million threshold inapplicable (or could apply a lower threshold, such as $5 million) to acquisitions in NAICS Industry Groups 5132 (Software Publishers), 5182 (Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services), 5192 (Web Search Portals, Libraries, Archives, and Other Information Services), 5415 (Computer Systems Design and Related Services), and 5417 (Scientific Research and Development Services).

Second, we believe the requirement to provide information about prior acquisitions should remain limited to the *acquiring person*. The acquired person's HSR filing will contain all the information needed for the Agencies to understand the acquired person's current operations, including the operations of any businesses that the acquired person may have acquired over the past ten years.

8. Comments on Proposed "Additional Information" Section

Identification of Certain Defense or Intelligence Contracts. We would propose two modest changes to the proposed instruction on "Defense or Intelligence Contracts." First, while we recognize that much of the information requested in this instruction is in the public domain, there are also some defense and intelligence contracts whose existence is classified or otherwise confidential due to national-security or similar interests.[47] Therefore, to avoid a conflict with other important federal laws, the proposed instruction should be clarified to exclude any contracts *that are classified or otherwise subject to a government-imposed duty of confidentiality*. Second, we note an apparent typographical error in the instructions: the reference to "50 U.S.C. 3033(4)" should refer to *50 U.S.C. 3003(4)*.

Identification of Communications and Messaging Systems. We strongly disagree with the proposal to require filing parties to identify "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." This proposed instruction is unjustifiably overbroad. The NPRM's expectation "that this information is readily available to the filing person and . . . would

[47] *See, e.g.*, 10 U.S.C. § 3204(a)(6) ("The head of an agency may use procedures other than competitive procedures . . . when . . . the disclosure of the agency's needs would compromise the national security . . . ."); 41 U.S.C. § 3304(a)(4) ("An executive agency may use procedures other than competitive procedures . . . when . . . the disclosure of the executive agency's needs would compromise the national security . . . ."); 48 C.F.R. § 5.606(c)(5) & (6) ("The following types of contract actions are not to be reported to FPDS . . . Actions that, pursuant to other authority, will not be entered in FPDS [Federal Procurement Data System] (*e.g.*, reporting of the information would compromise national security) [or] Contract actions in which the required data would constitute classified information"); 48 C.F.R. § 5.102(a)(5)(i) ("The contracting officer need not make a solicitation available through the GPE [Governmentwide point of entry] . . . when . . . [d]isclosure would compromise the national security (e.g., would result in disclosure of classified information, or information subject to export controls) or create other security risks.").

impose minimal burden"[48] is mistaken. In reality, the information being requested could require extensive interviews with individuals at every operating unit and every level of a company's hierarchy—including those individuals who have no involvement with or knowledge of the transaction being reported. These difficulties are compounded by the inevitable complications that are caused by large organizations or funds whose operating companies each have separate IT systems, special IT systems that are only used by particular units within a business, legacy IT systems that are in the midst of replacement or inherited through prior acquisitions, and individual employees who do not follow corporate IT policies.

As a law-enforcement tool, this proposed instruction is unnecessary. The Commission already requires companies facing a Second Request to provide at an early stage "basic information about how they maintain data that is responsive to specifications in the second request."[49] In addition, Second Requests also require parties to submit a "Data Map" that shows "where and how the Company stores all physical and electronic information."[50] The Antitrust Division has similar practices as well. Given these existing practices and requirements for the small fraction of transactions that are investigated, there is no reason to separately require this information for those transactions that are not investigated.

9. Comments on Proposed "Certification" Section

Prevention of Destruction of Documents. Finally, we have five objections to the proposal to change the HSR filing's "Certification" language to include a representation that the certifier has "taken the necessary steps to prevent the destruction of documents and information related to the proposed transaction." First, we are not aware of any requirement—nor does the NPRM suggest there is any requirement—for filers to suspend their ordinary-course document-destruction practices when making an HSR filing. Nothing in the HSR Act or regulations imposes such a duty. The only potential source for any such duty is the common law, which obligates parties "to preserve evidence from the moment that litigation is reasonably anticipated."[51] For approximately 97% of HSR filings, however, the parties are allowed to close the transaction without

[48] 88 Fed. Reg. at 42,205.

[49] *See* Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, Competition Matters (Sept. 28, 2021).

[50] Federal Trade Commission, *Model Second Request* (rev. Oct. 2021), Specification 1(d) & Definition D 4.

[51] *See generally Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 521 (D. Md. 2010); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (quotation omitted)).

undergoing an in-depth investigation, let alone litigation. Therefore, for the vast majority of HSR filings, there simply is no duty to preserve documents while an HSR filing remains pending.[52]

Second, the proposed Certification language is unnecessary. The Commission has proposed adding an instruction to the HSR form that "Federal law provides criminal penalties, including up to twenty years imprisonment, for any person who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence an ongoing or anticipated federal investigation (see, e.g., Section 1519 of Title 18, United States Code.)." This proposed instruction is accurate as a statement of law, and it fairly advises certifiers of their obligation not to obstruct potential investigations. Any additional instruction or Certification language is not necessary to protect the Agencies' interests.[53]

Third, implementing a litigation hold can be massively burdensome. It is not a matter of flipping a switch from "on" to "off." Instead, it routinely takes dozens of hours or more of lawyer and technician time to identify the various disparate IT systems that may contain relevant documents or information, to determine technically how best to suspend the automatic deletion of documents or information, and to implement those suspensions. And then, both for documents stored on non-central resources and for non-electronic documents, separate processes are required to identify potential custodians and ensure that each individual is instructed about the scope of the document hold.

Fourth, even assuming for sake of argument that there existed a common-law duty to preserve relevant documents while an HSR filing was pending, the language of the proposed Certification would not accurately reflect the scope of that duty. The common-law duty to preserve documents "is neither absolute, nor intended to cripple organizations."[54] Instead, the duty "must be measured against the yardstick of proportionality."[55] It is not proportional to require filers to preserve all documents and information related to a proposed transaction.

The final problem is procedural. If the Agencies desire to create a duty to preserve documents while an HSR filing remains pending, then the Commission should promulgate a regulation that affirmatively says so. Such a rulemaking would need to comply with both the

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[52] *See generally Victor Stanley*, 269 F.R.D. at 521 ("Absent some countervailing factor, there is no general duty to preserve documents, things, or information, whether electronically stored or otherwise." (quotation omitted)); *Zubulake*, 220 F.R.D. at 217 ("Merely because one or two employees contemplate the possibility that a fellow employee might sue does not generally impose a firm-wide duty to preserve.").

[53] Importantly, "the duty to preserve evidence relevant to litigation of a claim is a duty owed to the *court*, not to a party's adversary." *Victor Stanley*, 269 F.R.D. at 525.

[54] *Id.* at 522 (quotation omitted).

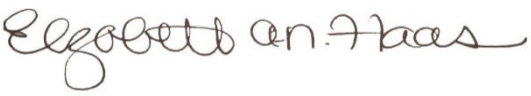
[55] *Id.* at 523.

Administrative Procedures Act and the Paperwork Reduction Act, among other requirements. But the Commission has not done so. Instead, the Commission has simply proposed an administrative change—adding a single sentence to the Certification section of the HSR form—without citing any authority for why that sentence is appropriate and without any estimates of the burden this additional obligation would impose.

10. Conclusion

We sincerely appreciate this opportunity to submit comments on the Proposed Rulemaking. If you have any questions about these comments, or if there is anything else we can do to assist the Agencies as they move forward with the Proposed Rulemaking, please contact us.

Sincerely,



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