September 21, 2023

VIA ELECTRONIC SUBMISSION

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

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

Dear Ms. Tabor:

Managed Funds Association ("**MFA**")[1] appreciates the opportunity to provide comments to the Federal Trade Commission ("**FTC**" or the "**Commission**") on the Notice of Proposed Rulemaking concerning "Premerger Notification; Reporting and Waiting Period Requirements" published in the Federal Register on June 27, 2023 (the "**NPRM**"). MFA's members include traditional hedge funds, credit funds, and crossover funds that all work to help pension plans, university endowments, charitable foundations, and other institutional investors diversify their investments, manage risk, and generate attractive returns over time.

MFA recognizes the importance of the Hart-Scott-Rodino Antitrust Improvements Act ("**HSR Act**") premerger notification system, which allows the Commission and the Antitrust Division of the Department of Justice (together, the "**Agencies**") to identify and remediate or sue to enjoin mergers and acquisitions that violate the Clayton and Sherman Antitrust Acts before they occur.[2] We support the FTC's goal of making the initial review the Agencies must conduct when an HSR filing is made more efficient and effective. We submit this comment letter because we are concerned that a number of the proposed amendments contemplated in the NPRM will, contrary to this goal, in fact make such review *less* efficient and effective and will needlessly impose substantial burdens on our members and the investors they work to support, with damaging consequences to the capital markets. Accordingly, and for the reasons outlined more fully below, we believe that the Commission should withdraw the NPRM. Should the

[1] MFA, based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] 18 U.S.C. § 18a (HSR Act); 15 U.S.C. § 12 et seq. (Clayton Act); 15 U.S.C. § 1 et seq. (Sherman Act).

Commission proceed with adoption of some version of the NPRM, MFA strongly recommends several amendments to the NPRM that would reduce the burden on filing parties as well as on the Agencies.

As a threshold matter, we are advocating for a withdrawal of the NPRM because the amendments that it contains would not promote efficiency. The NPRM would replace the current HSR notification system, which calibrates the amount of time and effort parties and the Agencies must spend on disclosure to the likelihood that the deal presents competitive concerns, with a "one size fits all" approach in which parties to all reportable deals must submit information similar to that required in a Voluntary Request Letter or a Request for Additional Information ("**Second Request**"). Requiring parties to submit substantially more information up front would undoubtedly make the initial review and identification of concerning transactions less efficient and effective. First, it will overwhelm the responsible staff with information when they are operating under a tight 30-day deadline. Second, even assuming that these advance filings will provide a benefit in a select set of cases, the overwhelming majority of reportable transactions present no competition concerns, resulting in the imposition of tremendous (and, in the proposal, dramatically understated) costs for no benefit at all. That is inconsistent with clear congressional intent not to burden transactions that "are not likely to violate the antitrust laws", as set forth in the HSR Act and repeatedly affirmed by the Commission itself.[3]

MFA members have substantial experience with HSR-reportable transactions that are not mergers or acquisitions, and that raise no concern of substantially lessening competition in violation of the antitrust laws. These transactions in fact encourage competition in a variety of important ways. Were the NPRM to apply to them, its effect would be to tax pro-competitive conduct, make capital markets less efficient, and saddle the Agencies and their staff with reviewing a great deal more paperwork and data concerning hundreds if not thousands of transactions of no competition interest. That result would not only hurt our members and the thousands of pensioned workers, retirees, universities, and other investors who rely upon them—it would make the work of identifying and stopping anticompetitive mergers even harder for the Agencies. We raise this likelihood of serious negative unintended consequences to urge the Commission not to move forward with this NPRM.

[3] The HSR Act contemplates that certain otherwise reportable transactions are unlikely to raise competitive issues and need not be required to make detailed filings. *See* 15 U.S.C. § 18a(d)(2)(B) (providing that the Commission may "exempt, from the [reporting requirements], classes of persons, acquisitions, transfers, or transactions which are not likely to violate the antitrust laws"). The Commission itself has recognized that "[t]he Agencies have a strong interest in receiving HSR filings that contain enough information to conduct a preliminary assessment of whether the proposed transaction presents competition concerns, while at the same time not receiving filings related to acquisitions that are very unlikely to raise competition concerns". Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053, 77055 (proposed Dec. 1, 2020). *See also* Premerger Notification; Reporting and Waiting Period Requirements, 61 Fed. Reg. 13666, 13666-67 (Mar. 28, 1996) (amending the HSR reporting rules "to reduce the burden of reporting on the public" and to "allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm" by eliminating certain requirements for "a significant number of transactions that are unlikely to violate the antitrust laws").

I. Executive Summary

A. The NPRM raises significantly the burden of making HSR filings for all reportable transactions, but most reportable transactions raise no competition concerns. The costs imposed by the proposal thus overwhelmingly outweigh the benefits.

B. This heightened burden will deter conduct that encourages competition, contrary to the purposes of the antitrust laws.

C. The NPRM fails to provide an evidentiary basis for its proposals.

D. The NPRM makes no serious effort to minimize the substantial burdens it acknowledges, which fall also on filers of the vast majority of reportable transactions, which do not raise competitive concerns.

E. In light of these concerns, the Commission should withdraw the NPRM. If the Commission determines to proceed with some version of the NPRM, then MFA strongly recommends implementing the several amendments discussed in this letter.

II. Discussion of Key Concerns

A. The Burdens of the NPRM Far Outweigh Any Benefits

The Commission has repeatedly emphasized that HSR filings should facilitate the Agencies' efficient review of transactions, while eliminating unnecessary burdens.[4] The NPRM therefore takes the wrong approach—rather than propose changes that will streamline filing and focus reporting on those transactions that are likely to raise competitive concerns, the NPRM imposes significant burdens on *all* reportable transactions. And by the Commission's own admission, the proposed changes to the HSR form are "significant and impose additional burden on some filing parties".[5] The Commission itself estimates that the cost on filing parties will nearly quadruple.[6] Expressing concern about the challenges Agency staff face in timely reviewing the HSR filings the FTC receives, the Commission concludes that the additional burden is warranted "because the requested documentary material and information is necessary

[4] *See* Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053, 77058 (proposed Dec. 1, 2020); Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners, Fed. Trade Comm'n, Vision and Priorities for the FTC at 3 (Sept. 22, 2021) (noting the importance of "[i]dentifying ways to reduce agency resources and burden associated with investigating and filing lawsuits against unlawful mergers").

[5] Premerger Notification; Reporting and Waiting Period Requirements, at 22 (proposed June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p239300_proposed_amendments_to_hsr_rules_form_instructions_2023.pdf [hereinafter "NPRM"]. *See also id*. at 36 (acknowledging that the NPRM "may require significant additional information from investment entities, such as funds and master limited partnerships").

[6] *Id*. at 103. As explained below, MFA believes that the NPRM underestimates the cost.

and appropriate for effective and efficient review of HSR Filings to determine within the initial waiting period whether the transaction may, if consummated, violate the antitrust laws".[7]

Because the proposed changes will make the task of Agency staff less efficient and effective, as the staff would be compelled to review voluminous information on every reportable deal and to divert attention from the ones that matter, the NPRM is the wrong means of addressing the Commission's stated goals. Under the HSR system today, the Agencies have access to all of the information at issue in the NPRM through post-filing informal requests, Voluntary Request Letters, and Second Requests.[8] The NPRM does not explain why these tools are insufficient for the Agencies to evaluate transactions and determine which are likely to raise competitive issues. The current system is efficient, because the deals that raise more concerns require more reporting. The NPRM undoes that efficiency. Even if one concedes that some efficiency may be achieved for the review of some transactions, however, there can be no doubt that the costs of the NPRM far outweigh the benefits because the data make clear that the vast majority of reportable (and thus newly-burdened) transactions present no likelihood of an antitrust violation whatsoever. For the overwhelming bulk of transactions, the burdens will produce no benefits at all.[9]

Most reportable transactions do not raise competition concerns, and nothing in the NPRM suggests to the contrary. For example, from 2012 to 2020, typically only about 2 to 3% of transactions resulted in a Second Request.[10] That remains true today, as FTC Chair Khan noted just recently.[11] An even smaller proportion results in some kind of enforcement, or abandonment by the parties.[12] Moreover, the Agencies ultimately initiate enforcement activity with respect to

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[7] *Id*. at 22.

[8] *See* FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents; FTC, Model Second Request (Rev. Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf.

[9] The NPRM is even more problematic because the burdens of preparing and producing documents and data fall fairly evenly upon all reportable transactions. Although the cost of producing some extra documents or data or preparing a longer narrative submission will be relatively marginal compared to the cost of major, complex public company mergers, the cost to comply with the NPRM will be substantial and out of proportion to the cost of many smaller, simpler transactions. These smaller transactions will become much more costly and not worth pursing, even if such transactions are far less likely to impact competition and would be ultimately beneficial to shareholders, innovation, and competition. The NPRM functions as a tax on activity and this tax disproportionately burdens those reportable transactions least likely to raise competitive concerns.

[10] *See* Appendix A, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 (2023) [hereinafter, "HSR 2021 Report"].

[11] *See* Lina M. Khan, FTC Chair on Consumer Protection and the Marketplace, C-SPAN (July 24, 2023), https://www.c-span.org/video/?529515-1/ftc-chair-consumer-protection-marketplace (explaining that "98% [of reported transactions] go through without even any second questions being asked", only "around 2% of all deals even get . . . a Second Request" and an "even smaller fraction ultimately result in a legal challenge").

[12] *See, e.g.*, *id*.; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Remarks at International Bar Association's 19th Annual International Mergers and Acquisitions Conference: An Update on FTC Merger Enforcement (June 15, 2022), (explaining that of the 12 merger actions the FTC initiated in 2021, four transactions were abandoned, five ended in consents and three resulted in litigation).

only a small subset of HSR transactions. In fiscal year 2021, there were 3,413 HSR transactions; the Agencies brought a combined 32 merger enforcement challenges.[13] That is not to say that only those transactions where the Agencies take action raise competition concerns—and some non-reportable transactions also may[14]—but there is simply no reason to believe that the number of transactions raising such concerns comes anywhere near the number that would make imposing the NPRM's burdens on every reportable transaction outweigh the costs of doing so.

As another example, prior to the suspension of early termination in February 2021, between 2012 and 2020, early termination ("**ET**") was granted in over half of filed transactions.[15] The HSR Act provides for the early termination of the waiting period,[16] and prior FTC practice involved granting early termination when parties requested it and when Agency staff did not view the transaction as even warranting asking for voluntary disclosures, much less a Second Request. ETs were thus transactions that Commission staff—the same individuals whose work the NPRM purports to want to make more efficient and effective—determined affirmatively were of no interest. Even assuming a conservative estimate of half of transactions as qualifying for ET, that means some half of the cost—$175 million yearly as estimated in the NPRM—comes with no benefit to competition enforcement whatsoever. And for the avoidance of doubt, the bulk of transactions *not* granted ET still did not result in Second Requests, much less actual enforcement.

As noted below, the NPRM states that some of the proposed changes will "significantly increase the burden" on certain filers and transactions.[17] But, without justification, the increased burden on those particular kinds of filers does not correlate with an increase in likelihood that the transactions in which they engage violate the antitrust laws. The NPRM offers no data or even real-world examples of how the lack of the proposed disclosures related to the organizational structure of the "Ultimate Parent Entity," including minority shareholders and noncontrolled entities or holders of other types of interest that "may exert influence"[18] have inhibited the work of the Agencies, or how the absence of such information has led to a failure to enjoin or remediate a transaction likely to substantially lessen competition. The "significant" burden on "certain" filers and transactions thus far outweighs any purported benefit, which in any event the NPRM fails to identify.

Available data (and the absence of contrary data in the NPRM) thus make abundantly clear that the overwhelming bulk of transactions reportable under HSR do not threaten to

[13] *See* HSR 2021 Report at 9-15; Exhibit A, Table I.

[14] *See, e.g.*, Complaint, In the Matter of Axon Enter., Inc. et al., FTC File No. 1810162 (Jan. 3, 2020); Complaint, In the Matter of Otto Bock HealthCare N. Am., Inc., FTC File No. 1710231 (Dec. 20, 2017).

[15] From 2012 to 2020, between 55% and 64% of transactions received early termination, and early termination was granted in roughly 80% of transactions requesting it. *See* HSR 2021 Report Appendix A.

[16] 18 U.S.C. § 18a(b)(1)(B).

[17] NPRM at 102.

[18] *Id*. at 32 ("The proposal would require the identification of entities within the acquiring person or acquired entity, minority shareholders, and other non-controlling entities, and create new requirements to identify certain other interest holders that may exert influence, as well as officers, directors, and board observers.").

decrease competition. While the additional information the NPRM would require provides little benefit in the first instance because the Agencies can already get it and in fact imposes costs on the Agencies—not to mention on filing parties—by making the work of staff less efficient and effective, whatever benefit it does confer is limited to a small minority of reportable deals and is clearly overwhelmed by the costs imposed on all.

A note about remedies: Congress adopted the HSR Act because of the difficulty of remediating anticompetitive mergers after the fact—"unscrambling the eggs" of integrated firms. Equity and debt investments in public markets do not present this issue. Selling equity or debt securities, for example, is not disruptive to the operations of a company. Thus, even should some anticompetitive investment be missed—and there is no evidence of this—at the end of the day there would be no eggs to unscramble and the remedy would be easy to order and effectuate. With this in mind, MFA urges the Commission not to adopt a costly and burdensome system that offers so little potential benefit.

B. Many of the Transactions that MFA Members Report are Not Concerning and are Pro-Competitive

MFA members have substantial experience with reportable transactions that not only raise no antitrust concern but in fact support competition, and yet the Commission fails to acknowledge that the NPRM's requirements would undoubtedly have a chilling effect on such transactions. The NPRM proposes to expand HSR filing requirements because of concerns the Commission has about mergers and the impact they have on competition.[19] "Premerger notification and review . . . gives the Agencies the procedural tools necessary to seek to prevent mergers in court before they cause harm."[20] But many of the reportable transactions in which MFA members are involved are not mergers or acquisitions in any colloquial sense; they simply happen to be reportable under HSR. MFA members rarely, if ever, have horizontal or even vertical relationships with the issuers whose securities they acquire. The NPRM fails to justify making the transactions in which they engage substantially slower and more time consuming, as does the data describing Commission experience.

Agency data concerning transactions in which our members are engaged bear out the lack of concern they pose—reported transactions in which the acquirer was a fund, trust, or other financial vehicle almost never result in a Second Request. For example, between fiscal years 2007 and 2021 (the only years for which such data are available), of the 677 reported transactions by funds, trusts, or other financial vehicles, only three[21] (less than half of a percent)

[19] NPRM at 4-5. *See also* Statement of Chair Lina M. Khan Joined by Comm'r Rebecca Kelly Slaughter and Comm'r Alvaro M. Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, FTC File No. P239300 (June 27, 2023) (explaining the HSR Act allows the Agencies "to block unlawful mergers prior to their consummation and before they could cause widespread harm") [hereinafter "Statement of Chair Khan"]; H.R. Rep. No. 94-1373 at 5 (1976) (explaining the purpose of the HSR Act is to "giv[e] the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated").

[20] NPRM at 4-5.

[21] Two of these Second Requests were issued in FY 2016 and one in FY 2007.

resulted in Second Requests.[22] That is a fraction of the percentage of HSR filings overall flagged for additional review, which, as noted above, is already a miniscule fraction of HSR filings in general. From fiscal years 2017 through 2021, *not one* acquisition by a fund, trust, or other financial vehicle resulted in a Second Request.[23] Of the 2,631 reported transactions where the acquirer was involved in securities, commodity contracts, or other financial investments and related advice over the same 14-year period from 2007 to 2021, only 14 (half of a percent) resulted in a Second Request.[24]

To understand the transactions in question is to grasp why. As just a few examples, HSR filings may be triggered when concentrated funds make large purchases due to sizeable investor inflows, when benchmark-relative funds make large purchases due to index rebalancing, or when managers shift portfolios into highly liquid names in anticipation of redemptions or in connection with wind-downs. These types of transactions do not impact competition negatively at all, but they do enable funds to meet investor needs, whether investors want more focused or more diversified investments or simply want to take their money out and put it to a different use.

HSR may also be triggered when venture or growth equity funds acquire stakes in pre-IPO-stage companies. These early-stage investments are critical to enabling startups to innovate, grow, and create and meet customer demand—the very essence of competition.[25] The NPRM relies in part on an FTC study of acquisitions by large technology companies,[26] and Chair Khan recently recognized that initial public offerings are a decreasingly common mechanism for new and smaller firms to get access to financing.[27] The financing our members provide, along with investments from venture capital firms and "angel" investors, are the necessary fuel for startups and other growing firms. Raising the cost of access to that capital, as the NPRM would do, will make outright acquisition (that is, mergers) an even more attractive option. That cannot be the goal of the Commission, but it is the effect of raising the cost on all reportable transactions, especially with "substantial" burdens applied to investment funds.

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[22] *See* HSR 2021 Report Exhibit A, Table X; Annual Competition Reports, Fed. Trade Comm'n, https://www.ftc.gov/policy/reports/annual-competition-reports.

[23] *See* HSR 2021 Report Exhibit A, Table X.

[24] *See id*.; Annual Competition Reports, Fed. Trade Comm'n, https://www.ftc.gov/policy/reports/annual-competition-reports.

[25] Securities and Exchange Commission Chair Gensler has acknowledged that the "private fund industry plays an important role in each sector of the capital markets", including by "participat[ing] in capital formation for startups to late-stage companies". Gary Gensler, Chair, Sec. & Exch. Comm'n, "The '90s: Rom-coms, the Spice Girls, & MFA:" Remarks Before the Managed Funds Association (May 2, 2023), https://www.sec.gov/news/speech/gensler-remarks-managed-funds-association-050223.

[26] NPRM at 85-86.

[27] *See* Lina M. Khan, FTC Chair on Consumer Protection and the Marketplace, C-SPAN (July 24, 2023), https://www.c-span.org/video/?529515-1/ftc-chair-consumer-protection-marketplace (noting that "IPOs [are] no longer as much of an available path" compared to acquisitions).

Shareholder engagement is "a hallmark of our public capital markets".[28] The U.S. Securities and Exchange Commission ("**SEC**")—tasked with protecting investors and promoting efficiency, competition, and capital formation[29]—has repeatedly recognized the importance of and encouraged shareholder engagement.[30] The NPRM, however, would tax shareholder engagement with no corresponding benefit to shareholders, companies, or competition, and we believe the Commission has not sufficiently recognized the likelihood of this adverse consequence.

In managing their funds' investments, our members routinely monitor them and communicate with company management on certain business decisions, such as executive pay and other corporate governance, operational, and strategic topics. These can include use of capital, corporate structure, operational efficiency, and other business strategies aimed toward improving a company's long-term durability and competitiveness. There are real benefits—to competition and to consumers—from shareholder engagement.[31] Because the FTC regards such engagement as taking investments outside of the "investment only" exemption to HSR filing, shareholders looking to engage must file HSR forms. The NPRM would make that filing much more expensive, thus taxing and disincentivizing shareholder engagement and undermining the securities laws and the proper functioning of our capital markets.

MFA membership also includes "activist" funds that acquire shares to effectuate changes in corporate management. They work to make target companies more competitive, benefiting the funds and all the shareholders of the target company. These efforts support the goals of antitrust enforcement. MFA members advocate for positions that strengthen companies' competitive position, increasing output, lowering prices, and increasing innovation. Activist investors also

[28] *See* Jay Clayton, Chairman, Sec. & Exch. Comm'n, Statement Announcing SEC Staff Roundtable on the Proxy Process (July 30, 2018), https://www.sec.gov/news/public-statement/statement-announcing-sec-staff-roundtable-proxy-process.

[29] *See* 15 U.S.C. § 77b(b) ("Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.").

[30] *See, e.g.*, Press Release, SEC Proposes Amendments to Shareholder Proposal Rule, Sec. & Exch. Comm'n (July 13, 2022), https://www.sec.gov/news/press-release/2022-121 (explaining the SEC's proposed amendments to Rule 14a-8 "would help shareholders exercise their rights to submit proposals for consideration by their fellow shareholders"); Shareholder Approval of Executive Compensation, 15 U.S.C. § 78n-1 (2011) (mandating shareholder vote on executive compensation); Daniel M. Gallagher, Comm'r, Sec. & Exch. Comm'n, Activism, Short-Termism, and the SEC: Remarks at the 21st Annual Stanford Directors' College (June 23, 2015), https://www.sec.gov/news/speech/activism-short-termism-and-sec ("If companies are republics, then management and even at times boards need to engage with shareholders with the same vigor that politicians engage with their constituents.").

[31] SEC Chair Gensler has noted the "important role" that funds play for investors "such as retirement funds and endowments", who invest on behalf of "teachers, firefighters, municipal workers, students, and professors". Gary Gensler, Chair, Sec. & Exch. Comm'n, "The '90s: Rom-coms, the Spice Girls, & MFA:" Remarks Before the Managed Funds Association (May 2, 2023), https://www.sec.gov/news/speech/gensler-remarks-managed-funds-association-050223.

famously often push to break up large companies—they are a force for deconcentration.[32] They seek to undo bad mergers.[33]

And because activist fund managers are typically much smaller in size than global multi-trillion asset management firms with broad retail offerings, the stakes that activist funds take cut against the "common ownership" concerns that some have raised in which large fund companies end up holding substantial shares in competing companies.[34] These are market forces pushing for the same ends as antitrust enforcers. Imposing substantial burdens on the transactions that make them work will result in less engagement with corporate managers, at the expense of institutional investors, shareholders, and competition.[35]

Institutional investors themselves also engage in these types of transactions in order to pursue Corporate and Social Responsibility ("CSR") goals. For example, in 2014, the New York City Comptroller Scott Stringer and the New York City Retirement Systems initiated a campaign for "proxy access" to ensure that "large, long-term shareholders like the City's pension funds have the ability to nominate directors to company boards—boosting corporate accountability and giving New York City pensioners a stronger voice in the long-term oversight of the companies the Systems invest in, including on issues related to the diversity of board members, the company's approach to climate change risks, and treatment of employees".[36] In 2017 and 2019, the Comptroller and pension funds initiated additional campaigns to increase board transparency and to implement search policies requiring the consideration of diverse candidates for board directors and CEOs.[37]

These are just a few examples of the kinds of pro-competitive, non-merger reportable transactions that would be burdened substantially by the changes to filing requirements captured in the NPRM. The effect of the changes would be to slow and raise the cost of all of these kinds of economic behavior. The NPRM offers no basis to conclude that such transactions are likely to violate the antitrust laws. Quite the contrary: they support competition.

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[32] *See, e.g.*, Ludwig Burger & Patricia Weiss, Bayer Shares Gain as Another Activist Investor Piles In, Reuters (Jan. 11, 2023) (explaining that activist investor Bluebell Capital "is pushing for a sale of [Bayer's] consumer health unit and, at a later stage, for a separation of Bayer's pharmaceuticals and agriculture businesses").

[33] *See, e.g.*, Alwyn Scott & Makiko Yamazaki, Carl Icahn Scores a Big Win as Xerox Pulls Out of Fujifilm Deal, Business Insider (May 14, 2018), https://www.businessinsider.com/xerox-fujifilm-deal-carl-icahn-scores-a-big-win-2018-5.

[34] *See, e.g.*, Jose Azar et al., Anticompetitive Effects of Common Ownership, 73 J. Fin. 1513 (2018); Einer Elhauge, Horizonal Shareholding, 1296 Harv. L. Rev. 1267 (2016).

[35] *See* Bilal Sayyed, A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption, Antitrust Source 1 (Apr. 2013).

[36] *See* Boardroom Accountability Project, New York City Comptroller, https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/overview/.

[37] *Id.*; Michael Garland et al., NYC Comptroller's Boardroom Accountability 3.0 Results, Harv. L. Sch. F. on Corp. Gov. (June 24, 2020), https://corpgov.law.harvard.edu/2020/06/24/nyc-comptrollers-boardroom-accountability-3-0-results.

Finally, it is worth noting that the additional burden the NPRM would impose would fall not only on funds but on the companies that are the targets of their share purchasing. Companies need to file under HSR even though the purchases in question were not initiated by them or with their consent, and even though there is no plausible competition concern with the sale (leaving aside the purchase) of shares. Raising dramatically the cost of making such filings would operate as nothing but a "trap for the unwary."

C. The FTC Underestimates the Burden of the NPRM

Another important driver of the need to withdraw the NPRM is its failure to contemplate in an accurate or realistic manner the burden that it would impose if adopted. The Commission estimates that the proposed amendments contemplated in the NPRM will result in an average of 107 additional hours to prepare a filing, for a total of 144 hours per filing, an increase of nearly 300%.[38] That is a staggering amount of additional cost, and yet, for the reasons described below, it vastly undercounts the costs and burden of complying with the NPRM.

First, the "methodology" the Commission employed to estimate the burden—"canvass[ing] current [FTC] staff who had previously prepared HSR filings while in private practice"—is facially invalid.[39] It is also non-verifiable, and thus not subject to empirical validation. The Commission fails to provide even the most basic information, such as the number of staff surveyed, who these staff are, their level of experience in preparing HSR filings, when they last prepared HSR filings, and—critically—what the canvass actually showed.

Second, the Commission's estimates are inconsistent with our members' experience with the time it takes to prepare HSR filings and to comply with information requests of a similar nature to the NPRM. The NPRM's proposal to require the collection and submission of drafts of transaction-related documents in the initial filing,[40] for example, adds a substantial burden to preparing HSR filings. Our members routinely generate numerous drafts of documents concerning investment strategy, market trends, and other relevant information with respect to each individual transaction. Collecting, reviewing, and producing these drafts, many of which may contain only minor differences, as well as reviewing for privilege or other disclosure restrictions, for all transactions imposes a substantial and unnecessary burden on filers, in particular when the Commission admits this information is readily available to the Agencies for transactions that do raise competitive concerns.[41]

Third, the NPRM fails even to consider the cost from taxing (and thus chilling) transactions that benefit investors, consumers, and competition, as detailed above. Take, for example, transactions undertaken in order to rebalance investments or to accommodate redemptions. The time and financial cost of the NPRM's changes would ultimately be expressed

[38] NPRM at 103. The Commission estimates that the NRPM will result in 12 to 222 additional hours per filing, depending on the complexity of the filing. *Id.*

[39] *Id*. at 102-03.

[40] *Id*. at 57-58.

[41] *Id*. at 57.

in higher fees charged by funds and less money in the hands of investors. The NPRM does not consider this cost. Nor does it address the losses (including to competition) for chilling shareholder engagement or the market for corporate control.[42] Senior Commission officials have spoken repeatedly about adopting policy mechanisms to "deter" anticompetitive mergers,[43] and raising the costs of filing the NPRM contributes to that goal. Deterrence will undoubtedly follow, but the cost of deterring all reportable transactions, mergers or not, anticompetitive or not, is ignored entirely by the NPRM. That deterrence applies equally (if not more so) to all the benefits from those transactions. The NPRM treats its proposed reforms as nothing but increased paperwork—it ignores these other costs entirely.

Finally, the NPRM ignores entirely the cost of requiring disclosure by limited partners in investment vehicles. In addition to "significantly increas[ing] the burden on certain filers" in terms of the cost of filing, such disclosures will also hurt investors, some of which have acute confidentiality concerns that drive lengthy negotiations with fund managers. The NPRM proposes to expand substantially the information that filing parties must submit about related parties and entities beyond that required today regarding the ultimate parent entity, subsidiaries, and shareholders. Under the proposal, parties will be required, among other things, to identify all minority shareholders, including limited partners, that hold 5% or more of the acquiring party.[44] Parties will also be required to identify all creditors that have, or would have, in conjunction with or as a result of the transaction, provided credit totaling 10% or more of the value of the acquiring entity.[45] These thresholds have no grounding in any concept of corporate control, and thus are particularly poorly targeted to identifying competition concerns. Because that disclosure is not required today, at minimum, these disclosure requirements will result in our members having to renegotiate agreements with limited partners. This will create friction and increase costs, especially because limited partners often do not wish to be disclosed. If the proposed disclosure rules capture these pension plan, university endowment, and charitable foundation investors, many will simply not invest—and that will hurt investors, the companies they invest in, and the funds themselves. Less money will remain invested. The NPRM misses this cost as well.

D. The NPRM Lacks an Evidentiary Basis

In addition to undercounting the costs, the Commission fails to provide a sound evidentiary basis for other aspects of the NPRM and should therefore withdraw the proposal.

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[42] *See* Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Opening Keynote at The Global Antitrust Economics Conference: Competing for Companies: How M&A Drives Competition and Consumer Welfare (May 31, 2019).

[43] Memorandum from Lina M. Khan, Chair, Fed. Trade Comm'n, to Commission Staff and Commissioners, Fed. Trade Comm'n, Vision and Priorities for the FTC at 3 (Sept. 22, 2021) ("[W]e need to find ways to deter unlawful transactions"); Chris May, Expanded US Merger Filing Disclosures Will Have 'Significant Deterrent Effect,' Top FTC Enforcer Says, MLex (Apr. 20, 2023), https://content.mlex.com/#/content/1465584/expanded-us-merger-filing-disclosures-will-have-significant-deterrent-effect-top-ftc-enforcer-says.

[44] NPRM at 36.

[45] *Id*. at 39.

The NPRM justifies the proposed amendments on the basis that the Agencies lack all of the relevant information needed to determine during the initial 30-day waiting period whether a proposed transaction may violate the antitrust laws. But the NPRM provides no evidence of any missed anticompetitive transactions, much less the kind of systematic problem attributable to the lack of the newly-sought information in the initial filing. (Again, all the information is available to the Agencies today.) The NPRM instead cites the Commission's recent report on unreported acquisitions by the technology companies Apple, Amazon, Google, Facebook, and Microsoft.[46] But that report concludes neither that any of the hundreds of acquisitions surveyed were anticompetitive nor that the FTC's evaluation would have been different had the NPRM's proposed reforms been in place. Nor could it: by definition, the surveyed acquisitions did not require reporting under the HSR Act and they would remain unreportable even were the NPRM in place. The report is a red herring.

The new disclosures related to the organizational structure of the "Ultimate Parent Entity," including the identity of minority shareholders and noncontrolled entities or holders of other types of interest that "may exert influence,"[47] also lacks a sound basis. The NPRM claims the information is relevant to the Agencies' "assessment of the nature of competitive decision-making within the relevant entity".[48] It cites no evidence to support that proposition, and offers no basis to believe that that presence of, for example, limited partners (or any specific limited partners) has a competitive impact, or that the lack of this information in the initial filing has resulted in the clearance of transactions that lessen competition. There are no data offered in support, nor even any anecdotal evidence of how the initial filing obligations today are not adequate.[49] The NPRM merely states that the "complex structure of investment entities is not adequately captured by the current [HSR] Form".[50] Even crediting this as true, the Commission has provided no justification for why this information is relevant to its task of identifying and

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[46] *Id*. at 85-86; Statement of Chair Khan at 3.

[47] NPRM at 32 ("The proposal would require the identification of entities within the acquiring person or acquired entity, minority shareholders, and other non-controlling entities, and create new requirements to identify certain other interest holders that may exert influence, as well as officers, directors, and board observers.").

[48] *Id*. at 35.

[49] The NPRM makes broad assertions that the currently-provided information is insufficient for the Agencies to conduct their review in a timely fashion. *See, e.g.*, *id*. at 35 (stating that the current requirements "often do[] not provide the Agencies with a sufficient overview of the scope of the businesses that the acquiring person and acquired entity(s) control"); *id*. at 39 ("Without information about these relationships, the Agencies cannot easily identify those transactions where these relationships exist and may affect the competitive dynamics before and after the transaction.").

While the NPRM states that the "[i]dentification of limited partners can provide valuable information about co-investors and leads to the identification of potentially problematic overlapping investments resulting from the transaction that could violate Section 7", *id*. at 35-36, it provides no evidentiary basis for that conclusion. Neither of the cases the Commission cites support the notion that the proposed changes will ameliorate the purported information gap because both were successfully challenged under the current HSR notification system. *See In re Red Ventures Holdco and Bankrate*, FTC File No. 171096 (Nov. 3, 2017) (consent order entered after the issuance of a Second Request); *United States v. Dairy Farmers of Am.*, 426 F.3d 850 (6th Cir. 2005) (challenge to a non-reportable transaction, which would remain non-reportable under the NPRM).

[50] NPRM at 36-37.

addressing anticompetitive transactions, much less why it is required to be submitted upfront. (Again, it is all information available to the Agencies.) Similarly, the NPRM provides no basis for the inclusion of information concerning creditors and small equity holders.[51]

The proposed disclosures requiring detailed information about officers, directors, and board observers lack an evidentiary basis sufficient to justify the burden of disclosure. The NPRM would require that filers identify all officers, directors, and board observers[52] of all entities within the acquirer or acquired entity for the prior two years; all other companies for which the individuals serve or have served over the past two years as officers, directors, or board observers; and this same information for all prospective officers, directors, or board observers, and for any officers, directors, or board observers of entities created by the transaction.[53] Gathering this information, in particular looking back over years, for what generally amount to routine securities transactions, imposes substantial burdens.

The Commission states that these disclosures would facilitate the Agencies' identification of interlocking directorates and the associated implications under Sections 7 and 8 of the Clayton Act.[54] But the additional information requests will not address this need. The NPRM concedes that Section 8 does not even apply to unincorporated entities or board observers.[55] It neglects to mention that Section 8 gives no reason to consider prior interlocks at all, as the statute only offers injunction as a remedy to the Agencies.[56] And, Section 8 prohibits directors and officers from serving simultaneously on the boards of competitors,[57] but the NPRM would require this information to be submitted for all transactions, even those with no competitive overlap. The information requests at issue are thus, facially, not calibrated to aid the Commission in executing the statutory function it cites for requiring them.

The Commission points to no examples where the Agencies were unable to remedy violations of Section 8 under the current HSR notification system, much less any that establish existence of a systematic problem that would warrant the reform.[58] The Commission justifies

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[51] *Id*. at 38-40.

[52] In the case of unincorporated entities, those with similar functions.

[53] NPRM at 43.

[54] *Id*. at 40.

[55] *Id*. at 40 n.34, 42.

[56] 15 U.S.C. § 21 (FTC); 15 U.S.C. § 25 (DOJ). *See also Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 319 (7th Cir. 2012) ("[W]hen the [DOJ] or the FTC concludes that directorships improperly overlap, it notifies the firm and gives it a chance to avoid litigation (or to convince the enforcers that the interlock is lawful). For more than 30 years, this process has enabled antitrust enforcers to resolve § 8 issues amicably—either avoiding litigation or entering consent decrees contemporaneous with a suit's initiation."). While damages may be available to private plaintiffs, no court has awarded such damages.

[57] 15 U.S.C. § 19(a).

[58] The cases cited in the NPRM indicate that the Agencies are already able to identify and remediate violations. *See, e.g.*, Compl., *United States v. CommScope Inc.*, No. 07-cv-2200 (D.D.C.) (Dec. 6, 2007) (alleging a violation of

these disclosures on the theory that the information is relevant to potential violations of Section 1 of the Sherman Act or Section 5 of the FTC Act;[59] but again, the NPRM provides no basis to conclude these disclosures are necessary for the Agencies to identify and remediate these violations.[60]

The NPRM proposes creating a new “Labor Markets” section that requires filers to provide detailed information concerning labor and workplace safety violations and geographic market information for overlapping employee classifications.[61] Again, the Commission provides no basis to believe that such information has any direct relationship to problems in labor competition. The NPRM speculates that “[i]f a firm has a history of labor law violations, it *may* be indicative of a concentrated labor market where workers do not have the ability to easily find another job”.[62] It cites no experiential, anecdotal, or empirical basis to believe that is true. Companies in competitive markets also commit violations from time to time. Certainly, the NPRM does not identify any problematic merger missed because of the absence of this information in the initial HSR filing.[63]

III. Ways to Minimize the Burden

MFA believes the NPRM is not calibrated to seek information “necessary and appropriate” to determine if reportable transactions may violation the antitrust laws.[64] The data make clear that no additional information is necessary to evaluate the overwhelming bulk of filed transactions, and the NPRM provides no sound basis—and no evidence—to support its claims of why the Agencies need to receive numerous additional categories of requested information in an initial filing, especially when all such information is available to them through other mechanisms better tailored to the risk of lessening competition. For all of these reasons, we believe the NPRM should be withdrawn.

Clayton Act § 8 following the issuance of a Second Request); Press Release, U.S. Dep’t of Just., Tullett Prebon and ICAP Restructure Transaction after Justice Department Expresses Concerns about Interlocking Directorates, (Jul. 14, 2016) (restructuring proposed transaction following the issuance of a Second Request); Press Release, U.S. Dep’t of Just., Justice Department’s Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023) (remediating potential Section 8 violations under the current HSR notification rules and through non-merger investigations).

[59] *See* NPRM at 41 n.38.

[60] *See, e.g.*, Compl., *United States v. Gemstar-TV Guide Int’l, Inc.*, No. 03-cv-00198 (D.D.C. Feb. 6, 2003) (alleging violations unrelated to any overlaps in directors, officers, or observers between the merging parties); Compl., *In the Matter of Insilco Corp.*, FTC File No. B232734 (Jan. 27, 1998) (same).

[61] NPRM at 67-70.

[62] *Id*. at 70 (emphasis added).

[63] *Id*. at 69-70.

[64] 15 U.S.C. § 46 (authorizing the FTC “to make rules and regulations for the purpose of carrying out the provisions of this subchapter”).

That said, should the Commission proceed with adoption of some version of the NPRM, MFA strongly recommends several amendments to the NPRM that would reduce the burden on filing parties and the Agencies and mitigate certain unintended negative consequences:

First, the FTC should not impose any additional disclosure requirements for acquisitions of 10% or less of the voting securities of an issuer. In 2020, the Commission considered excluding such transactions from HSR filing obligations entirely.[65] It revealed that since the promulgation of the HSR rules in 1978, the Agencies have never once challenged such a transaction, and have "rarely" engaged in an initial review.[66] Not only would exempting acquisitions of 10% or less of the voting securities of an issuer have reduced the burden on filers, the Commission found it would "allow the Agencies to better focus their resources on transactions that create the potential for competition concerns."[67] The FTC should not exacerbate both problems by further increasing the burden on filers and the Agencies, and should at the very least exempt such transactions from the additional filing requirements proposed in the NPRM.

Second, no additional disclosure requirements should be imposed on transactions in which the acquiring persons are funds, trusts, or other financial vehicles or are providing securities, commodities contracts, and other financial investments or related advice.[68] As demonstrated above, such transactions are substantially less likely than other reportable transactions to result in investigation. Exempting them from the additional filing requirements proposed in the NPRM would not only reduce the burden on filers whose transactions almost never present competitive issues, but also reduce the burden on the Agencies and allow the Agencies to focus their resources on mergers that are more likely to raise competitive concerns.

Third, at least for transactions of non-controlling equity stakes or those not involving NAICS code overlaps, the Commission should eliminate the requirement to submit narrative accounts.[69] Such disclosures, used typically in foreign jurisdictions with vastly different merger control regimes in which authorities generally do not have access to Second Request-style information requests and cannot intervene after consummation, serve no purpose for transactions unlikely to violate the antitrust laws. They will, however, reveal highly confidential investment strategies and set filers up for penalties if events do not pan out as expected. That amounts to another "trap for the unwary," in the context of transactions presenting no risk to competition whatsoever.

Fourth, the Commission should remove the proposed disclosures related to the organizational structure of the "Ultimate Parent Entity," including minority shareholders and noncontrolled entities or holders of other types of interest that "may exert influence", as well as

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[65] Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053, 77055 (proposed Dec. 1, 2020).

[66] *Id*. at 77061.

[67] *Id*.

[68] *I.e.*, NAICS codes 523, 525.

[69] *See* NPRM at 62-66.

the proposed disclosures related to officers, directors, or board observers.[70] The NPRM itself acknowledges that those requirements impose significant burden on certain filers and transactions, and it provides no justification for doing so.[71]

Fifth, the Commission should eliminate the request for information related to worker and workplace safety and geographic overlaps in the proposed "Labor Markets" section.[72] As explained above, the NPRM fails to provide any evidentiary basis for how such information could be indicative of problems in labor competition and does not identify any problematic mergers missed because of the absence of this information in the initial HSR filing, yet imposes a burden on all filers to submit detailed information. Especially for parties such as our members, who generally do not have access to this kind of internal due diligence information about companies in which they may invest, the information about the other party to the transaction is difficult or impossible to gather. The proposed requirements would have a chilling effect on transactions by any firm concerned about the possibility of submitting information that it cannot itself verify.

Finally, the Commission should similarly eliminate the requirement that filers provide drafts of responsive transaction-related documents that were provided to an officer, director, or supervisory team lead.[73] As explained, the burden of collecting, reviewing, and producing the large volume of drafts generated for every deal[74]—regardless of whether the transaction raises competitive concerns—is unjustifiably high.

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MFA appreciates the opportunity to provide comments to the Commission on the NPRM. If you have any questions about these comments, please do not hesitate to contact Rachel Grand, Vice President & Senior Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/S/ Jennifer W. Han

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[70] *Id*. at 32, 43.

[71] *See id*. 32-43, 102.

[72] *See id*. at 69-70.

[73] *Id*. at 57.

[74] The NPRM acknowledges that this requirement would increase the burden on *all* transactions, even those with no competitive concerns. *Id*. at 102.