

transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

#### Exemption Provisions

By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements—it is a total exemption, so the agency will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.<sup>4</sup>

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal—or even with a contractual option—of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

#### Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect

those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this document.

#### Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.<sup>5</sup> The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size thresholds on an annual basis, the number of HSR-reportable transactions has *decreased*.

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.<sup>6</sup>

<sup>5</sup> Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, "catch and kill" acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, "roll-ups," an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. See Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577783/p110014hsrannualreportchoprastatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf).

<sup>6</sup> See Healthcare Transaction Notification Requirement, WASH. STATE OFF. OF THE ATT'Y

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that "roll ups" are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemakings, so that our approach reflects market realities.

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## FEDERAL TRADE COMMISSION

### 16 CFR Parts 801, 802 and 803

RIN 3084-AB46

#### Premerger Notification; Reporting and Waiting Period Requirements

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Trade Commission ("FTC" or "Commission") is proposing amendments to the premerger notification rules ("the Rules") that implement the Hart-Scott-Rodino Antitrust Improvements Act ("the Act" or "HSR") to change the definition of "person" and create a new exemption. The Commission also proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

**DATES:** Comments must be received on or before February 1, 2021.

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "16 CFR parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014" on your comment. File your comment online at <https://www.regulations.gov> by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex J), Washington, DC 20580, or deliver your comment to the

GEN. (last visited Sept. 16, 2020), <https://www.atg.wa.gov/healthcare-transactions-notification-requirement>; see also S.H.B. 1607, 66th Leg., Reg. Sess. (Wash. 2019).

<sup>4</sup> The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. See Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

Robert Jones (202–326–3100), Assistant Director, Premerger Notification Office, Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Room CC–5301, Washington, DC 20024.

**SUPPLEMENTARY INFORMATION:**

**Invitation To Comment**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 1, 2021. Write “16 CFR parts 801–803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014” on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including the <https://www.regulations.gov> website.

Because of the public health emergency in response to the COVID–19 outbreak and the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comment online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “16 CFR parts 801–803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex J), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex J), Washington, DC 20024. If possible, please submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website, <https://www.regulations.gov>, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state

identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “trade secret or any commercial or financial information which . . . is privileged or confidential,”—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](https://www.regulations.gov)—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this NPRM and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before February 1, 2021. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, *see* <https://www.ftc.gov/site-information/privacy-policy>.

**Overview**

The Act and Rules require the parties to certain mergers and acquisitions to file notifications (“HSR Filing”) with the Federal Trade Commission and with the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (“the Assistant Attorney General”) (collectively, “the

Agencies”), and to wait a specified period of time before consummating such transactions. The reporting and waiting period requirements are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek an injunction in Federal court in order to enjoin anticompetitive mergers prior to consummation.

In this notice of proposed rulemaking (“NPRM”), the Commission proposes amendments to the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about their associates in Items 4 through 8 of the HSR Form and to aggregate acquisitions in the same issuer across their associates when making an HSR filing, as well as a ministerial change to § 801.1(d)(2). The Commission also proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer’s voting securities when the acquiring person does not already have a competitively significant relationship with the issuer. Finally, the Commission proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

Section 7A(d)(1) of the Clayton Act, 15 U.S.C. 18a(d)(1), directs the Commission, with the concurrence of the Assistant Attorney General, in accordance with the Administrative Procedure Act, 5 U.S.C. 553, to require that premerger notification be in such form and contain such information and documentary material as may be necessary and appropriate to determine whether the proposed transaction may, if consummated, violate the antitrust laws. In addition, Section 7A(d)(2) of the Clayton Act, 15 U.S.C. 18a(d)(2), grants the Commission, with the concurrence of the Assistant Attorney General, in accordance with 5 U.S.C. 553, the authority to define the terms used in the Act, exempt classes of transactions that are not likely to violate the antitrust laws, and prescribe such other rules as may be necessary and appropriate to carry out the purposes of Section 7A.

The Commission notes that comments it receives in response to this NPRM may also inform the Advanced Notice of Proposed Rulemaking (ANPRM) published in the **Federal Register** at the same time as this NPRM.

**Part 801—Coverage Rules**

§ 801.1 Definitions.

§ 801.2 Acquiring and acquired persons.

§ 801.12 Calculating percentage of voting securities.

#### Part 802—Exemption Rules

§ 802.15 De minimis acquisitions of voting securities.

#### Part 803—Transmittal Rules

Appendix A to Part 803—Notification and Report Form for Certain Mergers and Acquisitions

Appendix B to Part 803—Instructions to the Notification and Report Form for Certain Mergers and Acquisitions

#### Background

The HSR premerger notification program enables the Agencies to determine which acquisitions are likely to be anticompetitive and to challenge them before they are consummated when remedial action is most effective. Under the HSR program, the Agencies typically evaluate thousands of transactions every year. Given the large number of HSR filings submitted each year, the Agencies must use their resources effectively to focus on transactions that may harm competition. The 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. In the Agencies' experience, two particular categories of filings make it difficult for the Agencies to focus their resources effectively:

- *Filings for acquisitions by certain investment entities.* First, due to changes in investor structure and behavior since the HSR Act and Rules went into effect, filings from certain investment entities do not capture the complete competitive impact of a transaction. When certain investment entities file as acquiring persons, the Rules and Form do not currently require the disclosure of substantive information concerning both the complete structure of the acquiring person and the complete economic stake being acquired in an issuer.

- *Filings for acquisitions of 10% or less of an issuer.* At the same time, the Agencies regularly receive filings involving proposed acquisitions, not solely for the purpose of investment, that would result in the acquiring person holding 10% or less of an issuer. In the Agencies' experience, these filings almost never present competition concerns.<sup>1</sup>

To help the Agencies use their resources more effectively, the Commission proposes to address both issues in this proposed rulemaking. To obtain more complete filings from investment entities filing as acquiring persons, the Commission proposes amending the definition of person in § 801.1(a)(1) to include "associates," a term that is already defined in the Rules. This proposed change would require certain acquiring persons to disclose additional information about their associates in Items 4 through 8 of the HSR Form and to aggregate acquisitions in the same issuer across their associates when making an HSR filing. In addition, the Commission proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer's voting securities when the acquiring person does not already have a competitively significant relationship with the issuer. Finally, the Commission proposes explanatory and ministerial changes to the Rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes.

#### I. Proposed Changes to § 801.1 Definitions

##### A. Proposed Change to the § 801.1(a)(1) Definition of "Person"

Since the promulgation of the Rules in 1978, the investment landscape has undergone vast changes, including the proliferation of investment entities such as investment funds and master limited partnerships ("MLPs"). Both investment funds and MLPs facilitate investment through structures utilizing limited partnerships and limited liability companies. The Rules define limited partnerships and limited liability companies as "non-corporate entities," and non-corporate entities are their own Ultimate Parent Entity ("UPE") under the Rules when no one holds the right to 50% or more of the profits or assets upon dissolution. Thus, although each non-corporate entity exists within an overall structure of a "family" of funds or MLP, each is typically its own UPE under the HSR Rules. For instance, Parent Fund creates Fund Vehicle 1,

stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less. Occasionally, the Agencies will require merging parties to divest or make passive small investments in competitors that also carry rights to influence business decisions at the firm. See *U.S. v. AT&T Inc. and Dobson Communications Corp.*, 1:07-cv-01952 (D.D.C. 2007) (parties divested small stakes that carried significant rights to control core business decisions, obtain critical confidential competitive information, and share in profits at a rate significantly greater than the equity ownership share).

Fund Vehicle 2, and Fund Vehicle 3, each a non-corporate entity. No one controls these non-corporate entities, so each fund vehicle is its own UPE even though they exist within the same family of funds. The same is true when no one controls non-corporate entities within a MLP structure; although they exist within the same MLP, each non-corporate entity is its own UPE.

Treating these non-corporate entities as separate entities under HSR is often at odds with the realities of how fund families and MLPs are managed. In the fund context, a fund vehicle typically has an entity that manages how that fund vehicle will invest,<sup>2</sup> and this investment manager very often manages the investments of other fund vehicles within the same family of funds. As a result, Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 might well have the same Investment Manager<sup>3</sup> and that Investment Manager can use Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 to make separate investments in different issuers or the same issuer. MLPs, for their part, often have similar structures involving non-corporate entities that are their own UPEs but under common management.<sup>4</sup>

When non-corporate entities are their own UPEs but under common management as described above, this creates two scenarios in which it is difficult for the Agencies to assess the competitive impact of a transaction based on the HSR filing. The first involves filings from non-corporate entity UPEs as acquiring persons that do not contain a complete enough picture of the investment fund or MLP. The Commission first addressed this category of filings in 2011 when it created the "associates" concept.<sup>5</sup> Before that time, filings from non-corporate entity UPEs within families of funds and MLPs contained limited substantive information because non-corporate entity UPEs were not required to disclose information on any other entity within the investment structure. For instance, if Fund Vehicle 1 made a filing for a 100% interest in an Issuer, and Fund Vehicle 2, under common investment management with Fund Vehicle 1, held 100% of a competitor of the Issuer, Fund Vehicle 2's holding was not disclosed in the filing because Fund Vehicle 1 was its own UPE. A filing such as the one from Fund Vehicle 1 was of limited use to the Agencies

<sup>2</sup> As defined in 16 CFR 801.1(d)(2).

<sup>3</sup> As defined in 16 CFR 801.1(d)(2).

<sup>4</sup> As defined in 16 CFR 801.1(d)(2); the management of MLPs does not have to involve investment management.

<sup>5</sup> 76 FR 42472 (July 19, 2011).

<sup>1</sup> From FY 2001 to FY 2017, the Agencies received a total of 26,856 HSR filings, including 1,804 for acquisitions of 10% or less of outstanding

because it did not reveal relevant holdings within the same family of funds. Filings received from newly-formed fund vehicles, which did not yet own anything, were of even less use because these filings were largely blank. Filings from non-corporate entities that were their own UPEs within MLP structures raised the same issues.

In light of these issues, the Commission determined that updates to the HSR Form would allow the Agencies to “receive the information they need to get a complete picture of potential antitrust ramifications of an acquisition.”<sup>6</sup> Accordingly in 2010,<sup>7</sup> the Commission introduced and proposed to define the term “associates” to capture information in the HSR Form from certain entities that are under common management with the acquiring person. The 2011 final rule<sup>8</sup> required certain acquiring persons to disclose in their HSR filings what their associates hold in entities that generate revenue in the same NAICS codes as the target. With this change, any fund vehicle filing as an acquiring person must look to its investment manager to determine what other fund vehicles that investment manager manages. For instance, Fund Vehicle 1’s investment manager also manages the investments of Fund Vehicle 2, making Fund Vehicle 1 and Fund Vehicle 2 associates. Fund Vehicle 1 makes an HSR filing for a 100% interest in Issuer Q. Fund Vehicle 2 controls Entity Y and has a minority position in Entity Z, both of which report in the same NAICS code as Issuer Q. Fund Vehicle 1 must therefore disclose in its HSR filing Fund Vehicle 2’s controlling interest in Y and minority interest in Z. Non-corporate entity UPEs within MLP structures must disclose the same information about their associates when filing as acquiring persons.

Although this additional information has been helpful in assessing the competitive impact of a transaction, it is too limited to provide the Agencies with a sufficient overview of investment funds and MLPs as acquiring persons. For instance, the information currently required from associates is limited to controlling or minority interests in entities that report in the same NAICS codes as the entity being acquired. In the Agencies’ experience, competitors sometimes use different NAICS codes to describe the same line of business, particularly in the case of companies engaged in technology-based businesses. In addition, associates currently are not

required to provide any substantive information, such as financials or revenues, about the entities they control, making it difficult for the Agencies to determine whether an entity within an associate might create a competitive concern in a given transaction.

It is also difficult for the Agencies to understand the potential competitive impact of a transaction when a filing does not represent the total economic stake being acquired in the same issuer. For instance, Investment Manager uses Fund Vehicle 1 to acquire 6% of Issuer D and Fund Vehicles 2 and 3 to each acquire 3% of Issuer D. Only Fund Vehicle 1’s acquisition of 6% of Issuer D’s voting securities is large enough to cross the \$50 million (as adjusted) size of transaction threshold. Fund Vehicle 1 makes an HSR filing, but because it is its own UPE, it need not disclose the interests of Fund Vehicles 2 and 3 in Issuer D. As a result, the filing does not reflect the 12% aggregate interest in Issuer D of the fund vehicles under common investment management. Another common example arises when Investment Manager uses Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 to each acquire 2% in Issuer D. If none of these acquisitions of 2% is large enough to cross the \$50 million (as adjusted) size of transaction threshold, the Agencies receive no HSR filing, even though the fund vehicles hold an aggregate 6% of Issuer D. Although more rare, both of these scenarios can also play out in the MLP context when non-corporate entity UPEs within the MLP structure make acquisitions in the same issuer.

To help the Agencies accurately assess the potential competitive impact of a pending transaction in these scenarios, the Commission proposes to amend the § 801.1(a)(1) definition of “person” to include associates, such that it would read as follows: “Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means (a) an ultimate parent entity and all entities which it controls directly or indirectly; and (b) all associates of the ultimate parent entity.”

This proposed change would require a non-corporate entity UPE filing as an acquiring person to disclose additional information from its associates in Items 4 through 8 of the Form<sup>9</sup> and to aggregate acquisitions in the same issuer across its associates.

Under the proposed rule, a non-corporate entity UPE filing as an

acquiring person would be part of a new, larger Acquiring Person. This Acquiring Person would include non-corporate entity UPE, its associates (which would also be UPEs) and the entity that manages non-corporate entity UPE and its associates (the “managing entity”).<sup>10</sup> The managing entity would make the filing on behalf of the Acquiring Person, identifying itself in proposed Item 1(a) of the Form, and identify the relevant UPE making the acquisition in proposed Item 1(c) of the Form.<sup>11</sup> If two UPEs within the same Acquiring Person are making reportable acquisitions in the same issuer, the managing entity can choose which one will be the relevant UPE for purposes of the form. The relevant UPE can also file on behalf of the managing entity, as noted in proposed Item 1(c) of the Form. For example:

#### Hypothetical #1

- Fund Vehicles 1, 2 and 3, each non-corporate entities and their own UPEs, exist within the same family of funds. Fund Vehicles 1, 2 and 3 have the same Investment Manager, and are thus associates. Fund Vehicle 1 will acquire 6% of Issuer D valued at \$100 million, Fund Vehicle 2 will acquire 6% of Issuer D valued at \$100 million and Fund Vehicle 3 will acquire 3% of Issuer D valued at \$50 million. The Acquiring Person includes Fund Vehicles 1, 2 and 3, which are all UPEs, and Investment Manager.

- Fund Vehicle 1 does not control any operating companies.

- Fund Vehicle 2 controls Portfolio Company A and Portfolio Company B. Portfolio Company B was acquired two years ago and reports in the same NAICS code as Issuer D.

- Fund Vehicle 3 controls Portfolio Company C, which does not report in the same NAICS code as Issuer D. Fund Vehicle 3 also holds a minority position in several entities, M, N, and O, which report in the same NAICS code as Issuer D.

- Investment Manager files on behalf of the Acquiring Person for the 15% aggregate interest in Issuer D valued at \$250 million by placing its name in Item 1(a) of the Form. Although Investment Manager could designate Fund Vehicle 1 or 2 as the UPE making the acquisition, Investment Manager indicates in Item 1(c) of the filing that Fund Vehicle 1 is making the acquisition. Fund Vehicle 1 can also indicate in Item 1(c) of the Form that it is filing on Investment Manager’s behalf. The filing must include the following:

- Item 4(a): This item requires the Central Index Key (CIK) number of all entities within the Acquiring Person, which now includes

<sup>10</sup> The same would be true for an Acquired Person under the proposed rule.

<sup>11</sup> In the case of an Acquired Person, the managing entity would make the filing on behalf of the Acquired Person, identifying itself in proposed Item 1(a) of the Form, and identifying the selling UPE in proposed Item 1(c) of the Form. The selling UPE could also indicate in Item 1(c) of the Form that it is filing on the managing entity’s behalf.

<sup>6</sup> *Id.*

<sup>7</sup> 75 FR 57111 (Sept. 17, 2010).

<sup>8</sup> 76 FR 42471 (July 19, 2011).

<sup>9</sup> For acquired persons, Items 5 through 7 of the Form will still be limited to the assets, voting securities, or non-corporate interests being sold.

Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(b): This item requires financials from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(c): This item requires responsive documents from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 4(d): This item requires responsive documents from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 5: This item requires revenues by NAICS and NAPCS codes for the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C.

- Item 6: Items 6(a) and 6(b) require information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. Item 6(c) also requires information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 6(c) is still limited to minority holdings in entities that report in the same NAICS code(s) as the target, here M, N and O.

- Item 7: This item requires all responsive information from the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 7 is still limited to entities that report in the same NAICS code(s) as the target, here Portfolio Company B.

- Item 8: This item requires information on prior acquisitions within the last five years by the Acquiring Person, which now includes Investment Manager, Fund Vehicle 1, Fund Vehicle 2, Fund Vehicle 3, Portfolio Company A, Portfolio Company B, and Portfolio Company C. However, the information required by Item 8 is still limited to entities that report in the same NAICS code(s) as the target, here Portfolio Company B.

#### Hypothetical #2

- MLP creates LP1, LP2, and LP3, each a non-corporate entity and its own UPE, to separately hold the MLP's investments. LP1, LP2 and LP3 have the same Manager, and are thus associates. LP1 will acquire 100% of Issuer R valued at \$500 million. LP1 is the UPE but the Acquiring Person includes Manager, LP2 and LP3.

- LP1 controls two operating companies, OpCo 1 and OpCo 2, which report in the same NAICS code as Issuer R. OpCo 1 was acquired 10 years ago and OpCo 2 was acquired 3 years ago.

- LP2 controls OpCo 3, which reports in the same NAICS code as Issuer R and was acquired 1 year ago, and OpCo 4, which does not report in the same NAICS code as Issuer R.

- LP3 holds minority positions in OpCo 5 and OpCo 6, and each reports in the same NAICS code as Issuer R.

- Manager places its name in Item 1(a) of the Form to file on behalf of the Acquiring Person for the 100% interest in Issuer R, and indicates in Item 1(c) of the Form that LP1 is making the acquisition. LP1 can also indicate in Item 1(c) that it is filing on Manager's behalf. The filing must include the following:

- Item 4(a): This item requires the CIK number of all entities within the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(b): This item requires financials from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(c): This item requires responsive documents from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 4(d): This item requires responsive documents from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 5: This item requires revenues by NAICS and NAPCS codes for the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4.

- Item 6: Items 6(a) and 6(b) require information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. Item 6(c) also requires information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 6(c) is still limited to minority holdings in entities that report in the same NAICS code(s) as the target, here OpCo 5 and OpCo 6.

- Item 7: This item requires all responsive information from the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 7 is still limited to entities that report in the same NAICS code(s) as the target, here OpCo 1, OpCo 2, and OpCo 3.

- Item 8: This item requires information on prior acquisitions within the last five years by the Acquiring Person, which now includes Manager, LP1, LP2, LP3, OpCo 1, OpCo 2, OpCo 3 and OpCo 4. However, the information required by Item 8 is still limited to entities that report in the same NAICS code(s) as the target, here OpCo 2 and OpCo 3, but OpCo 1 would not be listed because it was acquired more than five years ago.

As these examples illustrate, the proposed change to § 801.1(a)(1) would require a non-corporate entity UPE

filing as an acquiring person to disclose more substantive information about its associates. The additional information required by the Form would be of tremendous value to the Agencies in assessing the potential competitive impact of a pending transaction. Specifically, the proposed changes to Items 4, 5 and 6(a) would give the Agencies a much better picture of what entities are under common management. The proposed changes to Item 6(b) would provide a clearer picture of the ways in which the entities within the acquiring person are connected, both within the investment structure and beyond. Proposed Item 8 would provide more complete information on entities within the acquiring person that have made acquisitions in the same industry as the target.<sup>12</sup> All of this additional information would give the Agencies a much more complete picture of who is making the filing in the case of investment funds and MLPs filing as acquiring persons.

The additional information concerning acquisitions made by a non-corporate entity UPE's associates in the same issuer would also be of great value to the Agencies. The proposed change to § 801.1(a)(1) would give the Agencies a much clearer understanding of the total economic stake being acquired in a single issuer by entities under common management. In some cases, looking across a non-corporate entity UPE's associates for acquisitions in the same issuer will result in a filing when one would not have been required previously. For instance, in a scenario where associates Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 will each acquire 2% of Issuer D for \$40 million, the Agencies currently do not receive a filing because none of the three \$40 million acquisitions is large enough to cross the \$50 million (as adjusted) size of transaction threshold. Under the proposed rule, the Agencies would now receive a filing for the aggregate 6% interest valued at \$120 million (assuming an exemption does not apply).<sup>13</sup>

The Commission acknowledges that the proposed change to § 801.1(a)(1) would result in more filings and an increased burden for certain acquiring

<sup>12</sup> There would be no change to the information Items 6(c) and 7 require, because those items already require information from associates. Each of these items would, however, be consolidated in the HSR Instructions and Form to reflect the new definition of "person," as explained below.

<sup>13</sup> In addition, certain acquiring persons will also be much more likely to meet the size of person test when including information about their associates as required by the proposed rule.

persons. Non-corporate entity UPEs within families of funds and MLPs would have to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons because some information about associates' holdings must be provided even under the current Rules. Given that these entities already conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should be manageable. The breadth of certain items will still be limited, and the burden should lessen after the first inquiry under the new rule. Nevertheless, the Commission acknowledges that there might be other ways to achieve the same result. The Commission invites comments on alternative ways the Agencies could obtain this necessary information that would result in a more limited burden for investment funds and MLPs filing as acquiring persons.

The proposed change to § 801.1(a)(1) would result in fewer filings and a reduced burden for certain other acquiring persons. The proposed rule would streamline the number of filings and fees from families of funds and MLPs. For instance, in the scenario where associates Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 will each acquire 7% of Issuer D for \$200 million, each currently must make a filing and pay a separate \$125,000 filing fee (assuming no exemptions apply). Under the proposed rule, the Agencies would receive one filing for 21% of Issuer D valued at \$600 million and one \$125,000 filing fee. In addition, the proposed rule would eliminate the need for a filing in the alternative. If the Investment Manager of associates Fund 1 and Fund 2 has not yet determined which of those funds should be the vehicle for a particular investment, the need to choose one for HSR filing purposes becomes moot under the proposed rule, eliminating the potential need to make two filings with two separate filing fees.

The Commission also proposes an additional reduction in burden for acquired persons. The HSR Form already limits what acquired persons must report in Items 5 through 7 to information on those assets, voting securities, and non-corporate interests being acquired in the transaction at issue. The limitation for acquired persons in these items is an acknowledgment that only what is being sold is relevant to the Agencies'

competition analysis. This is also the case for the financial information required in Items 4(a) and 4(b), and the Commission therefore proposes amending the HSR Instructions to create a similar limit for acquired persons with respect to these items. Under the proposed changes, an acquired person would provide relevant CIK numbers in response to Item 4(a) or financials in response to Item 4(b) only for (1) the assets, voting securities and non-corporate interests being acquired in the transaction at issue, and (2) the UPE of those assets, voting securities and non-corporate interests. This proposed amendment to the HSR Instructions would significantly limit what non-corporate entity UPEs within families of funds and MLPs would have to provide as acquired persons in response to Items 4(a) and 4(b) and would not adversely affect the Agencies' competitive analysis.

Finally, the Commission also acknowledges that certain non-corporate entity UPEs within families of funds and MLPs and their associates may be structured as index funds, exchange-traded funds (ETFs) or the like. Since these entities base their investments on an index, it is possible that it is not appropriate to apply the proposed change to § 801.1(a)(1) to these entities. The Commission invites comments on whether index funds, ETFs or the like should be differentiated under the proposed rule.

#### *B. Proposed Changes to § 801.1(d)*

Along with the proposed change to § 801.1(a)(1), the Commission also proposes conforming changes to the definition of associate in § 801.1(d)(2). Under the current definition, associate is only relevant to Items 6 and 7 of the HSR Form and to acquiring persons.<sup>14</sup> But the proposed change to the § 801.1(a)(1) definition of person would apply the associates concept more broadly in the HSR Form and to both acquiring and acquired persons. The Commission therefore proposes to eliminate the phrase "For purposes of Items 6 and 7" from § 801.1(d)(2), capitalize the subsequent "An" in § 801.1(d)(2) and include "or acquired" in § 801.1 (d)(2), (d)(2)(A) and (B) to reflect this proposed change.

## **II. Proposed § 802.15: De Minimis Acquisitions of Voting Securities**

To use their resources as effectively as possible, the Agencies have a strong interest not only in receiving HSR filings that contain sufficient information to assess whether proposed

transactions present real competition concerns, but also in eliminating filings for categories of acquisitions that are unlikely to create competitive concerns. In 1996, the Commission acknowledged this concern in issuing final rules exempting certain ordinary course transactions, as well as certain types of acquisitions of realty and carbon-based mineral reserves.<sup>15</sup> The Commission explained, "[t]hese rules are designed to reduce the compliance burden on the business community by eliminating the application of the notification and waiting requirements to a significant number of transactions that are unlikely to violate the antitrust laws. They will also allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm."<sup>16</sup>

Under the same rationale, the Commission has long contemplated the exemption of acquisitions of 10% or less of the voting securities of an issuer. These kinds of acquisitions can take many forms. The most typical is when an entity acquires 10% or less of an issuer in order to provide that issuer with needed capital. Sometimes certain shareholders of the target will acquire less than 10% of the buyer's voting securities as consideration for the transaction (typically called shareholder backside acquisitions). Except for a few instances when a shareholder backside acquisition of 10% or less of an issuer's voting securities was linked to a larger transaction that presented competitive concerns,<sup>17</sup> the Commission has not sought to block any acquisition of 10% or less of an issuer's voting securities.

Recognizing that some acquisitions of 10% or less are less likely than others to raise competitive concerns, the Act already includes an exemption for acquisitions of 10% or less of the voting securities of an issuer made "solely for the purpose of investment."<sup>18</sup> This exemption is codified in § 802.9,<sup>19</sup> and § 801.1(i)(1) defines the term "solely for the purpose of investment" so that filing parties may determine whether § 802.9 is available. "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."<sup>20</sup>

<sup>15</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>16</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>17</sup> See, e.g., *In re Time Warner, Inc.*, et al., Docket No. C-3709, (Feb. 7, 1997).

<sup>18</sup> 15 U.S.C. 18a(c)(9).

<sup>19</sup> 16 CFR 802.9.

<sup>20</sup> 16 CFR 801.1(i)(1).

<sup>14</sup> 16 CFR 801.1(d)(2).



The Statement of Basis and Purpose for the original 1978 Rules (“1978 SBP”) lays out specific factors that further illuminate the § 801.1(i)(1) definition. “[M]erely voting the stock will not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the Issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the Issuer; (5) being a competitor of the Issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the Issuer. The facts and circumstances of each case will be evaluated whenever any of these actions have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act’s requirements.”<sup>21</sup>

The Agencies have interpreted these factors narrowly: When an acquiring person takes any of the enumerated actions or is a competitor of the issuer, § 802.9 is generally not available.<sup>22</sup> On the other end of the spectrum, § 802.9 is clearly available if the acquiring person plans to do nothing but hold the stock. Given the changes in investor behavior since the HSR Act was passed,<sup>23</sup> however, a great deal of potential shareholder engagement involves more than merely holding (and potentially selling) stock, but does not encompass what the 1978 SBP discusses.<sup>24</sup>

Notably, some argue that communications between investors and management encourage corporate accountability to shareholders,<sup>25</sup> and that HSR filing requirements (and attendant obligations to provide notice to the issuer prior to purchase of the shares) might chill this beneficial interaction,<sup>26</sup> particularly since, depending on the degree of shareholder engagement, it can be quite difficult to determine whether filing parties can rely on the § 802.9 exemption. For instance, a discussion between shareholders and company executives may begin with the amount of compensation each executive receives, but then evolve into how each executive’s compensation will be determined by the company’s performance. This discussion on a seemingly innocuous topic may touch on basic business decisions, precluding

management as engagement priorities); *Vanguard Investment Stewardship 2019 Annual Report*, <https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019-investment-stewardship-annual-report.pdf> (discussing board composition (including diversity of gender, race and ethnicity) oversight of strategy and risk (including environmental risk), structure of executive compensation, and governance structures to support and ensure accountability of a company’s board and management to shareholders); and then *State Street Global Advisors Stewardship Report 2018–2019*, <https://www.ssga.com/library-content/products/esg/annual-asset-stewardship-report-2018-19.pdf> (describing engagement with boards and management teams, including, among other issues, “fearless girl campaign” to increase diversity of boards, “climate risk and reporting”, ethical issues in the pharmaceutical industry, including marketing of addictive substances, genetic engineering, and the use of personal data).

<sup>25</sup> See David Hirschmann, Comment, *FTC Hearings on Competition and Consumer Protection in the 21st Century*, (Dec. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_events/1422929/ftc\\_hearings\\_session\\_8\\_transcript\\_12-6-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18_0.pdf), at 102 (“Engagement allows management to communicate with their shareholder base as they implement strategies to generate long-term growth” and is “important for healthy capital markets.”).

<sup>26</sup> See Council of Institutional Investors and the Managed Funds Association, Comment, *Re: Competition and Consumption Protection in the 21st Century Hearings, Project Number P181201—Investment Community Request for HSR Reform*, (Aug. 13, 2018), [https://www.ftc.gov/system/files/documents/public\\_comments/2018/08/ftc-2018-0048-d-0010-147719.pdf](https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0010-147719.pdf), at 1–2, and 7 (“[T]he investment community is concerned that the Commission’s increasingly narrow interpretation and application of the investment-only exemption under the HSR Act is imposing an undue regulatory burden and unnecessary costs on institutional investors, such as employee pension funds, charitable foundations and university endowments. That burden undermines the strong public policy in favor of management-shareholder communications, involves significant and unnecessary costs, and is not justified by the Commission’s mission to protect competition.” . . . “CII and MFA are concerned that the current narrow application of the investment-only exemption is interfering with an animating policy objective of the federal securities laws to ensure a free flow of information and disclosure from issuers of securities to the investing public.”).

use of the § 802.9 exemption. In the Agencies’ experience, even the simplest of topics can present subtleties that complicate whether § 802.9 might exempt an acquisition of 10% or less of an issuer’s voting securities.

Over the years, the Agencies have considered revising § 802.9 in order to provide clearer guidance on when the acquisition of 10% or less of an issuer’s voting securities is exempt from HSR filing requirements. In 1988, the Commission initiated a notice and comment proceeding on a proposed approach and two alternative approaches:

The principal proposal would exempt from the premerger notification obligations all acquisitions of 10% or less of an issuer’s voting securities on the grounds that such acquisitions are unlikely to violate the antitrust laws. The alternative proposals would alter existing notification procedures for acquisitions of 10% or less of an issuer’s voting securities. One would permit the purchase, but require that the securities be placed in escrow pending antitrust review; the other would eliminate the reporting requirement imposed on the target firm, thus freeing the acquiror of its obligation to give the target prior notice.<sup>27</sup>

The Commission’s principal proposal in 1988 was a new exemption, § 802.24, that would have subsumed § 802.9 “by eliminating the filing requirement for all acquisitions of 10 percent or less of an issuer’s voting securities, regardless of the intent of the acquired person.” Although the Commission had rejected calls to ignore investment intent in 1978 when the original Rules were promulgated, it proposed to exempt all acquisitions of 10% or less of an issuer’s voting securities based on ten years of experience with reviewing those filings that were not solely for the purpose of investment. “It is not possible to say that voting securities acquisitions of 10 percent or less, or 5 percent or less, cannot violate the antitrust laws. The proposed exemption is rather based on the evidently low likelihood that ‘the class of transactions’ will violate the antitrust laws.”<sup>28</sup>

But the Commission also considered alternative proposals that would more directly address concerns related to other aspects of the Act that could increase the cost of acquiring shares, specifically the requirement to wait for the expiration of the waiting period before acquiring shares, and the requirement to notify the target of the intended acquisition.<sup>29</sup> As a result, the

<sup>27</sup> 53 FR 36831 (Sept. 22, 1988).

<sup>28</sup> *Id.* at 36841.

<sup>29</sup> “Acquirors are reluctant to file premerger notifications because both the delay imposed by the

<sup>21</sup> 43 FR 33450, 33465 (July 31, 1978).

<sup>22</sup> Letter from Thomas J. Campbell, Dir., Bureau of Competition, FTC, to Michael Sohn, Esq., Arnold & Porter (Aug. 19, 1982) (on file with the 6th report to Congress).

<sup>23</sup> See Scott Hirst & Lucian Bebchuk, *The Specter of the Giant Three*, 99 B.U. L. Rev. 721, 725–26 (2019). (In 1950, U.S. equities were predominantly held by households, with institutional investors accounting for only about six percent; now institutional investors hold 65 percent of U.S. equities); and then S&P Dow Jones Indices, Comment, *Re: FTC Hearing #8: Competition and Consumer Protection: Holdings of Non-Controlling Ownership Interests in Competing Companies*, (Jan. 15, 2019), [https://www.ftc.gov/system/files/documents/public\\_comments/2019/01/ftc-2018-0107-d-0015-163643.pdf](https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0107-d-0015-163643.pdf), at 1 (“Fifty years ago, there were no index funds; all institutional (and retail) asset management was conducted on an active basis. Today, we estimate that between 20 to 25 percent of the U.S. stock market is held by index funds.”).

<sup>24</sup> See, e.g., *Blackrock, Investment Stewardship, Engagement Priorities for 2020*, <https://www.blackrock.com/corporate/literature/publication/blk-stewardship-priorities-final.pdf> (identifying and describing board quality, environmental risk and opportunities, corporate strategy and capital allocation, compensation that promotes long-termism, and human capital

Commission proposed two alternative approaches. The first, proposed § 801.34, “would permit acquirors to purchase, but not take possession of, up to 10 percent of an issuer’s voting securities without filing a notification. The shares purchased would be placed in escrow and voted by the escrow agent in proportion to the votes cast by all other shares. The acquiror would be required to file and observe the waiting period prior to purchasing more than 10 percent of an issuer’s voting securities or prior to taking the shares out of escrow.”<sup>30</sup> The second proposal was an optional notification for acquisitions of 10% or less of the voting securities of an issuer. “This optional system would require the acquiror to submit specified public documents describing the entity to be acquired, but would not require that the issuer be given notice of the intended acquisition.”<sup>31</sup>

The 1988 proposed rulemaking received eighteen comments.<sup>32</sup> Some encouraged the Commission to move forward with the principal proposal that would exempt all acquisitions of 10% or less of an issuer’s voting securities regardless of investment intent. Several comments in favor of the principal proposal agreed with the Commission’s assertion in the proposed rulemaking that acquisitions of 10% or less of an issuer’s voting securities were unlikely to violate the antitrust laws.<sup>33</sup> In

waiting period and informing the target could increase the cost to them of acquiring the issuer’s voting securities.” 53 FR 36831, 36840 (Sept. 22, 1988).

<sup>30</sup> 53 FR 36831, 36,842 (Sept. 22, 1988).

<sup>31</sup> 53 FR at 36843.

<sup>32</sup> All comments are available at <https://www.ftc.gov/policy/public-comments/2020/08/initiative-122>.

<sup>33</sup> See Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf); Irving Scher, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment09.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment09.pdf); John A. Reid, Jr., Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment11-2.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment11-2.pdf); Howard E. Steinberg, Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment12.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment12.pdf); and then William J. Kolasky, Jr., Comment, *Re: Comments*

addition, some of the comments noted that the proposed rule would “eliminate the incentive to avoid compliance with the H–S–R Act without prejudicing antitrust enforcement efforts”<sup>34</sup> and benefit the Commission through the “freeing up of Commission resources currently expended on compliance investigations regarding transactions that lack antitrust significance.”<sup>35</sup> Several comments also noted that the proposed rule would ease conflicts with the securities laws. A company wrote that “by allowing the acquisition of securities under the secrecy afforded by the securities laws, acquirors will be able to purchase stock at prices that are not artificially inflated by the publicity which can be generated by an HSR Act notification filing at the \$15 million reporting threshold.”<sup>36</sup>

*Submitted by Wilmer, Cutler & Pickering Regarding Proposed Amendments to the Hart-Scott-Rodino Improvement Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment13.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment13.pdf).

<sup>34</sup> See Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf), at 1. See also James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf).

<sup>35</sup> See Howard E. Steinberg, Comment, *Re: Proposed Changes to Premerger Notification Rules*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment12.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment12.pdf), at 2. See also Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); and then James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf).

<sup>36</sup> See James E. Knox, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Nov. 8, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment07.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment07.pdf), at 2. See also Robert S. Pirie, Comment, *RE: Proposed Rulemaking Concerning Premerger Notification under Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 53 FR 36831, (Oct. 18, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrrulemakingcomment02.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrrulemakingcomment02.pdf); and then William J. Kolasky, Jr., Comment, *Re: Comments Submitted by Wilmer, Cutler & Pickering Regarding Proposed Amendments to the Hart-Scott-Rodino Improvement Act of 1976*, 53 FR 36831, (Nov. 21, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment13.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment13.pdf).

Other comments noted concerns with the proposed rule. One company wrote:

The proposed exemption for a person who acquires up to 10% of the securities of an issuer when such acquirer has the intent of influencing target’s management (which is virtually always the case for an acquisition of 10% of an issuer’s stock) is in diametric opposition to the fundamental purpose of the Act. Since power to influence the target’s management is the primary concern of Section 7, it is beyond our comprehension why the FTC would exempt review for acquisitions of up to 10% of an issuer’s stock when the acquisitions may be made for the purpose of influencing management.<sup>37</sup>

A trade association wrote: “The real thrust of the suggestion is not that the \$15 million threshold test serves no antitrust purpose, but rather that the FTC finds it difficult to force compliance by those who wish to make hostile tender offers. That, however, is not by itself an appropriate reason for the rules change. Violations cannot be ignored.”<sup>38</sup>

Members of Congress also weighed in on the proposed rulemaking. One argued that filing requirements should be enforced instead of changed<sup>39</sup> while another argued that the Agencies lacked the authority to create an exemption that would, in effect, render irrelevant the statutory minimum threshold.<sup>40</sup> Representative James J. Florio (then Chairman of the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce) wrote: “[t]he rulemaking notice points out that Congress was definitely interested in subjecting some types of acquisitions of 10 percent or less to premerger review.

<sup>37</sup> See Dennis P. Codon, Comment, *Re: Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Nov. 7, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment06.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment06.pdf), at 1.

<sup>38</sup> See John W. Hetherington, Comment, *Re: 16 CFR parts 801, 802, and 803 Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Dec. 19, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/12/p812937hsrrulemakingcomment17.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/12/p812937hsrrulemakingcomment17.pdf), at 2.

<sup>39</sup> See Jim Sasser, Comment, *Re: Premerger Notification*, 53 FR 36831, (Oct. 25, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/11/p812937hsrrulemakingcomment08.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/11/p812937hsrrulemakingcomment08.pdf), at 1, (“Indeed, I find the rationale for the proposed amendments flawed. The premerger notification rules should not be relaxed because, as you say, there is too much incentive to avoid them; rather, they should be strengthened.”).

<sup>40</sup> See Jack Brooks, Comment, 53 FR 36831, (Dec. 9, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/12/p812937hsrrulemakingcomment14.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/12/p812937hsrrulemakingcomment14.pdf), at 1, (“The proposal would, for all practical purposes, eliminate the \$15 million premerger notification threshold. I do not believe that Congress delegated authority to the Commission to repeal that statutory notification threshold.”).



In light of this Congressional intent, I am puzzled by the Commission's proposal to overrule Congressional intent by a blanket exemption." <sup>41</sup>

The Commission did not issue a final rule.

Since 1988, the parameters of the HSR premerger notification program have undergone considerable change. In 2000, Congress amended the Act to raise the minimum reportability threshold from \$15 million to \$50 million, and at the same time built in an automatic annual adjustment of all of the Act's thresholds based on the change in gross national product. Currently, a transaction must be valued at more than \$94 million to be potentially reportable, and the parties to that transaction must have sales or assets of at least \$188 million and \$18.8 million, respectively, unless the transaction is valued at more than \$376 million. The statutory thresholds have increased steadily since 2000,<sup>42</sup> which has reduced significantly the number of filings received by the Agencies.<sup>43</sup>

Since 1988, the Commission has also gained over 30 years of additional experience reviewing filings for acquisitions of 10% or less of an issuer's voting securities. Since the promulgation of the Rules in 1978, the Agencies have not challenged a stand-alone acquisition of 10% or less of an issuer, and have rarely engaged in a substantive initial review of a proposed acquisition of 10% or less of an issuer.<sup>44</sup> The Commission believes that proposed acquisitions of 10% or less of an issuer should be exempt when they are unlikely to violate the antitrust laws and that exempting this category of acquisitions will allow the Agencies to better focus their resources on transactions that create the potential for competition concerns. To achieve this goal, the Commission proposes a new approach to exempt acquisitions of 10% or less of an issuer's voting securities under certain conditions. Proposed § 802.15 reads as follows:

§ 802.15 De minimis acquisitions of voting securities

An acquisition of voting securities shall be exempt from the requirements of the act if as a result of the acquisition:

(a) The acquiring person does not hold in excess of 10% of the outstanding voting securities of the issuer; and

(b)(i) the acquiring person is not a competitor of the issuer (or any entity within the issuer);

(ii) the acquiring person does not hold voting securities in excess of 1% of the outstanding voting securities (or, in the case of a non-corporate entity, in excess of 1% of the non-corporate interests) of any entity that is a competitor of the issuer (or any entity within the issuer);

(iii) no individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of the issuer (or of an entity within the issuer);

(iv) no individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of a competitor of the issuer (or of an entity within the issuer); and

(v) there is no vendor-vendee relationship between the acquiring person and the issuer (or any entity within the issuer), where the value of sales between the acquiring person and the issuer in the most recently completed fiscal year is greater than \$10 million in the aggregate.

Proposed § 802.15 exempts acquisitions that would result in the acquiring person holding 10% or less of the issuer's outstanding voting securities, unless the acquiring person already has a competitively significant relationship with the issuer, such as where the acquiring person operates competing lines of business, has an existing vertical relationship with the issuer, or employs or is otherwise represented by an individual who is an officer or director of the issuer or a competitor. Because these types of relationships render even a small stake potentially competitively significant, the Commission proposes to continue to receive filings for any such acquisitions that are not exempt under § 802.9.

Over the last several years, there has been ongoing discussion of the impact of a single entity holding small percentages of voting securities in competitors within the same industry, sometimes referred to as common ownership.<sup>45</sup> The debate is not yet settled, but it has raised concerns about the competitive effect of common ownership because investors with small minority stakes may influence the behavior of an issuer. Thus, the

Commission proposes that the exemption in § 802.15 not apply if the acquiring person is a competitor of the issuer or if the acquiring person holds more than 1% in a competitor of the issuer on an aggregate basis. For instance, Fund Vehicle 1 will acquire 6% of Issuer D and Fund Vehicle 1 has two associates, Fund Vehicles 2 and 3. Fund Vehicle 1 is the UPE but the Acquiring Person includes Fund Vehicles 1, 2 and 3 under the proposed change to § 801.1(a)(1) discussed above. Fund Vehicles 1, 2 and 3 do not control any competitors of Issuer D and Fund Vehicle 1 does not hold any minority interest in a competitor of Issuer D, but Fund Vehicle 2 and Fund Vehicle 3 each holds a 1% minority interest in competitors of Issuer D. In this scenario, under the proposed rule, Fund Vehicle 1 would not be able to rely on proposed § 802.15 because its associates hold more than 1% in a competitor of Issuer D. This exception to the exemption would ensure the Agencies receive filings that provide insights into the influence of holdings in competitors. The Commission invites comment on this approach, including whether a different level of ownership in a competitor of the issuer would be more appropriate in determining that the proposed exemption should not apply.

The Rules do not currently define the term "competitor," and to implement this exception to the exemption, a definition must be added. The Commission proposes the following definition for the purpose of implementing § 802.15: "§ 801.1(r) *Competitor*. For purposes of these rules, the term *competitor* means any person that (1) reports revenues in the same six-digit NAICS Industry Group as the issuer, or (2) competes in any line of commerce with the issuer." This proposed definition of "competitor" would require two separate assessments to determine whether an acquiring person is a competitor of the issuer or holds interests in a competitor of the issuer. The first prong of the proposed definition would ask an acquiring person to look at the six-digit NAICS codes of entities it controls and compare them with the NAICS codes the issuer reports. NAICS codes (and their predecessor Standard Industrial Classification ("SIC") codes) have long been the basis for reporting revenues in the HSR Form, and they provide an objective and easy to administer measure of whether an acquiring person and an issuer compete. Moreover, because acquiring persons already compare their NAICS codes with those of the issuer in order to respond to items

<sup>41</sup> See James J. Florio, Chairman, Comment, *Re: Premerger Notification; Reporting and Waiting Period Requirements*, 53 FR 36831, (Oct. 12, 1988), [https://www.ftc.gov/system/files/documents/public\\_comments/1988/10/p812937hsrulemakingcomment01.pdf](https://www.ftc.gov/system/files/documents/public_comments/1988/10/p812937hsrulemakingcomment01.pdf), at 2.

<sup>42</sup> The thresholds have increased every year except for 2010. 75 FR 3468 (Jan. 21, 2010).

<sup>43</sup> As a result of these changes, many acquisitions of small stakes that would have resulted in an HSR filing prior to 2001 no longer trigger an HSR filing.

<sup>44</sup> Note 1 *supra*.

<sup>45</sup> FTC Hearings on Competition and Consumer Protection in the 21st Century, Session 8, FTC.GOV. (Dec. 6, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century>. See also Submission of the United States to OECD Hearing on Common Ownership by institutional investors and its impact on competition, FTC.GOV. (Nov. 28, 2017), [https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common\\_ownership\\_united\\_states.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common_ownership_united_states.pdf).

in the Form, as discussed above, this approach would be familiar to acquiring persons.

Filing parties can still be “competitors” even if they report in different NAICS codes. Thus, the second prong of the proposed definition of “competitor” would rely on filing parties to conduct a good faith assessment to determine whether any part of the acquiring person competes with or holds interests in entities that compete with the issuer, in any line of commerce.<sup>46</sup> The Commission expects that parties would do so consistent with their ordinary course documentation and informational practices and be able to defend reliance on proposed § 802.15 if challenged.

The Commission acknowledges that this proposed two-prong definition of “competitor” is broad. The Agencies and the public will benefit from such a broad definition because the Agencies, in fulfilling their obligations to enforce the antitrust laws, have a strong interest in receiving HSR filings that reveal any indicia of competition between the filing parties so the Agencies can fully evaluate the competitive impact of the proposed acquisition. Nevertheless, the Commission invites comment on other ways to define “competitor” that would still provide the Agencies with thorough information on the competition that exists between filing parties.

Proposed § 802.15 also asks filing parties to ascertain the existence of officer or director relationships between the acquiring person and the issuer. That is, the exemption in proposed § 802.15 would be unavailable if someone from the acquiring person is an officer or director of the issuer or a competitor of the issuer. To be an officer or director of any issuer is to be intimately connected to that issuer. Officers make the issuer’s day-to-day business decisions, and directors determine the overall direction of the issuer. If someone within the acquiring person has that kind of influence over the issuer or a competitor of the issuer, the Agencies have a strong interest in receiving filings about that proposed transaction to better understand its competitive impact. Thus, this exception to the proposed exemption would ensure that acquisitions of potential competitive significance do not become exempt.

Finally, the proposed § 802.15 exemption would not be available if the acquiring person and the issuer are in a vertical relationship valued at \$10 million or greater. There can be important competitive implications in vertical relationships, and the Agencies have a strong interest in reviewing transactions that create or expand vertical relationships. This exception to the exemption would ensure the Agencies receive filings where the buyer and issuer have a vertical relationship beyond the ordinary course. The Commission intends to exclude the purchase of ordinary course services and goods (e.g., office supplies, financial services, etc.) and invites comment on whether \$10 million is an appropriate threshold to distinguish ordinary course vertical relationships from those with competitive significance.

Proposed § 802.15 would allow the Agencies “to focus their resources more effectively on those transactions that present the potential for competitive harm.”<sup>47</sup> Proposed § 802.15 would further the Agencies’ goal of eliminating filings for acquisitions of 10% or less of an issuer where there is no existing competitive relationship or significant vertical relationship between the acquirer and the issuer and where the acquisition therefore is unlikely to violate the antitrust laws. At the same time, proposed § 802.15 would balance the exemption of these kinds of acquisitions with the Agencies’ interest in making sure that acquisitions of potential competitive significance are not exempt. The Commission invites comment on whether there are other factors to consider in evaluating the proposed exceptions to the exemption, or if other categories should be the subject of exceptions to the exemption.

Under proposed § 802.15, acquiring persons would have to evaluate their connection to the issuer and the issuer’s competitors in several ways. Although this approach is not without burden for acquiring persons, the Commission believes that information concerning competitors, relationships with the issuer’s officers or directors, and vertical relationships will either already be in acquiring persons’ possession or will be relatively straightforward to gather. On the whole, proposed 802.15 should benefit acquiring persons by exempting acquisitions of small amounts of voting securities without an examination of intent as required by § 802.9. Section 802.9 would remain unchanged and would still be available to exempt acquisitions of 10% or less of an issuer

where there is no intention to be involved in the basic business decisions of that issuer. With the addition of proposed § 802.15, acquiring persons would have two potential ways to exempt the acquisition of 10% or less of an issuer’s voting securities.<sup>48</sup>

### III. Proposed Explanatory and Ministerial Changes to the Rules and the Form and Instructions

To help illustrate the proposed changes to § 801.1 discussed above, the FTC proposes adding some examples to the Rules. The proposed changes to § 801.1 would also require explanatory and ministerial updates to the Form and Instructions.

#### A. Revised Examples to §§ 801.1, 801.2

The Commission proposes revising the examples in §§ 801.1 and 801.2 to clarify the proposed definition of person.

#### Revised Examples to § 801.1

1. Edit example 4 to § 801.1(a)(1) to make “example” plural:

*Example 4:* See the examples to § 801.2(a).

2. Add example 5 and 6 to § 801.1(a)(1):

Example 5. Fund 1, Fund 2, and Fund 3, each a UPE, are all associates under the common investment management of Manager, as defined by § 801.1(d)(2). Fund 1’s portfolio company A is making a reportable acquisition. The acquiring person includes Manager, Fund 1, Fund 2, Fund 3, and A. Manager would file on behalf of the acquiring person by placing its name in Item 1(a) of the Form. Manager indicates in Item 1(c) of the filing that Fund 1 is making the acquisition. Fund 1 can also indicate in Item 1(c) of the Form that it is filing on Manager’s behalf.

Example 6. Fund A will be selling its portfolio company P. Fund A’s investments are managed by Investment Manager, and Fund A’s associates are Fund B, Fund C, and Fund D. The acquired person includes Investment Manager, Fund A, Fund B, Fund C, and Fund D. Investment Manager would file on behalf of Fund A, the selling UPE, by placing its name in Item 1(a) of the Form. Fund A could also indicate in Item 1(c) of the Form that it is filing on Investment Manager’s behalf.

3. Add example 4 to § 801.1(a)(3):

*Example 4:* See the examples to § 801.1(a)(1).

4. Edit text of § 801.1(d)(2) by removing “For purposes of Items 6 and 7 of the Form,” capitalizing the subsequent “An,” and including “or acquired” as appropriate, so that § 801.1(d)(2) reads as follows:

(d)(2) Associate. An associate of an acquiring or acquired person shall be an

<sup>46</sup> As part of a typical antitrust compliance program, a company may already identify other companies that have competing sales in order to avoid violating Section 8 of the Clayton Act. Subject to certain minimum thresholds, Section 8 prohibits a person from serving as a director or an officer of two or more corporations that are horizontal competitors.

<sup>47</sup> 61 FR 13666 (Mar. 28, 1996).

<sup>48</sup> Institutional investors can also continue to rely on § 802.64.

entity that is not an affiliate of such person but:

(A) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring or acquired entity (a “managing entity”); or

(B) Has its operations or investment decisions, directly or indirectly, managed by the acquiring or acquired person; or

(C) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(D) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

#### Revised Examples to § 801.2

1. In § 801.2(a), number the current example as “Example 1” and add example 2.

*Example 2:* See the examples to § 801.1(a)(1).

2. Add examples 3 and 4 to § 801.2(b)

*Example 3:* See the examples to § 801.1(a)(1).

*Example 4:* See the examples to § 801.12(a).

#### Revised Examples to § 801.12(a)

1. In § 801.12(a), number the current example as “example 1” and add example 2:

*Example 2.* Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of Fund 1 and Fund 2, which are associates managed by Investment Manager. Both Fund 1 and Fund 2 hold shares of Issuer. A2 will acquire all of Issuer’s voting securities held by Fund 1 and Fund 2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is Issuer. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring person” is “A.”)

#### *B. Ministerial Changes to the Instructions and the Form*

The Commission also proposes the following changes to the Instructions and Form to clarify the definition of person as well as to streamline the Form where appropriate in light of the proposed changes:

##### Definitions, p.I of Instructions:

The terms “person filing” or “filing person” mean an ultimate parent entity (“UPE”) and its associates. Every person will have at least one UPE, and a person may be the same as its UPE. Not every person will have associates, but when a person has associates, the person will not be the same as its UPE(s). (See § 801.1(a)(1) and (d)(2).)

##### Item 1(a), p.IV of Instructions:

Provide the name, headquarters address, and website (if one exists) of the person filing notification. A person includes associates, but not every person will have associates. In the case of a person that has associates, the

person filing is the entity that manages the associates (“managing entity”) as defined by § 801.1(d)(2). (See § 801.1(a)(1) and (d)(2).)

##### Item 1(c), p.IV of the Instructions:

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, managing entity or other (specify). If the person is a managing entity, indicate the UPE making the acquisition. Indicate if a UPE is filing on behalf of the managing entity. (See § 801.1 and (d)(2).)

##### Item 1(c) in the Form:

This item will include a new box for managing entity and space for listing the name of the UPE making the acquisition.

##### Item 3(a), p.V of the Instructions:

Clarify that the item calls for information on the UPEs that are party to the transaction.

First paragraph: At the top of Item 3(a), list the name and mailing address of each acquiring and acquired UPE, and acquiring and acquired entity, that are party to the transaction whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned by an acquired entity.

##### Item 4(a), p.VI of the Instructions:

Add a requirement for acquiring persons to organize by UPE and by entity within each UPE. Specify limits for acquired persons.

Acquiring persons: Provide the names of all entities within the person filing notification, including all UPEs, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (“CIK”) number for each entity. Responses must be organized by UPE and by entity within each UPE.

Acquired persons: Provide the names of all entities within the selling UPE, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

##### Item 4(b), p.VI of the Instructions:

Specify limits for acquired persons. Add a requirement to organize by UPE and by entity within each UPE.

Acquiring persons: provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification. The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7. Responses must be organized by UPE and by entity within each UPE. If some of the UPEs or entities do not prepare separate financial statements, explain how their financial information is consolidated in the financial statements that are being submitted.

Acquired persons: Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the selling UPE. The acquired person should also provide the most recent reports of the acquired entity(s).

##### Item 5, p.VII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

Second paragraph: Responses must be organized by UPE and entity within each

UPE. List all NAICS and NAPCS codes in ascending order.

##### Item 5(a), p.VII of the Instructions:

Clarify requirement for persons.

Last paragraph: Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both persons generate dollar revenues.

##### Item 6(a), p.VIII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

*Subsidiaries of filing person.* List the name, city, and state/county of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Responses must be organized by UPE and by entity within each UPE. Entities with total assets of less than \$10 million may be omitted. Alternatively, the person filing notification may report all entities within it.

##### Item 6(b), p.VIII of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

*Minority shareholders.* For the acquired entity(s) and, for the acquiring person, the managing entity, all UPEs and the acquiring entity(s) or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within the UPE(s), list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. Responses must be organized by UPE and entity within each UPE. (See § 801.1(c)).

##### Item 6(c), p.VIII-IX of the Instructions:

Item 6(c) is currently segmented into two different sections: Item 6(c)(i) deals with the person filing and Item 6(c)(ii) deals with that person’s associates. Since the proposed definition of person would include associates, these two items within 6(c) would be collapsed and the Item renumbered to Item 6(c) with no subparts. The information required by this item would still be limited to entities within the acquiring person that report in the same NAICS code as the target. New 6(c) would read as follows:

##### Item 6(c)

*Minority holdings of filing person.* If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.

*The acquiring person should limit its response,* based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquiring person may rely on its regularly prepared financials that list its investments, provided the financials are no more than three months old. Responses must be organized by UPE and by entity within each UPE.

The *acquired person* should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the same 6-digit NAICS industry code as the acquiring person.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c), it is permissible for the acquiring person to list all entities in which it holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.

Item 7, p.IX–X of the Instructions:

Item 7(a) currently requires information from both the acquiring person and its associates. Since the proposed definition of person would include associates, Item 7(a) would be revised to eliminate the separate reference to associates.

#### Item 7(b)

The information required by Item 7(b) would be incorporated into Items 5 and 6(a), so this item would be eliminated.

#### Items 7(c) and 7(d)

Current Item 7(c) deals with the person filing and Item 7(d) deals with that person's associates, so these two items would be collapsed and renumbered to new 7(b).

New Item 7 would read as follows:

If, to the knowledge or belief of the person filing notification, the acquiring person derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

(1) In industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived *any amount* of dollar revenues in the most recent year; or

(2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person *not* contributed to the joint venture.

Responses must be organized by UPE and by entity within each UPE.

#### Item 7(a)

##### Industry Code Overlap Information

Provide the 6-digit NAICS industry code and description for the industry.

#### Item 7(b)

##### Geographic Market Information

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(b)(iv)(b), the person

filing notification may respond with the word “national” if business is conducted in all 50 states.

#### Item 7(b)(i)

##### NAICS Sectors 31–33

For each 6-digit NAICS industry code within NAICS Sectors 31–33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered by Item 7(b)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

#### Item 7(b)(ii)

##### NAICS Sector 42

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

#### Item 7(b)(iii)

##### NAICS Industry Group 5241

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.

#### Item 7(b)(iv)(a)

##### Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48–49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

#### Item 7(b)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, *arranged by state, county and city or town*, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 2123 nonmetallic mineral mining and quarrying
- 32512 industrial gases
- 32732 concrete
- 32733 concrete products
- 44–45 retail trade, *except* 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries

- 521 monetary authorities—central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, *except* 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, *except* 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

#### Item 7(b)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises
- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

Item 8, p.XI of the Instructions:

Add a requirement to organize by UPE and by entity within each UPE.

For each such acquisition, supply:

- (1) The 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;
- (2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;
- (3) the headquarters address of that entity prior to the acquisition;
- (4) whether assets, voting securities or non-corporate interests were acquired; and
- (5) the consummation date of the acquisition.

Responses must be organized by UPE and by entity within each UPE.

#### IV. Communications by Outside Parties to Commissioners and Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding, from any outside party to any Commissioner or

Commissioner's advisor, will be placed on the public record. See 16 CFR 1.26(b)(5).

## V. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small entities, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to invoke an HSR filing, the premerger notification rules rarely, if ever, affect small entities.<sup>49</sup> The 2000 amendments to the Act exempted all transactions valued at \$50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of \$94 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

## VI. Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501–3521, requires agencies to submit “collections of information” to the Office of Management and Budget (“OMB”) and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection requirements in the HSR Rules and Form have been reviewed and approved by OMB under OMB Control No. 3084–0005. The current clearance expires on January 31, 2023. Because the rule amendments proposed in this NPRM would change existing reporting requirements, the Commission is submitting a Supporting Statement for Information Collection Provisions (“Supporting Statement”) to OMB.

### *Amending § 801.1(a)(1)—Acquiring Persons*

The Commission proposes to amend the § 801.1(a)(1) definition of “person” to require certain acquiring persons to disclose additional information about

their associates when making an HSR filing. Thus, Items 4 through 8 (excluding Items 6(c) and 7)<sup>50</sup> on the Notification and Report Form (HSR Form) would be revised to seek information about associates of certain acquiring persons, including the aggregation of acquisitions in the same issuer across its associates. The Commission acknowledges that this proposed change would result in an increased burden for certain acquiring persons. Non-corporate entity UPEs within families of funds and MLPs would be required to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons as a result of the treatment of associates under the current Rules. Given that these entities already conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should result in limited additional burden for filers. Based on filing data from the past five fiscal years, the Commission estimates that 17.28% of entities would be required to provide additional information on behalf of associates. From this, we anticipate 846 filings would be affected per fiscal year ( $17.28\% \times 4894$  filings per year, as estimated in the FTC's most recent PRA clearance for the HSR Rules). The Commission also estimates that each affected filer will need about 10–15 additional hours per filing to comply. Thus, the aggregation is expected to lead to 10,575 additional annual hours of burden ( $846$  filings  $\times$   $12.5$  hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

The proposed change to § 801.1(a)(1) would also result in a reduced burden for certain acquiring persons by eliminating the potential need for families of funds and MLPs to make multiple filings with multiple filing fees. Based on filing data from the past five fiscal years, the Commission estimates that 39 filings would be affected per fiscal year. Since the FTC's current clearance with OMB estimates an average reporting burden per responding filer of 37 hours per filing, the proposed change to § 801.1(a)(1) would be a reduction of 1,443 hours of annual burden ( $39$  filings  $\times$   $37$  hours per filing). The Commission seeks

comments to help inform such burden estimates, to the extent applicable.

### *Acquired Persons*

Additionally, the Commission's proposal to revise the HSR Instructions to limit the financial information required in Items 4(a) and 4(b) should reduce burden for certain acquired persons. The HSR Form already limits what acquired persons must report in Items 5 through 7 to information on those assets, voting securities and non-corporate interests being acquired in the transaction at issue. The Commission's proposal to amend the HSR Instructions would create a similar limit for acquired persons with respect to Items 4(a) and 4(b) and should result in a reduction in the burden for families of funds and MLPs filing as acquired persons who will now face a more limited reporting burden after the amendments. Based on filing data from the past five fiscal years, the Commission estimates that 357 filings would be affected per fiscal year. The Commission also estimates that the burden on each affected filer will be reduced by 5 hours per filing. Thus, the proposed limit for acquired party reporting is expected to lead to a reduction in burden of 1,785 annual hours ( $357$  filings  $\times$   $5$  hours per filing). The Commission seeks comments to help inform such burden estimates, to the extent applicable.

### *Amending § 802.15—Acquisition of 10% or less*

Additionally the Commission proposes a new exemption, § 802.15, which would exempt the acquisition of 10% or less of an issuer's voting securities in certain circumstances. Proposed § 802.15 exempts the acquisition of 10% or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer, such as operating competing lines of business or having an existing vertical relationship, or where the investor (or its agent) is an officer or director of the issuer or a competitor. This proposed exemption would allow the acquisition of small amounts of voting securities without an examination of intent as required by § 802.9. As a result, the Commission anticipates that this exemption will reduce somewhat the number of transactions subject to review under the Rule and the number of entities that must engage in reporting under the Rule. Over the period from FY 2001 to FY 2017, the Commission received an average of 106 filings per fiscal year for acquisitions of 10% or

<sup>49</sup> See 13 CFR part 121 (regulations defining small business size).

<sup>50</sup> There would be no changes to what Items 6(c) and 7 require, because those items already require information from associates.

less.<sup>51</sup> Some of these filings would fall within the exemption in proposed § 802.15, leading to a reduction in burden for entities that would no longer need to report under the Rule. However, the Commission does not currently possess information as to how many entities would qualify for the proposed § 802.15 exemption. The Commission therefore requests comment on the percentage of entities that would qualify for the proposed exemption.

#### *Explanatory and Ministerial Changes*

Finally, the Commission proposes explanatory and ministerial changes to the rules, as well as necessary amendments to the HSR Form and Instructions to effect the proposed changes. These changes will result in no change to the information collection burden under the Rule.

#### *Request for Comments*

As noted above, the Commission invites comments on anticipated burdens for the proposed amendments and comments that will enable it to: (1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

Comments on the proposed reporting requirements subject to Paperwork Reduction Act review by OMB should additionally be submitted to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function. The [reginfo.gov](http://reginfo.gov) web link is a United States Government website produced by OMB and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs

(OIRA) reviews Federal information collections.

#### **List of Subjects in 16 CFR Parts 801, 802, and 803**

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission proposes to amend 16 CFR parts 801, 802, and 803 as set forth below:

#### **PART 801—COVERAGE RULES**

■ 1. The authority citation for part 801 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by:

■ a. Revising paragraph (a)(1) introductory text;

■ b. Adding paragraphs (a)(1)(i) and (ii);

■ c. Revising example 4 to paragraph (a)(1);

■ d. Adding examples 5 and 6 to paragraph (a)(1);

■ e. Adding example 4 to paragraph (a)(3);

■ f. Revising paragraph (d)(2); and

■ g. Adding paragraph (r).

The revisions and additions read as follows:

##### **§ 801.1 Definitions.**

\* \* \* \* \*

(a)(1) *Person*. Except as provided in paragraphs (a) and (b) of § 801.12, the term *person* means:

(i) An ultimate parent entity and all entities which it controls directly or indirectly; and

(ii) All associates of the ultimate parent entity.

*Examples:* \* \* \* 4. See the examples to § 801.2(a).5. Fund 1, Fund 2, and Fund 3, each a UPE, are all associates under the common investment management of Manager, as defined by § 801.1(d)(2). Fund 1's portfolio company A is making a reportable acquisition. The acquiring person includes Manager, Fund 1, Fund 2, Fund 3, and A. Manager would file on behalf of the acquiring person by placing its name in Item 1(a) of the Form. Manager indicates in Item 1(c) of the filing that Fund 1 is making the acquisition. Fund 1 can also indicate in Item 1(c) of the Form that it is filing on Manager's behalf.6. Fund A will be selling its portfolio company P. Fund A's investments are managed by Investment Manager, and Fund A's associates are Fund B, Fund C, and Fund D. The acquired person includes Investment Manager, Fund A, Fund B, Fund C, and Fund D. Investment Manager would file on behalf of Fund A, the selling UPE, by placing its name

in Item 1(a) of the Form. Fund A could also indicate in Item 1(c) of the Form that it is filing on Investment Manager's behalf.

\* \* \* \* \*

(3) \* \* \*

*Examples:* \* \* \* 4. See the examples to § 801.1(a)(1).

\* \* \* \* \*

(d) \* \* \*

(2) *Associate*. An associate of an acquiring or acquired person shall be an entity that is not an affiliate of such person but:

(i) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring or acquired entity (a "managing entity"); or

(ii) Has its operations or investment decisions, directly or indirectly, managed by the acquiring or acquired person; or

(iii) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(iv) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

\* \* \* \* \*

(r) *Competitor*. For purposes of these rules, the term *competitor* means any person that:

(1) Reports revenues in the same six-digit NAICS Industry Group as the issuer, or

(2) Competes in any line of commerce with the issuer.

■ 3. Amend § 801.2 by revising the example to paragraph (a) and adding examples 3 and 4 to paragraph (b) to read as follows:

##### **§ 801.2 Acquiring and acquired persons.**

(a) \* \* \*

*Examples:* 1. Assume that corporations A and B, which are each ultimate parent entities of their respective "persons," created a joint venture, corporation V, and that each holds half of V's shares. Therefore, A and B each control V (see § 801.1(b)), and V is included within two persons, "A" and "B." Under this section, if V is to acquire corporation X, both "A" and "B" are acquiring persons.

2. See the examples to § 801.1(a)(1).

(b) \* \* \*

*Examples:* \* \* \* 3. See the examples to § 801.1(a)(1).

4. See the examples to § 801.12(a).

\* \* \* \* \*

■ 4. Amend § 801.12 by revising the example to paragraph (a) to read as follows:

##### **§ 801.12 Calculating percentage of voting securities.**

(a) \* \* \*

<sup>51</sup> As set out in footnote 1, the Agencies received a total of 1,804 HSR filings from FY 2001 to FY 2017 for acquisitions of 10% or less of outstanding stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less.



*Examples:* 1. Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of corporation B1 and subsidiary B2. Assume that A2 proposes to sell assets to B1 in exchange for common stock of B2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is B2. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring persons” are “A” and “B.”)2. Person “A” is composed of corporation A1 and subsidiary A2; person “B” is composed of Fund 1 and Fund 2, which are associates managed by Investment Manager. Both Fund 1 and Fund 2 hold shares of Issuer. A2 will acquire all of Issuer’s voting securities held by Fund 1 and Fund 2. Under this paragraph, for purposes of calculating the percentage of voting securities to be held, the “acquired person” is Issuer. For all other purposes, the acquired person is “B.” (For all purposes, the “acquiring person” is “A.”)

\* \* \* \* \*

## PART 802—EXEMPTION RULES

■ 5. The authority citation for part 802 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 6. Add § 802.15 to read as follows:

### § 802.15 De minimis acquisitions of voting securities.

An acquisition of voting securities shall be exempt from the requirements of the act if as a result of the acquisition:

(a) The acquiring person does not hold in excess of 10% of the outstanding voting securities of the issuer; and

(b)(1) The acquiring person is not a competitor of the issuer (or any entity within the issuer);

(2) The acquiring person does not hold voting securities in excess of 1% of the outstanding voting securities (or, in the case of a non-corporate entity, in excess of 1% of the non-corporate interests) of any entity that is a

competitor of the issuer (or any entity within the issuer);

(3) No individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of the issuer (or of an entity within the issuer);

(4) No individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiring person, is a director or officer of a competitor of the issuer (or of an entity within the issuer); and

(5) There is no vendor-vendee relationship between the acquiring person and the issuer (or any entity within the issuer), where the value of sales between the acquiring person and the issuer in the most recently completed fiscal year is greater than \$10 million in the aggregate.

Example 1 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 has a .4% interest in a competitor of Issuer and Fund 2 has a .5% interest in the same competitor of Issuer. The acquisition of the 5% interest in Issuer would be exempt under § 802.15.

Example 2 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 has a .4% interest in a competitor of Issuer and Fund 2 has a .3% interest in a different competitor of Issuer. The acquisition of the 5% interest in Issuer would be exempt under § 802.15.

Example 3 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 controls an operating company that is a competitor of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 4 to paragraph (b)(5). Investment Manager manages the investments of Fund 1, Fund 2, Fund 3, and Fund 4, which are associates. Investment Manager, Fund 1, Fund 2, Fund 3 and Fund 4 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 2, Fund 3 and Fund 4 each have a .4% interest in a competitor of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 5 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. One of Fund 2’s officers (or the equivalent thereof) also serves as an officer of Issuer. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 6 to paragraph (b)(5). Investment Manager manages the investments of Fund 1, Fund 2, Fund 3, and Fund 4, which are associates. Investment Manager, Fund 1, Fund 2, Fund 3 and Fund 4 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. One of Fund 4’s officers (or the equivalent thereof) also serves as an officer of a competitor of Issuer’s subsidiary. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

Example 7 to paragraph (b)(5). Investment Manager manages the investments of Fund 1 and Fund 2, which are associates. Investment Manager, Fund 1 and Fund 2 are all part of the Acquiring Person. Fund 1 is acquiring 5% of Issuer. Fund 1 controls an operating company that has a vendor-vendee relationships with Issuer valued in excess of \$10 million. The acquisition of the 5% interest in Issuer would not be exempt under § 802.15.

## PART 803—TRANSMITTAL RULES

■ 7. The authority citation for part 803 continues to read as follows:

**Authority:** 15 U.S.C. 18a(d).

■ 8. Revise Appendix A to part 803 to read as follows:

**BILLING CODE** 6750-01-P

## 16 C.F.R. Part 803 - Appendix

( Filing is: ☐ New ☐ Amended )

## NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

Electronic Form Version 1.0.2, 01/02/2017

Missing Mandatory Items for Submission:

TRANSACTION NUMBER ASSIGNED

## FEE INFORMATION (For Payer Only)

TAXPAYER IDENTIFICATION NUMBER \_\_\_\_\_

☐ OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

AMOUNT PAID \$ \_\_\_\_\_

NAME OF PAYER (if different from PERSON FILING) \_\_\_\_\_

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. \_\_\_\_\_

FROM (NAME OF INSTITUTION) \_\_\_\_\_

IS THIS A CORRECTIVE FILING? YES ☐ NO ☐CASH TENDER OFFER? ☐ YES ☐ NOBANKRUPTCY? YES ☐ NO ☐DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? ☐ YES ☐ NO

(Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(voluntary) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO

IF YES, list jurisdictions: \_\_\_\_\_

## ITEM 1

1(a) PERSON FILING

NAME  
HEADQUARTERS ADDRESS  
ADDRESS LINE 2  
CITY, STATE, COUNTRY  
ZIP CODE  
WEB SITE1(b) PERSON FILING NOTIFICATION IS ☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION

☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Managing Entity ☐ Other \_\_\_\_\_

1(d) DATA FURNISHED BY

☐ calendar year ☐ fiscal year (specify period): \_\_\_\_\_ (month/year) to \_\_\_\_\_ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).NAME  
ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME  
ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) %

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESSCONTACT PERSON 2  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESS

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME  
FIRM NAME  
BUSINESS ADDRESS  
CITY, STATE, COUNTRY  
ZIP CODE  
TELEPHONE NUMBER  
FAX NUMBER  
E-MAIL ADDRESS

NAME OF PERSON FILING NOTIFICATION

DATE

**ITEM 2****2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL  
ACQUIRING PERSONS**[Add Row](#)

NAME	NON-REPORTABLE
	<input type="checkbox"/> <a href="#">Delete</a>

**LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL  
ACQUIRED PERSONS**[Add Row](#)

NAME	NON-REPORTABLE
	<input type="checkbox"/> <a href="#">Delete</a>

**2(b) THIS ACQUISITION IS (put an "X" in all the boxes that apply)**

- |  |  |
|--|--|
| <input type="checkbox"/> an acquisition of assets  | <input type="checkbox"/> a consolidation (see § 801.2)             |
| <input type="checkbox"/> a merger (see § 801.2)  | <input type="checkbox"/> an acquisition of voting securities       |
| <input type="checkbox"/> an acquisition subject to § 801.2 (e)   | <input type="checkbox"/> a secondary acquisition                   |
| <input type="checkbox"/> a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50) | <input type="checkbox"/> an acquisition subject to § 801.31        |
| <input type="checkbox"/> an acquisition subject to § 801.30 (specify type)   | <input type="checkbox"/> an acquisition of non-corporate interests |
|  | <input type="checkbox"/> other (specify)                           |

**2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED  
(acquiring person only in an acquisition of voting securities)**

- ☐ \$50 million (as adjusted)
 ☐ \$100 million (as adjusted)
 ☐ \$500 million (as adjusted)
 ☐ 25% (see Instructions) (as adjusted)
 ☐ 50%
 ☐ N/A

<b>2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD (\$MM)</b>  \$	<b>(v) VALUE OF NON-CORPORATE INTERESTS ALREADY HELD (\$MM)</b>  \$	
<b>(ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD</b>  %	<b>(vi) PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD</b>  %	
<b>(iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM)</b>  \$	<b>(vii) TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM)</b>  \$	<b>(ix) VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION (\$MM)</b>  \$
<b>(iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION</b>  %	<b>(viii) TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION</b>  %	<b>(x) AGGREGATE TOTAL VALUE (\$MM)</b>  \$

NAME OF PERSON FILING NOTIFICATION	DATE
------------------------------------	------

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

ACQUIRING UPE(S)	Add Row	ACQUIRED UPE(S)	Add Row
NAME	Delete	NAME	Delete
ADDRESS		ADDRESS	
ADDRESS LINE 2		ADDRESS LINE 2	
CITY, STATE		CITY, STATE	
ZIP CODE, COUNTRY		ZIP CODE, COUNTRY	
ACQUIRING ENTITY(S)	Add Row	ACQUIRED ENTITY(S)	Add Row
NAME	Delete	NAME	Delete
ADDRESS		ADDRESS	
ADDRESS LINE 2		ADDRESS LINE 2	
CITY, STATE		CITY, STATE	
ZIP CODE, COUNTRY		ZIP CODE, COUNTRY	

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT (or letter of intent to merge or acquire)  
(IF SUBMITTING PAPER, DO NOT ATTACH THE DOCUMENT TO THIS PAGE) ATTACHMENT NUMBER

NAME OF PERSON FILING NOTIFICATION

DATE

**ITEM 4**

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 (See *Item by Item instructions*). THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

**4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION**☐ NoneCENTRAL INDEX  
KEY NUMBER[Add Row](#)

	<a href="#">Delete</a>
--	------------------------

**4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS**☐ NoneATTACHMENT OR  
REFERENCE NUMBER[Add Row](#)

	<a href="#">Delete</a>
--	------------------------

**4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS**☐ NoneATTACHMENT OR  
REFERENCE NUMBER[Add Row](#)

	<a href="#">Delete</a>
--	------------------------

**4(d) ADDITIONAL DOCUMENTS**☐ NoneATTACHMENT OR  
REFERENCE NUMBER[Add Row](#)

	<a href="#">Delete</a>
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NAME OF PERSON FILING NOTIFICATION	DATE
------------------------------------	------

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

Check None at the bottom of the page and provide explanation if you are not reporting revenue

6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE	DESCRIPTION	YEAR	TOTAL DOLLAR REVENUES (\$MM)
<input type="button" value="Add Row"/>	Attachment:	<input type="checkbox"/>	<input type="button" value="Overlap"/> <input type="button" value="Delete"/>

NONE ☐ (PROVIDE EXPLANATION)



NAME OF PERSON FILING NOTIFICATION	DATE
5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY	<input checked="checked" type="checkbox"/> Not Applicable

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

Attachment:

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

Attachment:

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

Attachment:

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

<input type="button" value="Add Row"/>		Attachment:
CODE	DESCRIPTION	<input type="button" value="Delete"/>

NAME OF PERSON FILING NOTIFICATION	DATE
------------------------------------	------

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

Attachment:

Add Row

NAME	CITY	STATE	COUNTRY

Delete

6(b) HOLDERS OF PERSON FILING NOTIFICATION

Attachment:

Add Row

ISSUER/ UNINCORPORATED ENTITY	SHAREHOLDER/ INTEREST HOLDER	HQ ADDRESS	% HELD

Delete

6(c) HOLDINGS OF PERSON FILING NOTIFICATION

Attachment:

Add Row

FILING PERSON	ISSUER/UNINCORPORATED ENTITY	% HELD

Delete

NAME OF PERSON FILING NOTIFICATION	DATE
------------------------------------	------

**ITEM 7**

## OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

☐ None 

CODE	DESCRIPTION
	<input type="button" value="Delete"/>

7(b) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

 

CODE	GEOGRAPHIC MARKET INFORMATION
	<input type="button" value="Delete"/>

NAME OF PERSON FILING NOTIFICATION		DATE
<b>ITEM 8</b> <span style="float: right; font-size: small;">Missing Mandatory Items for Submission:</span> PRIOR ACQUISITIONS (ACQUIRING PERSON ONLY) <span style="float: right; font-size: x-small;">Add Row</span>		
NAICS Code	<div style="display: flex; justify-content: space-between;"> <span>Add NAICS</span> <span>Sort by Code</span> </div> <div style="border: 1px solid black; height: 20px; margin-top: 5px;"></div>	Delete
Acquired Entity		
Former HQ Address		
Acquisition Type	<input type="checkbox"/> Securities <input type="checkbox"/> Assets <input type="checkbox"/> Non Corporate Interests    Date of Acquisition:	
Notes		

### CERTIFICATION

This **NOTIFICATION AND REPORT FORM**, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the

City of \_\_\_\_\_, State of \_\_\_\_\_

[SEAL]

this \_\_\_\_\_ day of \_\_\_\_\_, the year \_\_\_\_\_

Signature \_\_\_\_\_

My Commission expires \_\_\_\_\_

NAME OF PERSON FILING NOTIFICATION	DATE
<b>16 C.F.R. Part 803 - Appendix</b>	
<b>NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS</b>	
Approved by OMB 3084-0005	

**Attach the Affidavit required by § 803.5 to the Form.**

**THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS**

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty for each day during which such person is in violation of 15 U.S.C. §18a. The maximum daily civil penalty amount is listed in 16 C.F.R. §1.98(a).

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

**DISCLOSURE NOTICE** - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premarmer Notification Office, Federal Trade Commission, 400 7th St. SW, Room #5301, Washington, DC 20024  
and  
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. That number is 3084-0005, which also appears above.

**Privacy Act Statement**--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day. We also may be unable to process the Form unless you provide all of the requested information.

**This page may be omitted when submitting the Form.**

NAME OF PERSON FILING NOTIFICATION	DATE
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ENDNOTES

Add Endnote

ENDNOTE NUMBER	PERTAINING TO	ENDNOTE TEXT	
			Delete



NAME OF PERSON FILING NOTIFICATION

DATE

**ATTACHMENTS**[Add Attachment](#)

AttachTotal:

ATTACHMENT NUMBER	ATTACHMENT DESCRIPTION		Delete
		DESCRIPTION	
	ATTACHED TO ITEM		

- 9. Revise Appendix B to part 803 to read as follows:

# **ANTITRUST IMPROVEMENTS ACT NOTIFICATION AND REPORT FORM for Certain Mergers and Acquisitions**

## **INSTRUCTIONS**

OMB: 3084-0005

## **GENERAL**

The Notification and Report Form ("the Form") is required to be submitted pursuant to § 803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules"). These instructions specify the information that must be provided in response to the items on the Form.

### **Information**

The central office for information and assistance concerning the Form and the Rules is:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7<sup>th</sup> Street, S.W.  
Washington, D.C. 20024  
Phone: (202) 326-3100  
E-mail: HSRhelp@ftc.gov

Copies of the Form, Instructions and Rules as well as information to assist in completing the Form are available at the [PNO website](#).

### **Definitions**

The definitions used in this Form are set forth in the Rules. See [Statute, Rules and Formal Interpretations](#) for copies of the Hart-Scott-Rodino Act ("the Act"), the Rules, and the Federal Register Notices issuing the Rules and Rule amendments ("Statements of Basis and Purpose").

The term "documentary attachments" refers only to materials submitted in response to Item 3(b), Item 4 and to submissions pursuant to § 803.1(b) of the Rules.

The terms "person filing" or "filing person" mean an ultimate parent entity ("UPE") and its associates. Every person will have at least one UPE, and a person may be the same as its UPE. Not every person will have associates, but when a person has associates, the person will not be the same as its UPE(s). (See § 801.1(a)(1) and § 801.1(d)(2)).

### **Filing**

Parties should file the completed Form, together with all documentary attachments, with the Premier Notification Office ("PNO") of the Federal Trade Commission ("FTC") and the Premier Unit of the Antitrust Division of the Department of Justice ("DOJ") (together, "the Agencies"). Filers have the option of submitting a [DVD filing](#) or a [paper filing](#). Filings should be submitted to:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7<sup>th</sup> Street, S.W.  
Washington, D.C. 20024

and

Department of Justice  
Antitrust Division  
Premier and Division Statistics Unit  
450 Fifth Street, N.W., Suite 1100  
Washington, D.C. 20530

If one or both delivery sites are unavailable, the Agencies may announce alternate sites for delivery through the media and, if possible, at the [PNO website](#).

### **If submitting a DVD filing**

- 1) Provide the FTC with:

**TWO (2)** DVDs, each containing the Form, affidavit, certification and all documentary attachments, along with the original hard copies of the cover letter, certification and affidavit.

- 2) Provide DOJ with:

**TWO (2)** DVDs containing the same content as above, along with **THREE (3)** hard copies of the cover letter.

The Form must be a searchable PDF document. All other files must be in searchable PDF or MS Excel spreadsheet format and saved in color, if applicable. This includes the affidavit and certification.

Label each DVD with the name of the person filing, the name of a contact person and that person's phone number. Leave space on the DVD for the Agencies to write the assigned transaction number and date of receipt.

If the DVD or files contain viruses, passwords, or are not readable, the filing will not be accepted and the waiting period will not start.

For further instructions on DVD filing and specific DVD requirements, go to [HSR Resources](#) on the [PNO website](#).

### **If submitting a paper filing**

- 1) Provide the FTC with:

**ONE (1)** original and **ONE (1)** copy of the Form, certification page and affidavit, along with an original cover letter and **ONE (1)** set of documentary attachments.

- 2) Provide DOJ with:

**TWO (2)** copies of the Form, certification page and affidavit, along with **THREE (3)** copies of the cover letter, and **ONE (1)** set of documentary attachments.

### **Affidavits**

Affidavit(s) are required by § 803.5 and must attest to the good faith of the persons filing to complete the transaction. Affidavits must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury. If an entity is filing on behalf of the acquiring or acquired person, the affidavit must still attest to the good faith of the UPE.

**In non-§ 801.30 transactions**, the affidavit(s) (submitted by both persons filing) must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction. (See § 803.5(b)).

**In § 801.30 transactions**, the affidavit (submitted only by the acquiring person) must attest:

- 1) that the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice, as described below, from the acquiring person;
- 2) in the case of a tender offer, that the intention to make the tender offer has been publicly announced; and

- 3) the good faith intention of the person filing notification to complete the transaction.

Acquiring persons in § 801.30 transactions are required to submit a copy of the notice received by the acquired person pursuant to § 803.5(a)(3) along with the filing. This notice must include:

- 1) the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity;
- 2) the specific notification threshold that the acquiring person intends to meet or exceed in an acquisition of voting securities;
- 3) the fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act;
- 4) the anticipated date of receipt of such notification by the Agencies; and
- 5) the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act. (See § 803.5(a)).

#### Responses

Enter the name of the person filing notification in Item 1(a) on page 1 of the Form, and enter the same name and the date on which the Form is completed at the top of each page of the Form.

If there is insufficient room on the Form for a response to a particular item, attach "additional pages" behind that item on the Form. Filers must submit a complete set of additional pages within each copy of the Form.

Each additional page should identify, at the top of the page, the name of the person filing notification, the date on which the Form is completed and the item to which it is addressed.

Voluntary submissions pursuant to § 803.1(b) should be identified as V-1, V-2, etc.

If unable to answer any item fully, provide such information as is available and a statement of reasons for non-compliance as required by § 803.3. If exact answers to any item cannot be given, enter best estimates and indicate the source or basis of such estimates. Add an endnote with the notation "est." to any item where data are estimated.

All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars.

#### Limited Response

The acquired person should limit its response in Items 5-7:

- 1) in the case of an acquisition of assets, to the assets being acquired;
- 2) in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such acquired entities; and
- 3) in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are being acquired and all entities controlled by such acquired entities.

Separate responses may be required where a person is both acquiring and acquired. (See § 803.2(b)).

Information need not be supplied regarding assets, voting securities or non-corporate interests currently being acquired

when their acquisition is exempt under the Act or Rules. (See § 803.2(c)).

#### Year

All references to "year" refer to calendar year. If data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period that most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

#### North American Industry Classification System (NAICS) and North American Product Classification System (NAPCS) Data

The Form requests "dollar revenues" for non-manufactured and manufactured products with respect to operations conducted within the United States, and for products manufactured outside of the United States and sold into the United States. (See § 803.2(d)). Filing persons must submit data by 6-digit NAICS code to reflect both non-manufacturing and manufacturing dollar revenues. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must also submit data by 10-digit NAPCS code. (See Item 5 below).

In reporting information by 6-digit NAICS code, refer to the *North American Industry Classification System - United States, 2017* published by the Executive Office of the President, Office of Management and Budget.

In reporting information by 10-digit NAPCS code, refer to the concordance tables between 2012 product codes and 2017 NAPCS-based product codes published by the Bureau of the Census.

Information regarding NAICS and NAPCS is available at [www.census.gov](http://www.census.gov). This site also provides assistance in choosing the proper code(s) for reporting in Item 5 of the Form.

#### Thresholds

Filing fee and notification thresholds are adjusted annually pursuant to 15 U.S.C. § 18A(a)(2)(A) based on the change in gross national product, in accordance with 15 U.S.C. § 19(a)(5). The current threshold values can be found at [Current Filing Thresholds](#).

## END OF GENERAL SECTION

[Online Style Sheet for the Form](#)

[Online Tips for the Form](#)

## THE FORM - ITEM BY ITEM

**Fee Information**

The fee for filing the Form is based on the aggregate total value of assets, voting securities and controlling non-corporate interests to be held as a result of the acquisition:

Value of assets, voting securities and controlling non-corporate interests to be held	Fee Amount
greater than \$50 million (as adjusted) but less than \$100 million (as adjusted)	\$45,000
\$100 million (as adjusted) or greater but less than \$500 million (as adjusted)	\$125,000
\$500 million or greater (as adjusted)	\$280,000

For current thresholds and fee information, see the [PNO website](#).

**Amount Paid**

Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges.

**Payer Identification**

Provide the payer's name and 9-digit Taxpayer Identification Number (TIN). If the payer is a natural person with no TIN, provide the natural person's social security number.

**Method of Payment**

The preferred method of payment is by electronic wire transfer (EWT). For EWT payments, provide the EWT confirmation number and the name of the financial institution from which the EWT is being sent. If the EWT confirmation number is not available at the time of filing, provide this information to the PNO within two business days of filing.

In order for the FTC to track payment, the payer must provide information required by the Fedwire Instructions to the financial institution initiating the EWT. A template of the Fedwire Instructions is available at the [PNO website](#) on the [Filing Fee Information](#) page.

There are now specific, limited criteria for paying by certified check. Please see the [Filing Fee Information](#) page for details.

**Corrective Filings**

Put an X in the appropriate box to indicate whether the notification is a corrective filing (i.e., an acquisition that has already taken place without filing, in violation of the statute). See [Procedures for Submitting Post-Consummation Filings](#) for more information on how to proceed in the case of a corrective filing.

**Cash Tender Offer**

Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

**Bankruptcy**

Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to Section 363(b) of the Bankruptcy Code (11 U.S.C. § 363).

**Early Termination**

Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register, as required by 15 U.S.C. § 18A(b)(2), and on the [PNO website](#). Note that if either party in any transaction requests early termination, it may be granted and published.

**Transactions Subject to International Antitrust Notification**

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority. Response to this item is voluntary.

**Index of Hyperlinks in these Instructions:**

[PNO website](https://www.ftc.gov/enforcement/premerger-notification-program): <https://www.ftc.gov/enforcement/premerger-notification-program>

[Statute, Rules and Formal Interpretations](https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations): <https://www.ftc.gov/enforcement/premerger-notification-program/statute-rules-formal-interpretations>

[HSR Resources](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources>

[Current Filing Thresholds](https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds): <https://www.ftc.gov/enforcement/premerger-notification-program/current-thresholds>

[Online Style Sheet for the Form](https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet): <https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions/style-sheet>

[Online Tips for the Form](https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf): [https://www.ftc.gov/system/files/attachments/form-instructions/hsr\\_form\\_tip\\_sheet\\_1.0.5.pdf](https://www.ftc.gov/system/files/attachments/form-instructions/hsr_form_tip_sheet_1.0.5.pdf)

[Filing Fee Information](https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information): <https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>

[Procedures for Submitting Post-Consummation Filings](https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations): <https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations>

[Online Tips for Item 4\(c\)](https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf): <https://www.ftc.gov/sites/default/files/attachments/hsr-resources/4ctipsheet.pdf>

[Online Tips for Item 4\(d\)](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-guidance-item-4d>

[Online Tips for Item 5](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/reporting-revenues-item-5>

[Online Tips for Item 6](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-6-hsr-form>

[Online Tips for Item 7](https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form): <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/tips-completing-item-7-hsr-form>

## ITEM 1

**Item 1(a)**

Provide the name, headquarters address and website (if one exists) of the person filing notification. A person includes associates, but not every person will have associates. In the case of a person with associates, the person filing is the entity that manages the associates ("managing entity") as defined by § 801.1(d)(2). (See § 801.1(a)(1) and § 801.1(d)(2)).

**Item 1(b)**

Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2).

**Item 1(c)**

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, or other (specify). If the person is a managing entity, indicate the UPE making the acquisition. Indicate if a UPE is filing on behalf of the managing entity. (See § 801.1 and § 801.1(d)(2)).

**Item 1(d)**

Put an X in the appropriate box to indicate whether data furnished in Item 5 is by calendar year or fiscal year. If fiscal year, specify the time period.

**Item 1(e)**

Put an X in the appropriate box to indicate if the Form is being filed on behalf of the UPE by another entity within the same person authorized by it to file notification on its behalf pursuant to § 803.2(a), or if the Form is being filed pursuant to § 803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the filing person named in Item 1(a) of the Form.

**Item 1(f)**

For the acquiring person, if an entity other than the UPE listed in Item 1(a) is making the acquisition, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

For the acquired person, if the assets, voting securities or non-corporate interests of an entity other than the UPE listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held directly or indirectly by the person named in Item 1(a) above.

**Item 1(g)**

Provide the name and title, firm name, address, telephone number, and e-mail address of the primary and secondary individuals to contact regarding the Form. A second contact person is required. (See § 803.20(b)(2)(ii)).

**Item 1(h)**

Foreign filing persons must provide the name, firm name, address, telephone number, and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See § 803.20(b)(2)(iii)).

Note: The Form has fields for fax numbers in Item 1. Providing fax numbers is no longer necessary. The fields will be deleted during the next update of the HSR Form.

END OF ITEM 1

## ITEM 2

**Item 2(a)**

Provide the names of all UPEs of acquiring and acquired persons that are parties to the transaction, whether or not they are required to file notification. If a person is not required to file, check the non-reportable box.

**Item 2(b)**

Put an X in all the boxes that apply to the transaction.

**Item 2(c)**

**This item should only be completed by the acquiring person where voting securities are being acquired.** If more than voting securities are being acquired, respond to this item only regarding voting securities. Put an X in the box to indicate the highest applicable threshold for which notification is being filed: \$50 million (as adjusted), \$100 million (as adjusted), \$500 million (as adjusted), 25% (if the value of voting securities to be held is greater than \$1 billion, as adjusted), or 50%. (See § 801.1(h)).

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities. For instance, an acquisition of 100% of the voting securities of an issuer, valued in excess of \$500 million (as adjusted) would cross the 50% notification threshold, not the \$500 million (as adjusted) threshold.

**Item 2(d)**

Provide the requested information on assets, voting securities and non-corporate interests. If a combination of assets, voting securities and/or non-corporate interests are being acquired and allocation is not possible, note such information in an endnote.

For determining percentage of voting securities, evaluate total voting power per § 801.12.

For determining percentage of non-corporate interests, evaluate the economic interests per § 801.1(b)(1)(i).

**Item 2(d)(i)**

State the value of voting securities already held. (See § 801.10).

**Item 2(d)(ii)**

State the percentage of voting securities already held. (See § 801.12).

**Item 2(d)(iii)**

State the total value of voting securities to be held as a result of the acquisition. (See § 801.10).

**Item 2(d)(iv)**

State the total percentage of voting securities to be held as a result of the acquisition. (See § 801.12).

**Item 2(d)(v)**

State the value of non-corporate interests already held. (See § 801.10).

**Item 2(d)(vi)**

State the percentage of non-corporate interests already held. (See § 801.1(b)(1)(i)).

**Item 2(d)(vii)**

State the total value of non-corporate interests to be held as a result of the acquisition. (See § 801.10).

## ITEM 2 cont.

**Item 2(d)(viii)**

State the total percentage of non-corporate interests to be held as a result of the acquisition. (See §§ 801.10 and 801.1(b)(1)(ii)).

**Item 2(d)(ix)**

State the value of assets to be held as a result of the acquisition. (See § 801.10).

**Item 2(d)(x)**

State the aggregate total value of assets, voting securities and non-corporate interests of the acquired person to be held as a result of the acquisition. (See §§ 801.10, 801.12, 801.13 and 801.14).

## END OF ITEM 2

**Most Common Mistakes When Completing the HSR Form**

- Noncompliant affidavit
- Missing contact information in Item 1(g)
- Failure to describe target in Item 3(a)
- Incomplete privilege log
- Failure to properly identify authors and recipients of Item 4c/4d documents
- Failure to properly round revenues in Item 5 to nearest tenth of a million and failure to list in ascending order
- Failure to provide required geographic information (e.g., state, county, and city or town) in Item 7(c)(iv)(b)
- Failure to provide the total number of states and territories in response to Item 7(c)

## ITEM 3

**Item 3(a)**

At the top of Item 3(a), list the name and mailing address of each acquiring and acquired person, and acquiring and acquired entity, that are party to the transaction whether or not required to file notification. It is not necessary to list every subsidiary wholly-owned owned by an acquired entity.

In the Transaction Description section, briefly describe the transaction, indicating whether assets, voting securities or non-corporate interests (or some combination) are to be acquired. Describe the business operation(s) being acquired. If assets, describe the assets and whether they comprise a business operation. Also, indicate what consideration will be received by each party and the scheduled consummation date of the transaction.

If any attached transaction documents use coded names to refer to the parties, please provide an index identifying the codes.

If there are additional filings, such as shareholder backside filings, associated with the transaction, identify those. Also, identify any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Part 802.

**Item 3(b)**

Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose assets, voting securities or non-corporate interests are to be acquired. Also furnish agreements not to compete and other agreements between the parties. Do not submit schedules and the like unless they contain agreements not to compete, other agreements between the parties, or other important terms of the transaction. For purposes of Item 3(b), responsive documents must be submitted; identifying an internet address or providing a link is not sufficient.

Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while agreements not to compete may be provided in draft form if that is the most recent version.

If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement, if one exists.

Note that transactions subject to § 801.30 and bankruptcies under 11 U.S.C. § 363 do not require an executed agreement or letter of intent. For bankruptcies, provide the order from the bankruptcy court.

## END OF ITEM 3



**ITEM 4****Item 4(a)**

**Acquiring persons:** Provide the names of all entities within the person filing notification, including all UPEs, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity. Responses must be organized by UPE and entity within each UPE.

**Acquired persons:** provide the names of all entities within the selling UPE, including the UPE, that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission, and provide the Central Index Key (CIK) number for each entity.

**Item 4(b)**

**Acquiring persons:** Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the person filing notification. The acquiring person should also provide the most recent reports of the acquiring entity(s) and any controlled entity whose dollar revenues contribute to an overlap reported in Item 7. Responses must be organized by UPE and by entity within each UPE. If some of the UPEs or entities do not prepare separate financial statements, explain how their financial information is consolidated in the financial information being submitted.

**Acquired persons:** Provide the most recent annual reports and/or annual audit reports (or, if audited is unavailable, unaudited) of the selling UPE. The acquired person should also provide the most recent reports of the acquired entity(s).

**Natural persons** need only provide the most recent reports for the highest level entity(s) they control. Do not provide personal balance sheets or tax returns.

If the most recent reports do not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Note that the person filing notification may incorporate a document by reference to an internet address directly linking to the document. (See § 803.2(e)).

**Items 4(c) and 4(d)**

For each document responsive to Items 4(c) and 4(d), provide the:

- 1) document's title;
- 2) date of preparation; and
- 3) name and title of each individual who prepared the document.

If a specific date is not available, indicate the month and year the document was prepared.

If a large group of people prepared the document, list all the authors and their titles, identifying the principal authors.

Alternatively, it is acceptable to indicate that the document was prepared under the supervision of the lead author and to provide the name and title of that author. If a third party prepared the document, the date of preparation and the name of the third party will suffice.

**Numbering**

Number each document provided in response to Items 4(c) and 4(d). Number 4(c) documents 4(c)-1, 4(c)-2, 4(c)-3, etc. Likewise, number 4(d) documents 4(d)-1, 4(d)-2, 4(d)-3, etc., regardless of the three sub-categories within Item 4(d). If providing only one document, identify it as 4(c)-1 or 4(d)-1.

When submitting a document responsive to both 4(c) and 4(d), list it only once, under 4(c) or 4(d). If a document is responsive to both 4(c) and 4(d), do not cross-reference.

**Privilege**

Note that if the filing person withholds or redacts portions of any document responsive to Items 4(c) and 4(d) based on a claim of privilege, the person must provide a statement of reasons for non-compliance (a "privilege log") detailing the claim of privilege for each withheld or redacted document. (See § 803.3(d)).

For each document, include the:

- 1) title of the document;
- 2) its author;
- 3) author's title/position;
- 4) addressee;
- 5) addressee's title/position;
- 6) date;
- 7) subject matter;
- 8) all recipients of the original and any copies;
- 9) recipients' titles/positions;
- 10) document's present location; and
- 11) who has control over it.

Additionally, the filing person must state the factual basis supporting the privilege claim in sufficient detail to enable staff to assess the validity of the claim for each document without disclosing the protected information.

If a privileged document was circulated to a group, such as the Board or an investment committee, the name of the group is sufficient, but the filing person should be prepared to disclose the names and titles/positions of the individual group members, if requested. If the claim of privilege is based on advice from inside and/or outside counsel, the name of the inside and/or outside counsel providing the advice (and the law firm, if applicable) must be provided. If several lawyers participated in providing advice, identifying lead counsel is sufficient. In identifying who controls a document, the name of the law firm is sufficient.

When creating a privilege log, use a separate numbering system for withheld documents, such as P-1, P-2, etc. Redacted documents should also be listed in a separate log that complies with § 803.3(d).

**Item 4(c)**

Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets,

## ITEM 4 cont.

potential for sales growth or expansion into product or geographic markets.

**Item 4(d)****Item 4(d)(i)**

Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

**Item 4(d)(ii)**

Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the UPE of the acquiring or acquired person or of the acquiring or acquired entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

**Item 4(d)(iii)**

Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

## END OF ITEM 4

**Tip for Item 4**

If there is insufficient room on the Form for a response, attach "additional pages" behind that item on the Form. (See Responses on page II).

[Online Tips for Item 4\(c\)](#)

[Online Tips for Item 4\(d\)](#)

## ITEMS 5 THROUGH 7

**Limited response for acquired person.** For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of:

- 1) assets, to the assets to be acquired;
- 2) voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer; and/or
- 3) non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s).

A person filing as both acquiring and acquired persons may be required to provide a separate response to Items 5 through 7 in each capacity so that it can properly limit its response as an acquired person. (See §§ 803.2(b) and (c)).

## ITEM 5

This item requests information regarding dollar revenues. (See NAICS and NAPCS Data section on page II). All persons must submit all dollar revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), filers must also submit revenue by 10-digit NAPCS code. Concordance tables between 2012 10-digit NAICS codes and 10-digit 2017 NAPCS codes are available at: <https://www.census.gov/programs-surveys/economic-census/guidance/understanding-napcs.html>.

Responses must be organized by UPE and entity within each UPE. List all NAICS and NAPCS codes in ascending order.

Acquiring persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time the Form is prepared. Acquired persons filing notification should include the total dollar revenues for all entities included within the acquired entity at the time the Form is prepared. If no dollar revenues are reported, check the "None" box and provide a brief explanation.

**Item 5(a)**

Provide 6-digit NAICS industry data concerning the aggregate U.S. operations of the person filing notification for the most recent year in all NAICS Sectors in which the person engaged. If the dollar revenues for a non-manufacturing NAICS code totaled less than one million dollars in the most recent year, that code may be omitted from Item 5(a).

Additionally, provide 10-digit NAPCS product code data for each product code within all manufacturing NAICS Sectors (31-33) in which the person engaged in the U.S., including dollar revenues for each product manufactured outside the U.S. but sold into the U.S. Sales of any manufactured product should be reported in a manufacturing code, even if sold through a separate warehouse or retail establishment.

If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS codes and 10-digit NAPCS codes may be provided.

Check the Overlap box for every 6-digit manufacturing and non-manufacturing NAICS code and every 10-digit NAPCS code in which both persons generate dollar revenues.

## ITEM 5 cont.

**Item 5(b)**

**Complete only if the acquisition is the formation of a joint venture corporation or unincorporated entity.** (See §§ 801.40 and 801.50). If the acquisition is not the formation of a joint venture, check the "Not Applicable" box.

**Item 5(b)(i)**

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

**Item 5(b)(ii)**

Describe fully the consideration that each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

**Item 5(b)(iii)**

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including its principal types of products or activities, and the geographic areas in which it will do business.

**Item 5(b)(iv)**

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAPCS product code in which it will derive dollar revenues.

## END OF ITEM 5

**Tip for Item 5**

Remember, all financial information should be expressed in millions of dollars, rounded to the nearest one-tenth of a million dollars.

**Online Tips for Item 5**

## ITEM 6

**An acquired person does not complete Item 6 if the transaction involves only the acquisition of assets.** If the transaction involves a mix of assets along with voting securities and/or non-corporate interests, the acquired person must complete Item 6 as related to the voting securities and non-corporate interests.

**Item 6(a)**

**Subsidiaries of filing person.** List the name, city and state/country of all U.S. entities, and all foreign entities that have sales in or into the U.S., that are included within the person filing notification. Responses must be organized by UPE and by entity within each UPE. Entities with total assets of less than \$10 million may be omitted. Alternatively, the filing person may report all entities within it.

**Item 6(b)**

**Minority shareholders.** For the acquired entity(s) and, for the acquiring person, the managing entity, all UPEs, and the acquiring entity(s) or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each shareholder that holds 5% or more but less than 50% of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person. Responses must be organized by UPE and entity within each UPE. (See § 801.1(c))

For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.

**Item 6(c)**

**Minority holdings of filing person.** If the person filing notification holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, list the unincorporated entity and the percentage of non-corporate interests held.

The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquiring person may rely on its regularly prepared financials that its investments, provided the financials are no more than three months old. Responses must be organized by UPE and by entity within each UPE.

The acquired person should limit its response, based on its knowledge or belief, to entities that derive dollar revenues in the same 6-digit NAICS industry code as the acquiring person.

If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c), it is permissible for the acquiring person to list all entities in which it or its associate(s) holds 5% or more but less than 50% of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings in those entities that have total assets of less than \$10 million may be omitted.

## END OF ITEM 6

**Tip for Item 6(c)**

Remember, if NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed.

**Online Tips for Item 6****ITEM 7**

If, to the knowledge or belief of the person filing notification, the acquiring person derived any amount of dollar revenues (even if omitted from Item 5) in the most recent year from operations:

- 1) in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year; or
- 2) in which a joint venture corporation or unincorporated entity will derive dollar revenues;

then for each such 6-digit NAICS industry code follow the instructions below for this section.

Note that if the acquired entity is a joint venture, the only overlaps that should be reported are those between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture.

Responses must be organized by UPE and by entity within each UPE.

**Item 7(a)****Industry Code Overlap Information**

Provide the 6-digit NAICS industry code and description for the industry.

**Item 7(b)****Geographic Market Information**

Use the 2-digit postal codes for states and territories and provide the total number of states and territories at the end of the response.

Note that except in the case of those NAICS industries in the Sectors and Subsectors mentioned in Item 7(c)(iv)(b), the person filing notification may respond with the word "national" if business is conducted in all 50 states.

**Item 7(b)(i)****NAICS Sectors 31-33**

For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a), list the relevant geographic information in which, to the knowledge or belief of the person filing the notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form (whether they are sold by the person filing notification or by others to whom such products have been sold or resold). Except for industries covered by Item 7(c)(iv)(b), the relevant geographic information is all states or, if desired, portions thereof.

**Item 7(b)(ii)****NAICS Sector 42**

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a), list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

**Item 7(b)(iii)****NAICS Industry Group 5241**

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a), list the state(s) in which the person filing notification is licensed to write insurance.

## ITEM 7 cont.

## Item 7(b)(iv)(a)

Other NAICS Sectors

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 11 agriculture, forestry, fishing and hunting
- 21 mining
- 22 utilities
- 23 construction
- 48-49 transportation and warehousing
- 511 publishing industries
- 515 broadcasting
- 517 telecommunications
- 71 arts, entertainment and recreation

## Item 7(b)(iv)(b)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, provide the address, arranged by state, county and city or town, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

- 2123 nonmetallic mineral mining and quarrying
- 32512 industrial gases
- 32732 concrete
- 32733 concrete products
- 44-45 retail trade, except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores)
- 512 motion picture and sound recording industries
- 521 monetary authorities - central bank
- 522 credit intermediation and related activities
- 532 rental and leasing services
- 62 health care and social assistance
- 72 accommodations and food services, except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses)
- 811 repair and maintenance, except 8114 (personal and household goods repair and maintenance)
- 812 personal and laundry services

## Item 7(b)(iv)(c)

For each 6-digit NAICS industry code listed in item 7(a) within the NAICS Sectors or Subsectors below, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

- 442 furniture and home furnishings stores
- 443 electronics and appliance stores
- 516 internet publishing & broadcasting
- 518 internet service providers
- 519 other information services
- 523 securities, commodity contracts and other financial investments and related activities
- 5242 insurance agencies and brokerages, and other insurance related activities
- 525 funds, trusts and other financial vehicles
- 53 real estate and rental and leasing
- 54 professional, scientific and technical services
- 55 management of companies and enterprises

- 56 administrative and support and waste management and remediation services
- 61 educational services
- 7212 recreational vehicle parks and recreational camps
- 7213 rooming and boarding houses
- 813 religious, grantmaking, civic, professional, and similar organizations
- 8114 personal and household goods repair and maintenance

END OF ITEM 7

[Online Tips for Item 7](#)

## ITEM 8

This item should only be completed by the acquiring person. Determine each 6-digit NAICS industry code listed in Item 7(a), in which the acquiring person derived dollar revenues of \$1 million or more in the most recent year and in which either:

- 1) the acquired entity derived dollar revenues of \$1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive dollar revenues of \$1 million or more); or
- 2) in the case of acquired assets, to which dollar revenues of \$1 million or more were attributable in the most recent year.

For each such 6-digit NAICS industry code, list all acquisitions of entities or assets deriving dollar revenues in that 6-digit NAICS industry code made by the acquiring person in the five years prior to the date of the instant filing, even if the transaction was non-reportable. List only acquisitions of 50% or more of the voting securities of an issuer or 50% or more of non-corporate interests of an unincorporated entity that had annual net sales or total assets greater than \$10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

This item pertains only to acquisitions of U.S. entities/assets and foreign entities/assets with sales in or into the U.S., i.e., with dollar revenues that would be reported in Item 5.

For each such acquisition, supply:

- 1) the 6-digit NAICS industry code (by number and description) identified above in which the acquired entity derived dollar revenues;
- 2) the name of the entity from which the assets, voting securities or non-corporate interests were acquired;
- 3) the headquarters address of that entity prior to the acquisition;
- 4) whether assets, voting securities or non-corporate interests were acquired; and
- 5) the consummation date of the acquisition.

Responses must be organized by UPE and by each entity within each UPE.

## END OF ITEM 8

## CERTIFICATION

See § 803.6 for requirements.

The certification must be notarized or use the language found in 28 U.S.C. § 1746 relating to unsworn declarations under penalty of perjury.

## PRIVACY ACT STATEMENT

Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. § 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to the amount listed in 16 C.F.R. §1.98(a) per day.

We also may be unable to process the Form unless you provide all of the requested information.

## DISCLOSURE NOTICE

Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premier Notification Office  
Federal Trade Commission, Room #5301  
400 7th Street, S.W.  
Washington, D.C. 20024

and

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Washington, D.C. 20503

Under the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The operative OMB control number, 3084-0005, appears within the Notification and Report Form and these Instructions.

## END OF FORM INSTRUCTION

## BILLING CODE 6750-01-C

By direction of the Commission,  
Commissioner Chopra and Commissioner  
Slaughter dissenting.

**April J. Tabor,**  
*Acting Secretary.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

Statement of Commissioner Noah  
Joshua Phillips

September 18, 2020

Today, the Federal Trade Commission (the "Commission") voted to publish for public comment a Notice of Proposed Rulemaking ("NPRM") and an Advance Notice of Proposed Rulemaking ("ANPRM"), both relating to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act")

or "HSR").<sup>1</sup> The NPRM proposes two non-ministerial changes: (1) Broadening the filing requirement to include holdings of affiliates

<sup>1</sup> The HSR Act established the federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. The parties may not close their deal until the waiting period outlined in the HSR Act has elapsed, or the government has granted early termination of the waiting period. Under this framework, the government may sue to block those deals it determines may violate the antitrust laws before the deals have been consummated.

of the acquirer, and (2) the creation of a new exemption, discussed below. The ANPRM poses a series of questions around several topics that may inform future efforts to update and refine the rules.

I write today to discuss the proposed exemption for *de minimis* acquisitions of voting securities, and to explain why I voted in favor of seeking comment on this proposal. In brief, the proposed exemption will carve out from the HSR Act's reporting requirements acquisitions of voting securities that leave the acquirer holding 10% or less of the issuer's total voting stock,<sup>2</sup> subject to several limitations.

The HSR Act was enacted to give the Commission and the Antitrust Division of the Department of Justice (the "Division") (collectively, the "Agencies") advance notice of mergers and acquisitions so that the Agencies could challenge anticompetitive transactions before they were consummated. Among other things, the system it established often allows the government and companies to avoid the more difficult process of "unscrambling the eggs"—separating, say, two illegally merged companies.

That is a good thing; but, like most good things, it comes at a cost. Investors must notify the target of the acquisition, wait as long as a month, and pay a fee of \$45,000 to \$280,000. That can make simple transactions much more costly, and sometimes not worth doing. The target may publicize the deal, driving up the price. Management may take defensive measures. The waiting period may change the viability of the transaction. The fees are substantial. All of that leads investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial improvement—and, ultimately, competition. The HSR Act provides an exemption for the acquisition of 10% or less of voting securities made "solely for the purpose of investment".<sup>3</sup> But the large grey area between what the investment-only exemption clearly permits shareholders to do (e.g., just hold on to their stock) and what it clearly forbids (e.g., proposing corporate action requiring shareholder approval)<sup>4</sup> encompasses interactions with management that play a critical role in keeping corporations accountable and stoking competition.

Today, in effect, HSR operates as a tax on activities that can often be beneficial. But it is not supposed to be a tax, whether on shareholder input or mergers and acquisitions activity. It also is not supposed

to be an early-warning system for tender offers and corporate takeovers—for that we have a number of laws at the federal and state level.<sup>5</sup> And it is not supposed to be a monitoring system for equity investments generally. To the extent possible, it should not be any of those things. It should effectuate its purpose: Helping the Agencies spot transactions likely to violate the antitrust laws, so that we can stop or remedy them prophylactically.

That is why Congress gave the Commission, with the concurrence of the Division's Assistant Attorney General, the ability to exempt from premerger notification those "acquisitions, transfers, or transactions which are not likely to violate the antitrust laws".<sup>6</sup> The proposed *de minimis* exemption covers transactions that we know are not likely to do so. The HSR Act was enacted in 1976, and 44 years of experience since then have taught us that acquisitions of 10% or less of a company are extremely unlikely to raise competition concerns. According to the NPRM, the Agencies have reviewed a multitude of 10%-or-less acquisitions that do not qualify for the investment-only exemption over the last four decades; and none have warranted a challenge. For example, from fiscal year 2001 to 2017, the Agencies received 1,804 10%-or-less filings. What do these real-world data show? Only a handful of 10%-or-less acquisitions required any substantive review whatsoever, and none were challenged by the Agencies. Not one.

Thus, the proposal represents an important step in tailoring the HSR regime to its intended purpose of identifying and addressing competition issues, while simultaneously eliminating unnecessary regulatory burdens on beneficial investment activity that does not harm competition and, indeed, often promotes it.<sup>7</sup>

Four-plus decades of real world experience should go a long way towards allaying concerns that the proposed *de minimis* exemption will allow competitively troubling acquisitions to fly under the Agencies' radar. But scholarship in recent years has raised the question whether common ownership of substantial but non-controlling interests in competing companies (often by large, diversified, asset managers) has an anticompetitive effect. That debate, including its implications for antitrust policy, continues.<sup>8</sup> For now, the proposed *de minimis* exemption errs on the side of caution, excluding from its scope transactions that might implicate this

concern. (To the extent that the feared competition harms of common ownership result from the passivity of the largest shareholders, the *de minimis* exemption may help mitigate the concern by facilitating the smaller, more active, voices.<sup>9</sup>) It also does not apply to other transactions where a competitively significant relationship between the issuer of the voting securities and the acquirer claiming the exemption exists. What it does reach are transactions that, in over 40 years, have raised no competition issues.

In 1988, following complaints by investors about the negative impact HSR was having on their small stock purchases and a study that showed the Agencies had never challenged one as violating Section 7 of the Clayton Act, the FTC considered whether to exempt acquisitions of 10% or less of a company's voting securities from HSR reporting. Those problems are still with us, and the data today show the same thing. Transactions of 10% or less are just as unlikely to lessen competition today as they were 30 years ago; and small stock purchases have almost never needed even a second look. Those decades of experience speak volumes, and what they tell us is that, at great cost, the benefits of continuing to tax *de minimis* stock purchases are virtually nonexistent. We can change that.

## Statement of Commissioner Rohit Chopra

September 21, 2020

### Summary

- Premerger notification is a critical data source, but the Commission faces enormous information gaps when seeking to detect and halt anticompetitive transactions.
- While the proposed rule closes a loophole when it comes to investment manager holdings, the proposed approach to exempt a wide swath of minority stakes is concerning and adds to existing information gaps.
- The Commission needs to update the treatment of certain debt transactions when determining deal size for the purpose of premerger notification. The current approach allows dealmakers to structure anticompetitive transactions in ways that can go unreported.

In September 1976, Congress gave the Federal Trade Commission an important tool enabling it to block harmful mergers. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires prior notification to the antitrust agencies in advance of closing certain mergers and acquisitions.<sup>1</sup>

Prior to the HSR Act's enactment, companies could quickly "scramble the eggs" of assets and operations, or even shut down

<sup>2</sup> The 10% threshold applies to the acquirer's aggregate holdings of the issuer's voting securities. Therefore, the *de minimis* exemption does not permit those claiming it to avoid HSR review by acquiring control of an entity via a "creeping" series of acquisitions, each involving less than 10% of the firm's voting securities. Once an acquirer comes to own 10% of an issuer's voting securities, it may no longer avail itself of the exemption.

<sup>3</sup> 15 U.S.C. 18a(c)(9).

<sup>4</sup> According to this definition, "[v]oting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 CFR 801.1(i)(1) (2020).

<sup>5</sup> See, e.g., Williams Act, 15 U.S.C. 78m(d)–(e), 78n(d)–(f).

<sup>6</sup> 15 U.S.C. 18a(d)(2)(B).

<sup>7</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Keynote Address at the Global Antitrust Economics Conference (May 31, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1524321/phillips\\_-\\_competing\\_for\\_companies\\_5-31-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf).

<sup>8</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Taking Stock: Assessing Common Ownership, Keynote Address at the Global Antitrust Economics Conference (June 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1382461/phillips\\_-\\_taking\\_stock\\_6-1-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf).

<sup>9</sup> See Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Opening Remarks at FTC Hearing #8: Competition and Consumer Protection in the 21st Century: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1454690/phillips\\_-\\_ftc\\_hearing\\_8\\_opening\\_remarks\\_12-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1454690/phillips_-_ftc_hearing_8_opening_remarks_12-6-18.pdf).

<sup>1</sup> Clayton Act section 7A, 15 U.S.C. 18a.

functions. This made it extremely difficult for the antitrust agencies to remedy competitive harms through divestitures of assets. Years of protracted litigation to stop further damage and distortions were often the result.<sup>2</sup>

The HSR Act fundamentally changed the process of merger review by giving the antitrust agencies time to halt anticompetitive transactions before these deals closed. Today, the FTC focuses a substantial portion of its competition mission on investigating and challenging mergers reported under the HSR Act. Importantly, only a small set of transactions—the ones with the highest valuations—are subject to premerger notification. The HSR Act specifies the valuation threshold, currently set at \$94 million, which is typically adjusted upward each year. Since there are many ways to determine a deal's valuation, Congress gave the FTC broad authority to implement rules so that buyers know if they need to report their transactions and what they are required to submit with their filing. The Commission can also exempt classes of transactions and tailor filing requirements.

While premerger notification filings provide the Commission with certain nonpublic information,<sup>3</sup> gathering and analyzing market intelligence on transaction activity and competitive dynamics is a major challenge. We need to continuously assess how we can enhance our market monitoring techniques and evolve our analytical approaches.

Today, the Commission is soliciting comment on two rulemaking notices regarding our policies to implement the HSR Act's premerger notification protocols. The first publication, a Notice of Proposed Rulemaking, proposes specific rules and exemptions. While some of the proposals are helpful improvements, I respectfully disagree with our approach to exempting a broad swath of transactions from reporting. The second publication, an Advance Notice of Proposed Rulemaking, requests comment on a broad range of topics to set the stage for modernizing the premerger notification program to align with market realities. I support soliciting input to rethink our approach. I discuss each of these notices below.

### Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking outlines specific amendments that the Commission is proposing to the HSR rules. The aggregation and exemption provisions are particularly noteworthy. The aggregation provisions are worthwhile, since they close a loophole and align with market realities. However, I am concerned about the exemption provisions, since we will completely lose visibility into a large set of transactions involving non-controlling stakes.

<sup>2</sup> For example, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), it took seventeen years of litigation before a divestiture finally took place.

<sup>3</sup> I agree with Commissioner Slaughter that current filing requirements, including for minority stakes, can have the beneficial effect of deterring certain anticompetitive transactions.

### Aggregation Provisions

The financial services industry is well known for using an alphabet soup of small entities, like shell companies, partnerships, and other investment vehicles, to structure deals. Even though they may be under common management by the same person or group, like a private equity fund or a hedge fund, these smaller legal entities are all treated separately under the existing rules.

The proposed aggregation provisions will help to prevent acquirers from splitting up transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

### Exemption Provisions

By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements—it is a total exemption, so the agency will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.<sup>4</sup>

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal—or even with a contractual option—of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

<sup>4</sup> The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. See Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), <https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10>.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking notice does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

### Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this document.

### Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.<sup>5</sup> The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size

<sup>5</sup> Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, "catch and kill" acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, "roll-ups," an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. See Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577783/p110014hsrannualreportchoprastatement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf).



thresholds on an annual basis, the number of HSR-reportable transactions has *decreased*.

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.<sup>6</sup>

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that “roll ups” are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemaking notices, so that our approach reflects market realities.

### Statement of Commissioner Rebecca Kelly Slaughter

September 18, 2020

Today, the Commission voted to advance two proposals with respect to our HSR premerger notification rules. I support the broad solicitation of input in the Advance Notice of Proposed Rulemaking and the proposed aggregation provisions in the Notice of Proposed Rulemaking (NPRM). But I oppose provisions in the NPRM that would broaden the categories of transactions exempt from filing HSR notice.

I share the concerns Commissioner Chopra articulated, and write separately only to add a few points. I share the general view that we should do what we can to right-size our HSR requirements. We generally benefit when the universe of transactions that are required to file under HSR matches as closely as possible the universe of transactions that are competitively problematic. Too many filings on non-problematic transactions are an unnecessary resource drain for the agency, and too few filings on problematic transactions clearly would allow anticompetitive acquisitions to proceed unnoticed and unchallenged. I also generally agree that transaction size (the main trigger for HSR filing under current law) is not the only or even necessarily the best indicator of competitive significance.

However, I am concerned about the expanded *de minimis* exemptions in the proposal released today for two reasons: Its broadening of the black box of unseen transactions and its effect on corporate governance.

Commissioner Phillips is correct that, of the filings the agency has reviewed of sub-10% acquisitions, none have led to enforcement action. But we cannot conclude that sub-10% acquisitions could never be problematic, because we do not know if any problematic transactions were deterred from consummation for fear of disclosures that are required in a filing, nor do we know how many might fall into that category. I worry that adding exemptions broadens the category of transactions outside of the agencies’ view, and therefore share Commissioner Chopra’s preference that the agency consider something other than a full exemption.

My other concern is that expanding the *de minimis* exemptions will have profound policy effects primarily in an area outside of the FTC’s particular expertise and jurisdiction: Corporate governance. Commissioner Phillips in his statement points out the ways in which the current HSR filing requirement for non-passive acquisitions can chill investors. He notes the rules around HSR may lead “investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial improvement—and, ultimately, competition.” Although I have not seen evidence to support his conclusion about the effect on competition, the evidence we have seen, even anecdotally, supports his assertions about investor behavior. It follows, therefore, that expanding HSR exemptions may likely change investor incentives and behavior.

These changes may ultimately be a good thing as a matter of public policy, and they might not be; the concern for me is that they would effect a public policy goal outside the realm of antitrust, and I am hesitant for the FTC unilaterally to enact rules outside the scope of our primary authority. I certainly understand that the rules as they exist today have a public policy effect outside antitrust, but they are the rules that we have, and disrupting the status quo is something that should be done only after careful consideration of and in consultation with experts on corporate governance, investor behavior, and securities law and policy.

So, I welcome comments on this NPRM from those in the corporate governance and securities community, and experts on investor behavior, to help us better understand the implications of such a change—including whether it would, as Commissioner Phillips asserts, actually improve competition.

[FR Doc. 2020–21753 Filed 11–30–20; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2020–0630]

RIN 1625–AA00

### Safety Zone; Bahia de Ponce, Ponce, PR

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is proposing to establish a permanent safety zone for certain waters of the Bahia de Ponce, Ponce, Puerto Rico. This action is necessary to provide for the safety of life on these navigable waters during ship-to-ship liquefied natural gas transfer operations between liquefied gas carriers. This proposed rulemaking would prohibit persons and vessels from being in the safety zone when activated unless authorized by the Captain of the Port San Juan or a designated representative. We invite your comments on this proposed rulemaking.

**DATES:** Comments and related material must be received by the Coast Guard on or before December 31, 2020.

**ADDRESSES:** You may submit comments identified by docket number USCG–2020–0630 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this proposed rulemaking, call or email Lieutenant Natallia Lopez, Sector San Juan Prevention Department, Waterways Management Division, U.S. Coast Guard; telephone 787–729–2380, email [Natallia.M.Lopez@uscg.mil](mailto:Natallia.M.Lopez@uscg.mil).

#### SUPPLEMENTARY INFORMATION:

##### I. Table of Abbreviations

CFR Code of Federal Regulations  
COTP Captain of the Port  
DHS Department of Homeland Security  
FR Federal Register  
LG Liquefied Gas  
LNG Liquefied Natural Gas  
NPRM Notice of proposed rulemaking  
PR Puerto Rico  
§ Section  
U.S.C. United States Code

<sup>6</sup> See Healthcare Transaction Notification Requirement, WASH. STATE OFF. OF THE ATT’Y GEN. (last visited Sept. 16, 2020), <https://www.atg.wa.gov/healthcare-transactions-notification-requirement>; see also S.H.B. 1607, 66th Leg., Reg. Sess. (Wash. 2019).