# Dechert LLP Comments:

# Proposed Amendments to the Premerger Notification Rules under the HSR Act

**16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules**
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## TABLE OF CONTENTS

**Introduction** ... 1

**I. Several Proposals Exceed the Agencies' Authority or Lack a Sufficient Basis under the HSR Act** ... 1

- **A. Officers, Directors, and Board Observers** ... 1
- **B. Labor Markets Information** ... 3

**II. The Expanded Document Requirements Are Excessive and Vague** ... 5

- **A. Supervisory Deal Team Leads** ... 5
- **B. Draft Documents** ... 6
- **C. Certification** ... 7

**III. New Disclosure Requirements Would Chill Private Capital Markets, Harming Small Businesses, Workers, and Consumers** ... 8

- **A. Identification of Limited Partners** ... 9
- **B. Increased Disclosure of Other Minority Holders** ... 11
- **C. Privacy Concerns for Fund Investors** ... 12
- **D. The Burdens of Additional Information Gathering Will Fall Disproportionately On Private Investment Firms** ... 13
- **E. Impact on Small Businesses, Workers, and Consumers** ... 13

**Conclusion** ... 15

## Introduction

Dechert LLP submits these comments to the proposed rulemaking on Hart-Scott-Rodino ("HSR") premerger notification changes, announced by the U.S. Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, the "agencies") on June 27, 2023.[1] The views expressed herein are those of Dechert based on our experience representing a broad range of clients; however, these comments are not being submitted on behalf of any company or organization.

Dechert commends the agencies on their efforts to modernize the HSR filing process. However, we believe that some of the proposals exceed the agencies' authority to implement rules pursuant to the HSR Act to assess the competitive impact of reported transactions. Furthermore, many of the proposals in the Notice of Proposed Rulemaking create significant additional burdens for all filers, including parties to transactions that pose no harm to competition. Certain of the current proposals are too vague, overbroad, or lacking in probative value. Finally, the proposals—particularly those that appear targeted at private investment firms—are likely to chill private investment across the board, potentially harming small businesses, workers, and consumers.

## I. Several Proposals Exceed the Agencies' Authority or Lack a Sufficient Basis under the HSR Act

The agencies are seeking to add substantial reporting requirements to the HSR form that exceed the agencies' authority under the HSR Act and/or lack a sufficient basis under the Act. These new obligations relate to board interlocks and labor issues that exceed the scope of the HSR Act. With these proposed requirements, the agencies seek information that goes not to whether a transaction may violate Section 7 – the proper focus under the HSR Act – but rather to whether the merging companies may be in violation of the antitrust laws more generally for conduct separate from the reported transaction.

### A. Officers, Directors, and Board Observers

The proposed rules include a new requirement for merging companies to identify all current officers, directors, and board observers for each entity within the acquiring person and the acquired entity, as well as those who have served in the applicable position within the past two years.[2] This proposal also applies to individuals exercising similar functions in unincorporated entities.[3] In addition, for each officer, director, and board observer identified, the merging companies are required to identify all other entities for which the individual serves, or has served within the last two years, as an officer, director, or board observer.[4]

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[1] Fed. Trade Comm'n, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review* (June 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

[2] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178, 42212 (June 29, 2023).

[3] *Id.*

[4] *Id.*

This new reporting obligation exceeds the authority of the agencies to issue rules to implement the HSR Act. The information the agencies propose to collect goes to whether any individuals at the merging companies are involved in an interlocking directorate in violation of Section 8 of the Clayton Act. The Statement of Basis and Purpose issued with the final HSR rules in 1978 includes zero references to Section 8 or interlocking directorates.[5] That is unsurprising, as Section 8 is a provision of law under the Clayton Act that is not part of the HSR Act. The agencies claim that both statutes were intended to address incipient violations.[6] But similarities in the legislative intent of these two statutes does not provide the agencies with authority to use the HSR Act to identify potential violations of Section 8 – or any other antitrust law, for that matter – that are not raised by the reported transaction at issue.

In seeking to justify this new obligation, the agencies claim, among other things, that the lack of board of directors information "makes it difficult for the agencies to complete their assessment of potential Section 8 issues during the initial waiting period."[7] That may be the case; however, a Section 8 analysis is not one of the purposes of the HSR regime. While the HSR Act charges the FTC (with the concurrence of the DOJ) with promulgating rules governing the form and content of premerger filings, the statute provides only that the filings include "such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [agencies] to determine whether *such acquisition* may, if consummated, violate the antitrust laws."[8] The HSR Act further provides that the agencies may "prescribe such other rules as may be necessary and appropriate to carry out the purposes *of this section*."[9]

Nor is it proper for the agencies to use the HSR Act to address their perceived shortcomings of Section 8. As noted above, the agencies' proposal would apply to unincorporated entities, even though, as recognized by the agencies in their proposal, Section 8 does not apply to such entities.[10] The agencies cite to concerns that "post-merger enforcement of Section 8's *per se* ban can be ineffective."[11] However, that concern can and should be addressed via Congressional amendment of Section 8 – not the unjustified imposition of additional burdens on merging companies. Similarly, in justifying the inclusion of board observers – in addition to officers and directors – the agencies acknowledge not only that Section 8 does not apply to board observers, but that "the acquisition of rights to be a board observer is not a reportable event under the HSR Act."[12] Under the U.S. Constitution, Congress passes legislation, not the agencies. If the agencies perceive shortcomings in Section 8, they should take those up with

[5] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33450, 33452 (July 31, 1978).

[6] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42190 n.35(citation omitted).

[7] *Id.* at 42190.

[8] 15 U.S.C. § 18a(d)(1) (emphasis added).

[9] 15 U.S.C. § 18a(d)(2)(C) (emphasis added).

[10] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42189 n.34 ("Although Section 8 does not technically apply to unincorporated entities, information sharing and coordination can still raise concerns *under Section 1 of the Sherman Act*.") (emphasis added).

[11] *Id.* at 42190.

[12] *Id.*

Congress, rather than trying to extend the reach of the HSR Act to require information that exceeds their mandate.

The agencies' proposal concludes the discussion of the board information requirement by arguing that collecting this information would help the agencies identify competitive decision-makers, "allowing the Agencies to engage in more effective enforcement of *the antitrust laws*."[13] The agencies give away the game here, implicitly acknowledging that they are using the HSR Act as a means for requiring merging companies to provide information that may help the agencies enforce the antitrust laws generally, rather than assessing the competitive effects of the reported transaction, the only proper focus under the HSR Act.

### B. Labor Markets Information

The proposed rules include new obligations for filing parties to submit extensive information regarding workers and labor law violations. First, the rules would require each filer to identify the five largest categories of their employees based on the Bureau of Labor Statistics ("BLS") six-digit Standard Occupation Classifications ("SOC").[14] Second, for the five largest overlapping SOCs, filers would have to identify each Department of Agriculture Economic Research Service Commuting Zone in which both the acquiring person and acquired entity employ workers and identify the number of employees in each commuting zone.[15] Finally, each filer would have to identify, and provide detailed information regarding, any penalties or findings issued against the acquiring person or acquired entity by (1) the U.S. Department of Labor's Wage and Hour Division, (2) the National Labor Relations Board, or (3) the Occupational Safety and Health Administration in the last five years, as well as any matters pending before those regulatory authorities.[16]

This proposed obligation exceeds the authority of the agencies under the HSR Act and, in any case, lacks a sufficient basis under the Act. At a minimum, before imposing additional burdens on HSR filers, the agencies should demonstrate a reasonable nexus between the requested information and a proper assessment of the competitive effects of reported transactions.

We are not aware of – and the agencies fail to cite – any agency or court decision that has relied on this type of information as a basis for finding that a proposed merger may harm a labor (or any other) market. To justify this new obligation, the agencies state that they "have increasingly recognized the importance of evaluating the effect of mergers and acquisitions on labor markets."[17] Even if so, the agencies have identified buyer market power or monopsony

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

[14] *Id.* at 42215.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 42197.

power – the primary theory of harm applicable to labor inputs – as a potential concern in their Horizontal Merger Guidelines for at least three decades.[18]

The agencies further justify this new obligation by arguing that "[t]ransactions have been challenged on the basis that consummation would result in labor market harms."[19] The evidence cited by the agencies for this assertion is less than compelling. The agencies first cite to the Division's recent challenge of Penguin Random House's proposed acquisition of Simon & Schuster.[20] Yet, the relevant product markets in that case were the acquisition of U.S. publishing rights to books from authors and to anticipated top-selling books[21] – perhaps a labor market broadly defined, but certainly not one involving the employees of the merging companies, which the proposed rules are targeting. Unsurprisingly, the district court's decision in that case did not include even a passing reference to any of the labor information that the agencies seek to add to the HSR form.[22] The other item cited by the agencies is even less compelling: a concurring statement by two FTC Commissioners stating that they would have alleged a relevant labor market in a case that did not include any such allegation.[23]

The agencies fail to demonstrate how either occupation classifications from the BLS or commuting zones from the Department of Agriculture would meaningfully inform the antitrust analysis of relevant labor markets. In fact, the agencies explicitly disclaim any endorsement of the use of the BLS data that the agencies propose to collect "for any other purpose, such as defining a relevant labor market."[24] By their own admission, then, the very information the agencies propose to collect is not useful in defining a relevant labor market.

Still, the information with the most dubious – and in fact non-existent – connection to any proper antitrust analysis of relevant labor markets is the workplace safety and other violations the agencies propose to collect. The agencies base this additional obligation solely on their unsupported conjecture that "a history of labor law violations . . . may be indicative of a

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[18] U.S. Dep't of Just. and Fed. Trade Comm'n, Horizontal Merger Guidelines § 0.1 (Apr. 2, 1992, revised April 8, 1997), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf (discussing monopsony power). The DOJ's 1982 Horizontal Merger Guidelines also included a reference to buyer market power. U.S. Dep't of Just., Horizontal Merger Guidelines, at 2 n.5 (1982), https://www.justice.gov/archives/atr/1982-merger-guidelines.

[19] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42197 .

[20] *Id.* at n.47.

[21] *See* Complaint at 13-16, United States v. Bertelsmann SE & Co., No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021) (identifying relevant markets as the "acquisition of U.S. publishing rights to books from authors" and the "acquisition of U.S. publishing rights to anticipated top-selling books"); United States v. Bertelsmann SE & Co., 2022 WL 16949715, at *12-20 (D.D.C. 2022) (focusing on latter market definition).

[22] *See generally* United States v. Bertelsmann SE & Co., 2022 WL 16949715 (D.D.C. 2022).

[23] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42197 n.47 (citing Concurring Statement of Commissioner Slaughter and Chair Khan regarding FTC and State of Rhode Island v. Lifespan Corporation and Care New England, at 1-2 (Feb. 17, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/public_statement_of_commr_slaughter_chair_khan_re_lifespan-cne_redacted.pdf).

[24] *Id.* at 42197.

concentrated labor market."[25] There is no limiting principle to such an approach, which could be used to justify collecting violations of environmental, securities, tax, or any number of other laws to which merging companies are subject.

The agencies clearly have prioritized labor markets in their enforcement agendas. However, the worker-related information they are seeking to require from merging companies exceeds the agencies' authority and lacks a sufficient basis under the HSR Act.

## II. The Expanded Document Requirements Are Excessive and Vague

The agencies propose to expand the HSR document submission requirements on several fronts, including by adding "supervisory deal team leads" to the list of individuals searched for responsive materials, expanding draft document submission requirements, and introducing a new certification affirming that documents and information relating to a proposed transaction have been preserved. These expanded document submission proposals raise numerous concerns because they are excessive and vague.

### A. Supervisory Deal Team Leads

The HSR form currently requires filers to search for and submit competition-related documents that were prepared by or for an officer or director and used to evaluate the transaction.[26] The new rules propose adding "supervisory deal team lead(s)" to the list of individuals searched for responsive materials.[27] The agencies' justification for this expansion is that some entities have someone other than an officer or director leading the deal team and that person's files may contain crucial competition-related documents that are relevant to the analysis of the transaction, regardless of such person's decision-making authority.[28] The proposal states that identifying the supervisory deal team lead is "not […] based upon title alone" and that it is up to the filing person to "determine the individual or individuals who functionally lead or coordinate the day-to-day process for the transaction at issue."[29] The proposal also states that a "supervisory deal team lead need not have ultimate decision-making authority but would have responsibility for preparing or supervising the assessment of the transaction and be involved in

[25] *Id.* at 42198.

[26] Premerger Notification Office Staff, Bureau of Competition, *Resetting our views on HSR Items 4(c) and 4(d),* Fed. Trade Comm'n (Nov. 28, 2016), https://www.ftc.gov/enforcement/competition-matters/2016/11/resetting-our-views-hsr-items-4c-4d ("In particular, Item 4(c) of the HSR Form requires filers to submit documents prepared by or for officers or directors used to evaluate or analyze the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets. Item 4(d) of the Form requires filers to submit certain documents prepared by or for officers or directors that relate to the acquisition, including confidential information memoranda, documents prepared by third party advisors, and documents evaluating or analyzing synergies. These documents often reveal important aspects of the competitive environment in which the transaction takes place, and are key to the agencies' initial review of a transaction.").

[27] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42193.

[28] *Id*. at 42194.

[29] *Id*.

communicating with the individuals, such as officers or directors, that have the authority to authorize the transaction."[30]

The current HSR form appropriately focuses on documents in the possession of individuals that have decision-making authority, namely officers and directors. Accordingly, such individuals' documents are more likely to contain information being relied upon by the parties to evaluate the transaction, and therefore have more probative value with respect to the core antitrust issues that the agencies analyze during the initial waiting period. It is important not to lose sight of the broader framework the agencies utilize in analyzing transactions. They can, for example, issue voluntary access letters to request more information during the initial waiting period. During a Second Request investigation, the agencies can and do receive documents from various levels of employees in the company to further assess relevant competitive dynamics and issues. The current approach strikes the right balance between submitting probative documents relating to the transaction during the initial waiting period with the needs of agency staff to decide whether a Second Request is warranted.

The proposed requirement for identifying and appointing a "supervisory deal team lead" as a central figure in transactions raises concerns. As a threshold matter, it may not reflect how transactions are staffed. In addition, unlike an officer or director, a "supervisory deal team lead" is not a well-defined or known role within organizations. Thus, the proposed rule may subject those filers who designated a "supervisory deal team lead" in good faith to arbitrary scrutiny given that the definition for such individuals is vague and there is no general consensus or understanding of a supervisory deal team lead role outside of the agencies' proposal.

### B. Draft Documents

The agencies' "long-standing position" governing draft documents for HSR filings is that draft documents need not be submitted unless (1) there is no final version of the document, in which case the latest version of the document should be submitted or (2) the draft was shared with the board of directors, in which case the draft should be submitted with the filing.[31] The proposed rules expand this position by requiring that <u>all</u> drafts of responsive documents that were provided to an officer, director, or supervisory deal team lead be submitted with the HSR filing.[32]

There are sound reasons behind the agencies' long-standing position not to require the submission of draft versions of documents under most circumstances. Drafts are inherently less probative because they can contain outdated, misleading, or factually inaccurate information. Moreover, the submission of all drafts could result in hundreds more documents being produced, which would impose a substantial burden on the filing parties. It is also likely to slow down

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[30] *Id.*

[31] *See id.*; Fed. Trade Comm'n, *Item 4(c) Tip Sheet* (Nov. 28, 2016), https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf ("It has been the PNO's informal position for many years that if there is no final version of a document responsive to Item 4(c), the latest draft should be submitted. If there is a final version, no drafts need to be additionally supplied unless the draft went to the Board. When a copy of a draft document is sent to the Board, it ceases to be a draft and must be submitted if it meets the other Item 4(c) criteria, even if a final version is also being submitted.").

[32] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42194-95.

agency staff's review of the transaction. For example, if over twenty versions of a presentation are produced, it may be difficult and time-consuming for agency staff to identify the final version of the presentation and understand the basis for the changes. Multiply this exercise by potentially tens of Item 4 documents during the typical 30-day waiting period. The agencies recognize this issue in their proposal, noting that "HSR filings that contain large document submissions could overwhelm the agencies and undermine the goal of effective and efficient screening for transactions that require an in-depth investigation."[33]

We do not believe that the agencies' currently proposed alternative—in which filing parties collect draft documents when preparing HSR filings but hold off on submitting these documents unless agency staff asks—fully addresses the concerns we have raised as to burden. We propose that the agencies identify specific types of documents that are likely to have probative information and limit the submissions of draft documents accordingly. For example, submission of all drafts that are shared with a CEO may balance the needs of the staff reviewing the transaction in the initial waiting period while limiting the burden on filing parties and agency staff.

We also propose that the agencies provide additional guidance as to what constitutes a draft document under any new rules. In today's collaborative work environment, it is not unusual for several contributors to be working on the same document simultaneously. An entire team of individuals may circulate comments, feedback, and markups as an initial draft or template becomes more fully fleshed-out and refined to correct inaccuracies or add further context. A supervisory deal team lead who acts as a coordinator for these individuals may receive all of these draft versions. An officer, director or supervisory deal team lead could themselves make changes to a document, save the file as a draft, and then later making further edits. Any potential probative value of these types of incremental revisions over the course of preparing a single document is likely to be far outweighed by the burden of gathering and sifting through each version. By doing away with the current bright-line test of submitting earlier drafts of responsive documents only to the extent such earlier drafts were circulated to the entire board of directors, filing parties are left with little clarity as to what amounts to a "draft" that should be submitted with the HSR filing. This vagueness will lead to arbitrary and capricious enforcement.

### C. Certification

The agencies propose adding a certification that requires filing persons to affirm that they have "taken the necessary steps to prevent the destruction of documents and information related to the transaction" prior to the expiration of the waiting period.[34] The agencies' proposal notes that "such steps could include, for example, the suspension of auto-delete policies in place at any entity within the filing person."[35]

The proposed certification essentially imposes litigation hold-type requirements on all transactions, even if they are not under investigation. This is a burdensome requirement to

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[33] *Id*. at 42195.

[34] *Id*. at 42206.

[35] *Id*.

impose on all filing parties when, in reality, the agencies request clearance to review only around 10% of all merger filings.[36] An even smaller percentage, historically just about 2-3% of filings, receive a Second Request.[37] For this tiny sliver of transactions, the agencies commonly include litigation hold requests in access letters. Further, companies that reasonably anticipate litigation may be required by law to unilaterally implement documents holds. The agencies provide no evidence that these existing measures are ineffective. Yet the agencies instead seek to create an automatic presumption of anti-competitiveness against the vast majority of reported transactions that raise no issues at all.

Data retention policies are implemented by organization in the ordinary course for several important reasons, ranging from compliance requirements to cost considerations because data can be expensive to store.[38] The proposed certification is overly broad and vague in that the requirement to preserve all "documents and information related to the transaction" may cover large components of day-to-day business operations, including correspondence about the business that has no competitive implications. The proposed rule, which offers no clarifications or limitations on what aspects of the day-to-day business operations "related to the transaction" would need to be preserved, could prove difficult to implement or even unworkable for medium or large organizations.

## III. New Disclosure Requirements Would Chill Private Capital Markets, Harming Small Businesses, Workers, and Consumers

While the cumulative effect of the changes outlined in the proposed rules will be significant for all parties, the agencies' proposed disclosure requirements for limited partner interests and minority holders is particularly overbroad. Agency concerns about minority holders would be better addressed by narrowly tailored requests aimed at determining whether the reported transaction would raise issues under Section 7. Furthermore, the proposed disclosure requirements, when taken in the aggregate, will be disproportionately burdensome on private investment firms engaged in M&A activity and ironically lead to unreasonably long delays in transactions that do not pose significant antitrust concerns as compared with strategic buyers with simpler ownership structures. The proposed disclosure requirements far exceed the amount of up-front information necessary to flag potential Section 7 violations and threaten to chill private capital markets in a manner that will favor larger public companies and investment firms over the smaller private investment firms that often serve as a critical source of capital, particularly for small businesses, benefitting both workers and consumers.

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[36] Cornerstone Research, Trends in Merger Investigations and Enforcement at the U.S. Antitrust Agencies Fiscal Year 2011-2020 (Seventh Edition). *See also* Fed. Trade Comm'n and Dep't of Just., Hart-Scott-Rodino Annual Report: Fiscal Year 2021 at Exhibit A, Table 1 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf (for FY2021, the most recent reported fiscal year, the Agencies collectively requested clearance to review only 7.9% of all transactions).

[37] Hart-Scott-Rodino Annual Report: Fiscal Year 2021 at 5 (showing that 1.9% to 3.7% of transactions resulted in a Second Request during fiscal years 2012 through 2021).

[38] Collins Ayuya, *The importance of data retention policies*, TechRepublic (Feb. 3, 2023, 4:07 AM EST), https://www.techrepublic.com/article/the-importance-of-data-retention-policies/.

### A. Identification of Limited Partners

The proposed changes would require disclosure of all limited partners that hold five percent or more of a limited partnership, which is a significant expansion of what is currently required under Item 6(b).[39] Private investment firms typically set up their fund vehicles as limited partnerships in which a general partner or management company exercises investment discretion over the selection of investments and deployment of the investors' capital commitments to the fund. Therefore, while limited partners are able to benefit from the private investment firm's due diligence and industry expertise, they typically have, consistent with their role as limited partners, limited influence in respect of investment or operational decisions. When the HSR form was revised in 2011, the agencies consciously "made an exception for limited partnerships and only required the identification of the general partner."[40] This decision reflected the fact that limited partners are usually passive investors—essentially the *customers* of private investment firms—who typically "have no control over the operations of the fund or the portfolio companies."[41] Indeed, to avail themselves of limited liability to third parties, limited partners are statutorily restricted from participating in the control of the business.[42] Rather than require disclosure of these passive investors, the agencies previously established that "[a]ny general partner(s) would have to be listed in proposed Item 6(b), regardless of the percentage held, as these are entities that typically manage the limited partnership."[43] It was a distinct and pragmatic effort to look at genuine issues of control rather than putting form over substance.

The agencies imply that, by creating this "exception" from disclosure for limited partner interests in 2011, the FTC was giving limited partnerships unjustified preferential treatment.[44] Yet to be clear, the 2011 revisions did not provide any favorable treatment of limited partnerships. On the contrary, the 2011 revisions established an entirely new concept ("associates" of the acquiring person) "to define entities that are under common management with the acquiring person, but are not under common HSR control with the acquiring person."[45] This was a new requirement, the onus of which fell squarely upon unincorporated entities such as private funds and master limited partnerships, that sought to uncover potential Section 7 concerns beyond traditional notions of HSR control.[46]

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[39] *See generally* Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188.

[40] *Id.*

[41] Premerger Notification; Reporting and Waiting Period Requirements, 75 Fed. Reg. 57110, 57118 (Sept. 17, 2010), adopted in 2011, 76 Fed. Reg. 42471 (July 19, 2011).

[42] *See e.g.,* 6 Del. C. § 17-303(a) ("A limited partner is not liable for the obligations of a limited partnership unless he or she is also a general partner or, in addition to the exercise of the rights and powers of a limited partner, he or she participates in the control of the business.").

[43] *Id.*

[44] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188 ("The Commission, however, made an exception for limited partnerships and only required the identification of the general partner.").

[45] Premerger Notification; Reporting and Waiting Period Requirements, 75 Fed. Reg. at 57112.

[46] Fed. Trade Comm'n, *Decision Tree for Identifying Associates*, at 1, https://www.ftc.gov/sites/default/files/attachments/hsr-resources/decision-tree.pdf (last visited Sept. 21, 2023) ("A

The agencies did not neglect limited partnerships in 2011; to the contrary, the agencies were laser focused on identifying any potential Section 7 concerns that might arise with limited partnership structures given the different ways that private investment funds function as compared with other businesses. At the time, Dechert noted that "[t]his new requirement could significantly increase the burden of HSR compliance for some private equity funds and investment firms."[47] As such, nobody should view the 2011 amendments as letting limited partnerships off easy. Instead, by adding the "associates" rules to target limited partnerships, the agencies spent considerable resources evaluating limited partnership structures and were being pragmatic about what information would be genuinely useful — and what would not.

Despite that effort, the new proposed rules seek to cast the prior balance aside, implying that the agencies' prior understanding of limited partnerships was just wrong. "[A]fter more than a decade," the FTC now asserts, "the Commission now believes that it is inappropriate to make generalizations regarding the role of investors in limited partnership structures."[48] The FTC further asserts that "[i]dentification of limited partners can provide valuable information about co-investors and lead to the identification of potentially problematic overlapping investments resulting from the transaction that could violate Section 7."[49] The agencies cite two cases for that proposition; neither provides a compelling basis for requiring disclosure of five percent or greater limited partnership interests across the board.

Take, for example, *United States v. Dairy Farmers of America.*[50] In that case, Dairy Farmers of America ("DFA") held a fifty percent stake in *both* Southern Belle and National Dairy Holding, L.P. (the owner of Southern Belle's competitor, Flav-O-Rich).[51] As such, DFA's investments in Southern Belle may not have been reportable under Item 6(b) if it was the UPE of both entities. In any event, DFA also owned fifty percent of the general partner of National Dairy Holding, L.P. Section 7 issues did not arise in the DFA case due to having the same minority investor in both companies. To the contrary, the potential competitive problem was DFA's significant, if not controlling, stake in both entities. And given it was decided in 2005, the DFA case seems a strange basis for a modern rethinking of the existing rules in this area. The case was certainly familiar to the agencies well before they decided not to require disclosure of limited partnership interests in 2011.

The other case cited by the agencies to support a broader disclosure requirement is similarly unmoving.[52] There, the FTC alleged that two limited partners who together held 34

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corporate entity filing as an acquiring person generally will not have associates. The concept targets funds and master limited partnerships.").

[47] Dechert LLP, *FTC, DOJ Announce Final HSR Rules Requiring Significant Additional Reporting Obligations, Including Expanded Scope of Document Production* (July 15, 2011), https://www.dechert.com/content/dam/dechert%20files/knowledge/onpoint/2011/7/ftc-doj-announce-final-hsr-rules-requiring-significant-addition.

[48] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188.

[49] *Id.*

[50] 426 F. 3d 850 (6th Cir. 2005).

[51] *Id.* at 853-854.

[52] *See generally* In re Red Ventures Holdco and Bankrate, FTC Dkt. C–4627 (Nov. 3, 2017).

percent of an acquiring entity would be able to improperly influence the acquired entity, which operated a competing business.[53] There too, however, the competitive issues did not merely relate to a five percent limited partner interest. Instead, the two limited partners in that case each had the right to designate one board seat and approval rights over two other board members of the seven-person board of directors for the management company that controlled the acquiring entity.[54] Again, it is not clear why a broad requirement to disclose *all* limited partners who hold interests of five percent or more is necessary to identify a potential competitive concern irrespective of such limited partners' ability or inability to participate in the management or control of the applicable fund, general partner, or acquired business.

We can understand the agencies' interest in obtaining more information about significant limited partner interests that fall below the formal definition of HSR control for unincorporated entities. At the same time, it is possible to address those concerns without implementing a broad disclosure requirement for all limited partners who hold interests of five percent or more, especially given their typically passive role. The agencies could, for example, require the disclosure of any limited partner interests above five percent for limited partners who have the right to appoint a voting representative to the board of directors or equivalent body of the general partner or management company. This limitation would be more probative of the potential concerns raised by these cases without imposing the burden of the more sweeping limited partner disclosure proposal.

### B. Increased Disclosure of Other Minority Holders

The proposed changes to the HSR form also require the disclosure of all entities or individuals that hold between five and fifty percent of various entities in the ownership chain between the UPE and the acquiring entity, asserting that "obtaining a broader picture of relevant minority investments, where they exist, would aid the agencies in their assessment of the nature of competitive decision-making within the relevant entity."[55] This description, of course, assumes that all entities or individuals that hold between five and fifty percent of various intermediate entities are "relevant" minority investments for the purpose of merger analysis. There is little reason to believe that is correct.

Instead, as with the proposed new rule for limited partner interests, this new request for minority holder information is overbroad and, as acknowledged by the agencies, it "may require significant additional information from investment entities, such as funds and master limited partnerships, for which organizational structures are often more complex."[56] To reduce this burden, the agencies should limit this request to minority holders that have the right to appoint a voting representative to the board of directors or equivalent body of the entity in question, which is likely to include the most relevant minority holders for the purpose of merger analysis.

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[53] Compl. ¶ ¶ 2, 13-15, 17, FTC Dkt. C–4627 (Nov. 3, 2017).

[54] *Id.* ¶ 2.

[55] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188.

[56] *Id.*

### C. Privacy Concerns for Fund Investors

When the agencies decided that it would not be probative to require the disclosure of limited partners in 2011, they also considered the fact that "the identity and investment level of limited partners is often highly confidential."[57] This important consideration appears to have been entirely overlooked – or rejected without any basis – by the agencies in 2023.

Here, it is critical to understand that the burden inherent in disclosing minority shareholder information is not the same for public companies and private limited partnerships. For a public company, the burden of disclosing minority investors who hold five percent or more is minimal. The U.S. Securities & Exchange Commission already requires investors who own more than five percent of a public company to publicly report those ownership interests under Schedule 13D or 13G. Investors who choose to make large investments in public companies accordingly lack a reasonable expectation of privacy for those investments.

By contrast, individuals who invest in funds managed by private investment firms have legitimate and substantial expectations of privacy. In part, these expectations are rooted in the Gramm-Leach-Bliley Act of 1999, which established that "[i]t is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."[58] Indeed, existing FTC guidance on the Gramm-Leach-Bliley Act specifies that "[f]inancial institutions must give their customers . . . a 'clear and conspicuous' written notice describing their privacy policies and practices."[59] In line with those requirements, private investment firms typically include strict confidentiality provisions in fund offering agreements and subscription documents. Based on those assurances, the limited partners who subsequently invest in these funds have every expectation that their privacy will be protected. The agencies' 2011 analysis reflected their understanding of these confidentiality requirements.

We acknowledge that the contents of HSR filings are treated as confidential by the agencies and are not subject to Freedom of Information Act disclosure.[60] Yet the prospect of limited partnership information being made in regulatory filings can be expected to chill future investment in smaller funds from privacy-conscious investors. If the proposed rules are adopted, such investors will be much more likely to gravitate towards investments in either public companies or large private funds where their investments are less likely to hit the five percent threshold. These changes will have the perverse effect of further concentrating private investment in larger institutions at the expense of smaller investment funds, which will have ripple effects on small businesses, workers, and consumers.

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[57] Premerger Notification; Reporting and Waiting Period Requirements, 75 Fed. Reg. at 57118.

[58] 15 U.S.C. § 6801(a).

[59] Fed. Trade Comm'n, *How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*, https://www.ftc.gov/business-guidance/resources/how-comply-privacy-consumer-financial-information-rule-gramm-leach-bliley-act (last visited Sep. 19, 2023).

[60] 15 U.S.C. § 18a(h).

### D. The Burdens of Additional Information Gathering Will Fall Disproportionately On Private Investment Firms

Many of the additional burdens that would be imposed on filing parties across the board if the agencies' proposals are adopted will only be compounded when the filer holds interests in many companies across a variety of industries, as is often case when the acquiring person is a financial sponsor like a private investment fund. Because of the nature of their business, such filers must rely on personnel at the companies they invest in to gather the required information. The addition of new information requirements that apply to all companies within an acquiring person – such as detailed director and officer information going back two years, or labor markets data as discussed above– not only imposes significant additional burden and costs on such filers but are overbroad and unnecessary to the analysis of the competitive impact of the transactions at hand.

Take, for example, the proposal that each filing party provide an exhaustive list of alternative NAICS codes that could apply to each product or service offered, even when there is no overlap. This proposed requirement will be extremely difficult to comply with when relying on personnel at various operating companies that have varying familiarity with the NAICS system. The agencies are underestimating the additional burdens implicated by such changes in the aggregate. Moreover, there are more efficient ways of gathering information that would be relevant to the competitive analysis of the notified transaction. For example, if the concern is that the agencies are missing potential overlaps because parties are selecting different codes for competing products, that concern can be more effectively addressed in the new Horizontal Overlap Narrative that the agencies propose to require.

Here again it is key to remember that the proposed rules would impose broad disclosure requirements regardless of whether the requested information is relevant to any specific antitrust concern. This imposes substantial and unwarranted new costs on private investment firms with broader investment portfolios that are likely to raise fewer antitrust concerns. These up-front costs are likely to discourage investment by private investment firms in smaller businesses with less upside potential, and they also may make private investment firms that raise no potential competition concerns appear less favorable as buyers than strategic buyers that can more quickly collect the information required to complete an HSR filing.

### E. Impact on Small Businesses, Workers, and Consumers

The proposed rules for heightened disclosure of limited partner and minority holder interests purport to be evenhanded. The agencies' proposal depicts the changes as just an effort "to harmonize the requirement for limited partnerships with the requirements for limited liability companies and corporations."[61] But the proposed rules fail to consider how expansive disclosure requirements will handicap the smaller private investment firms that cannot guarantee their investors' privacy as compared with big public companies and large investment firms where individual investors are less likely to cross the five percent threshold requiring disclosure. The proposed rules also fail to address the significantly higher burdens that would be imposed on private investment firms than other businesses by broad new disclosure requirements across the

[61] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42188.

board. These changes will impact the ability of smaller private investment firms to raise funding which, in turn, will have a negative impact on small businesses, workers, and consumers.

To understand the impact of these changes, it is first necessary to understand the role that private capital markets play in support of small businesses.[62] Of course, all businesses require capital to sustain and grow their operations.[63] Yet small businesses and large businesses obtain capital in different ways. At a high level, "small businesses generally only have access to private equity and debt markets, whereas large businesses have access to public markets."[64] This distinction is key. Public companies can raise capital from public securities offerings; by contrast, small businesses obtain external finance "almost exclusively" from private markets.[65] Public companies similarly have access to bank or commercial lending, whereas "bank or commercial finance company lending would typically not be available to small businesses until they achieve a level of production where their balance sheets reflect substantial tangible business assets that might be pledged as collateral, such as accounts receivable, inventory, and equipment."[66] Private capital markets can be key to helping these small businesses survive and thrive until they have matured to the point where public capital markets and commercial finance options are available. Chilling private capital markets will make it more difficult for small businesses to keep their doors open.

It is also important to understand what is at stake. Small businesses collectively contribute much to the modern economy. In brief: "Small businesses are an essential part of the American economy, and core to the financial security of our middle class. There are 56 million workers employed at firms with fewer than 50 employees, representing 45 percent of all private-sector jobs in the first quarter of 2022."[67] Small businesses are even more critical in rural counties, where they operate 84.8 percent of establishments and account for 54.3 percent of employment.[68] The funding that private investment firms are able to provide can allow companies to grow organically by acquiring new equipment, investing in new technologies, or hiring more employees. In some cases, private investment firms may ensure continuity for

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[62] The precise definition of small business may vary by industry. *See generally* U.S. Small Business Admin., *Table of Size Standards* (Mar. 17, 2023) (providing small business definitions by NAICS code based on firm revenue and employment ranging from $1 million to over $40 million and 100 to 1,500 employees), https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%282%29.pdf.

[63] Michael J. McManus, *Dissecting Access to Capital*, U.S. Small Business Admin. (Sep. 2017), https://advocacy.sba.gov/wp-content/uploads/2019/06/Capital_Access_Fact_Sheet_FINAL.pdf.

[64] Allen N. Berger & Gregory F. Udell, *The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle*, 22 J. OF BANKING & FIN. 613, 626 (1998).

[65] *Id.*

[66] *Id.* at 623-24.

[67] White House, *Investing in America Means Investing in America's Small Businesses* (May 1, 2023), https://www.whitehouse.gov/cea/written-materials/2023/05/01/investing-in-small-businesses/.

[68] Daniel Wilmoth, Ph.D., *Small Business Facts: Small Business in Rural Areas*, U.S. Small Business Admin. (Aug. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/08/Fact-Sheet-Small-Business-in-Rural-Areas-508c.pdf.

founder-led businesses. Private investment firms can be a vital lifeline to keeping these businesses operating.

Consumers benefit from private capital markets as well. Private investment firms contribute to the growth of smaller businesses, delivering more competition that benefits consumers. In addition, private capital markets are more willing to invest capital in so-called "[h]igh risk-high growth" startups and businesses with high upfront development costs that drive innovation that benefits consumers and drives further competition.[69]

Private investment firms can be particularly impactful in helping put small businesses on an even playing field with larger public companies. "Unlike publicly traded firms," one recent study notes, "private firms cannot generally issue equity to raise capital needed to finance investment and may become financially constrained when they reach their debt capacities."[70] That study found "consistent evidence of a large and rapid increase in sales growth after private firm buyouts," explaining that "relaxing financing constraints and facilitating growth are an important source of value creation in private firm buyouts."[71] In other words, by providing a capital bridge to small businesses, private investment firms enable small businesses to catch up to big businesses benefiting from better access to capital.

The agencies should keep in mind these benefits from private capital markets when considering imposing any heightened disclosure requirements for limited partners and minority holders. Small businesses already find it difficult enough to obtain necessary capital today. Pushing privacy-conscious investors to public companies or larger investment firms does not serve the interests of small businesses or their workers, nor does it further the competition and innovation that ultimately benefits consumers.

## Conclusion

We hope that the agencies will thoughtfully consider the concerns raised in these comments. In our view, many of the agencies' proposals require significant refinement for the HSR process to function as intended rather than become a veritable minefield in the eyes of even the most well-intentioned filing parties. As the agencies recognize, "[i]nformation submitted as part of the HSR premerger notification process is a key starting point, and the information contained in the HSR Filing should be sufficient to allow the agencies to conduct a thorough but quick evaluation of whether the proposed transaction is one that requires more in-depth investigation through the issuance of Second Requests."[72] The level of proposed disclosure is unnecessary for carrying out the purposes of the HSR Act.

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[69] Berger & Udell, *supra* note 64 at 615, 622-24.

[70] Jonathan B. Cohn, Edith S. Hotchkiss, & Erin M. Towery, *Sources of Value Creation in Private Equity Buyouts of Private Firms*, REV. OF FIN. 257, 283 (2022)

[71] *Id.* at 259.

[72] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42179.