Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff* v. KKR & CO. INC., KKR & CO. GP LLC, KOHLBERG KRAVIS ROBERTS & CO. L.P., KKR AMERICAS FUND XII L.P., KKR AMERICAS FUND XXII (KESTREL) L.P., KKR AMERICAS FUND XII (THRIVE) L.P., KKR APPLE AGGREGATOR L.P., KKR CHORD IP AGGREGATOR L.P., KKR CORE II HOLDING COMPANY LLC, KKR DCIF LOWER ENTITY III SCSP, KKR GLOBAL IMPACT FUND SCSP, KKR GLOBAL INFRASTRUCTURE INVESTORS IV USD (APPLE) L.P., KKR NORTH AMERICA FUND CIII SCSP, and KKR OBSIDIAN AGGREGATOR LP, *Defendants.*	Case No. 1:25-cv-343 [rel. 1:25-cv-448]

BRIEF OF *AMICUS CURIAE* AMERICAN INVESTMENT COUNCIL IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Investment Council ("AIC") is an advocacy and research organization dedicated to the promotion of responsible long-term investment by the private equity and credit investors who comprise its membership. Acting on this mission, AIC improves access to capital, creates jobs, expands retirement security, generates innovation, and spurs economic growth throughout the United States.

AIC's mission is an important one. In communities across America, private equity and credit investors support millions of jobs, help thousands of small businesses, and deliver the strongest returns of any investment vehicle for public pensions. AIC's members are united by their commitment to growing and strengthening the businesses in which they invest, most of which are small. In 2024, 85% of all private equity investments went to support small businesses with fewer than 500 employees. These investments help local companies hire new employees, improve their operations, and grow.

AIC has a significant interest in this case because mergers and acquisitions are a regular feature of the private equity business model. Although many of their transactions involve small businesses and very few raise competitive concerns, AIC's members regularly enter into mergers, acquisitions, or other transactions that meet or exceed the size thresholds for filing a premerger notification form under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). AIC's members therefore regularly submit notification filings under the HSR Act.

In the Complaint, and more clearly in the Opposition to the Motion to Dismiss, the Antitrust Division of the Department of Justice ("DOJ" or "Antitrust Division") advances a novel interpretation of the HSR Act that would expose parties who substantially complied with the statute's notification requirement to the threat of significant penalties. The Antitrust Division's

interpretation departs from long-established practice in place for more than 45 years and, if endorsed by this Court, would dramatically expand the time and expense of preparing HSR filings for thousands of reportable transactions each year. AIC thus presents this brief to provide the Court with information on the impact that the HSR Act's premerger notification requirement has on private equity firms and the harmful consequences of allowing the Antitrust Division's strict liability theory to proceed.

INTRODUCTION

In opposing the KKR Defendants' motion to dismiss, the Antitrust Division has advanced an interpretation of the HSR Act that departs from settled practice and would have far-reaching implications for businesses like AIC's members. To comply with the HSR Act, AIC's members file a premerger notification form ("HSR Form") with the Federal Trade Commission ("FTC") and the DOJ's Antitrust Division before closing reportable transactions. Under the HSR Act, a company must provide notice of certain basic details of the transaction to allow antitrust authorities to determine whether to seek more information through a Second Request. The purpose of this premerger notification is to enable the agencies to prevent anticompetitive "midnight mergers" while minimizing the burden on critical business capital transfers.

Most transactions do not present any colorable competitive concerns. Historically, according to the FTC, 98% of premerger filings have not warranted further scrutiny.[1] Congress thus struck a careful balance in the HSR Act by imposing a small, but manageable, regulatory tax on transactions through the premerger notification requirement.[2] Congress deemed this modest

[1] Hart-Scott-Rodino Annual Report, Fiscal Year 2023, App'x A, https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf.

[2] U.S. Chamber of Com., HSR/Merger Guides Practitioner Survey (Sept. 2023), https://www.uschamber.com/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process, [hereinafter "U.S. Chamber Practitioner Survey"] (discussing compliance costs with premerger notification requirement) . In November 2024, the FTC finalized a new rule that dramatically expands the amount of documentary material and information

burden appropriate to ensure that the two antitrust agencies have the chance to investigate, and if necessary, sue to block a transaction before the parties have integrated their assets and management and made the merged company a fait accompli. But Congress did not intend to require litigation-like production through the notification requirement, much less to impose on companies the burden of producing under the threat of potentially gigantic civil penalties.

To that end, for decades, regulators and businesses, including AIC's members, have understood that the premerger notification submissions must substantially comply with the HSR Form's instructions by including enough information for the reviewing agencies to determine whether the proposed transaction represents one of those rare deals that warrants more information through a Second Request. The "substantial compliance" understanding of the HSR Act is consistent with the purpose of the Act, the FTC's own interpretations of the Act to this point, its implementing regulations, and the government's prior attempts to seek civil penalties against parties who had allegedly failed to comply with the Act.

In opposition to the motion to dismiss in this case, DOJ has advanced a novel reading of the HSR Act's requirements that would turn this well-established understanding on its head and transform Congress's modest premerger notification regime into a trap for potentially enormous legal liability. In its view, merging parties must conduct an exhaustive search for—and provide the government with—literally every document that might be considered responsive to the HSR Form's call for "all studies, surveys, analyses and reports" prepared by or for officers and directors and touching on competitive concerns. Substantial compliance is no longer enough, and nothing

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that must be included in the initial premerger notification form for all HSR-reportable transactions. *See Premerger Notification; Reporting and Waiting Period Requirements*, 89 Fed. Reg. 89,216 (Nov. 12, 2024). AIC is currently one of several plaintiffs challenging the lawfulness of that regulation under the Administrative Procedure Act. *See Chamber of Com. et al. v. FTC*, No. 6:25-cv-00009-JDK (E.D. Tex. May 8, 2025).

short of perfect compliance can avoid massive statutory penalties. If merging parties do not meet this exacting standard—even if the merging parties have *substantially* complied with the HSR Act in good faith, even if their technical noncompliance had zero impact on notification to the antitrust agencies, and even if the deal does not even arguably present any competitive concern—they could be subject to huge fines that snowball every day that the notification form remains purportedly incomplete.

The Court should reject DOJ's attempt to re-write the HSR Act's text, implementing regulations, and history. If accepted, DOJ's view would dramatically raise compliance costs and cast a chill over the economically beneficial and procompetitive M&A activity that AIC's members engage in every day.

BACKGROUND

I. Private Equity Grows the Economy and Promotes Competition.

AIC's members play a crucial role in growing the United States economy. In 2024, private equity firms and their portfolio companies generated $2.0 trillion of gross domestic product, employed 13.3 million workers, and paid $337 billion in taxes.[3] They support companies in every sector of the American economy and fuel innovation daily. And by helping other companies compete more effectively, private equity firms ultimately benefit consumers, workers, and investors (including pension funds, charities, and other endowments) in the form of lower prices, higher wages, and stronger returns.

Private equity firms operate by pooling capital from institutional and other sophisticated investors, investing that capital in new or existing companies, and working with these companies

[3] *Economic Contribution of the US Private Equity Sector in 2024*, Am. Inv. Council 1–2, 16 (Mar. 24, 2025), https://www.investmentcouncil.org/wp-content/uploads/2025/03/EY-AIC-2024-Economic-contribution-of-the-US-private-equity-sector.pdf [hereinafter "2024 Report"].

to expand or turn around their businesses.[4] Many of these investments take the form of mergers and acquisitions that meet the threshold for reporting under the HSR Act (which is currently $126.4 million for most deals).[5] For new companies on the cusp of major growth, private equity investment can turbocharge operations and allow them to quickly reach consumers in new industries and markets. For mature businesses that are struggling to remain competitive and whose profits have stalled, private equity investment can help restore financial health and profitability. Either way, private equity provides resources and expertise to companies that need them.[6] Without private equity's capital and know-how, many young businesses would never reach scale, and many mature ones would have wound down, unable to adapt to changing technologies and business environments.

Empirical data confirms that private equity powers innovation and efficiency. Private equity backed companies, on average, report increased productivity while keeping employment constant by focusing on opportunities where they can compete most effectively.[7] Private equity ownership also tends to increase product quality and to expand the availability of products across different geographic markets.[8] And private equity firms are more likely to acquire underutilized assets and install new management to revitalize them as independent companies.[9] Longstanding

[4] *See Private Equity FAQs*, Am. Inv. Council, https://www.investmentcouncil.org/private-equity-faqs/ (last visited May 29, 2025).

[5] *See* FTC, *New HSR Thresholds and Filing Fees for 2025* (Feb. 6, 2025), https://www.ftc.gov/enforcement/competition-matters/2025/02/new-hsr-thresholds-filing-fees-2025.

[6] *See*, *e.g.*, 2024 Report at 1–3.

[7] *Id.* at 3.

[8] Cesare Fracassi et al., *Barbarians at the Store? Private Equity, Products, and Consumers*, 77 J. Fin. 1439 (June 2022).

[9] *See Diamonds in the Rough: How PE Breathes New Life Into Unloved Businesses*, Am. Inv. Council (Sept. 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/09/AIC-carveout-Report_0823.pdf.

DOJ and FTC policies have recognized and acknowledged the many procompetitive benefits that private equity provides.[10]

Private equity's benefits are felt everywhere in the economy, but particularly by consumers. Because private-equity-backed firms reduce marginal cost and increase productivity, they can reduce prices.[11] But the value they add goes well beyond lower prices—they also increase product quality, variety, and availability for consumers by launching products in new categories and expanding offerings in new geographic markets.[12] These benefits are well-recognized, including by courts. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001) ("[A] merger's primary benefit to the economy is its potential to generate efficiencies."); *St. Alphonsus Med. Ctr.–Nampa v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 789 (9th Cir. 2015) ("[A] primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

Workers—particularly small business employees—benefit too. The median private-equity-backed business is small and employs 72 workers.[13] In 2024, workers in private-equity-backed businesses collectively earned $165 billion in wages and benefits and generated $290 billion in GDP, fueling growth in their own communities.[14] Private equity is also crucial for small

[10] Kenneth Schwartz et al., *Private Equity and Competition—Comparing U.S. Agency Views to Recent Policy and Empirical Evidence*, Antitrust Mag. Online (Apr. 2023), https://www.skadden.com/-/media/files/publications/2023/04/private_equity_and_competition_comparing_us_agency_views_to_recent_policy_and_empirical_evidence.pdf?rev=2c1ff11c7354469c966d3d939cc13afb.

[11] *State of the Union: Private Equity Is Building Better Businesses Across America*, Am. Inv. Council (Feb. 7, 2023), https://www.investmentcouncil.org/state-of-the-union-private-equity-is-building-better-businesses-across-america/.

[12] Fracassi, *supra* note 8, at 1439–41.

[13] 2024 Report at 10.

[14] *Id.* at 11.

businesses in need of capital because they "generally only have access to private equity and debt markets."[15] Private equity thus enables them to compete more effectively with larger rivals, who often have access to public markets.[16]

Private equity also benefits investors, including pension funds, endowments, insurance companies, and charitable foundations. From public school teachers to first responders, many hardworking Americans depend on their pensions for a safe and secure retirement. Private equity helps provide one. Nearly 90 percent of public pension funds are invested in private equity, and these funds benefit more than 34 million American public servants and retirees.[17] Studies show that investing in private equity pays off, since private equity funds consistently yield strong returns and even outperform public markets in the long run.[18]

II. Private Equity Investments Require HSR Filings.

As noted, mergers and acquisitions are a regular feature of the successful private equity business model. Even though many transactions involve investment in small businesses and are procompetitive, many of AIC's members enter into mergers, acquisitions, or other transactions that meet or exceed the size thresholds for filing a premerger form under the HSR Act. For instance, according to *Pitchbook*, there were 2,330 U.S. private equity deals in 2024 that exceeded $100 million or more in total size, and that number is typical over the past four years.[19]

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[15] *See* Allen N. Berger & Gregory F. Udell, *The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle*, 22 J. Banking & Fin. 613, 628 (1998).

[16] *Id.*

[17] *2024 Public Pension Study*, Am. Inv. Council at 2, https://www.ohsers.org/wp-content/uploads/2024/08/AIC-2024-PE-Pension-Study.pdf. (last visited June 2, 2025).

[18] Priv. Inv. Works, *Time and Again, Private Equity Pays Off for American Pensioners*, Am. Inv. Council (July 25, 2023), https://www.privateinvestmentworks.com/2023/07/25/time-and-again-private-equity-pays-off-for-american-pensioners/.

[19] *See* Ex. A, United States Private Equity Deal Count by Size Bucket (Jan. 14, 2025), *Pitchbook*.

Pursuant to the HSR Act, the FTC has designed the "form" of the premerger notification and established the "documentary material and information" that is "necessary and appropriate" to enable FTC or DOJ to determine whether more information is necessary to evaluate a transaction. 15 U.S.C. § 18a(d)(1). Under this standard, the FTC seeks basic information sufficient to allow the reviewing antitrust agency to make a preliminary assessment of the transaction and determine whether further review is necessary. If the initial screen suggests cause for further scrutiny, then the reviewing agency may issue what is known as a Second Request: a required "submission of additional information or documentary material relevant to the proposed acquisition." *Id.* § 18a(e)(1)(A). The Second Request extends the waiting period and generally prevents merging companies from closing their transaction until 30 days after they have submitted the additional information. *Id.* § 18a(e)(2).

Under historical practice, there is a massive difference between the costs of filing a premerger notification and the costs of responding to a Second Request. A recent survey of antitrust practitioners by the U.S. Chamber of Commerce found that under existing standards, the cost of complying with the HSR Act's premerger notification requirement averages approximately $80,000.[20] By contrast, the cost of a Second Request—which typically involves millions of pages of documents—can run more than $5 million on average and take up to six months.[21]

Private equity companies are sensitive to the costs of HSR compliance and to preserving the well-established difference between the good faith requirements for a premerger notification and the sweeping document production that may be required under a Second Request. It is

[20] U.S. Chamber Practitioner Survey, *supra* note 2.

[21] *See Antitrust Modernization Comm'n Rep. & Recommendations* 163 & tbl. C (2007), https://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf [hereinafter "AMC Rep."] (citing American Bar Association, *Section of Antitrust Law, Public Comments Submitted to AMC Regarding Hart-Scott-Rodino Second Request Process*, at 4 (Dec. 7, 2005)).

therefore vitally important to AIC's members that DOJ not be permitted to expand the scope of premerger notification by expanding the penalty provisions at issue in this lawsuit and forcing merging parties to engage in Second-Request-style searches (with all their attendant costs) to avoid massive penalties.

ARGUMENT

I. Parties Satisfy the HSR Act's Premerger Notification Requirement by Submitting Materials "Necessary and Appropriate" to Evaluate a Proposed Transaction.

Congress passed the HSR Act to address the problem of "midnight mergers," where parties quickly scrambled their assets "to deny the government any opportunity to secure preliminary injunctions," making any antitrust violations extremely difficult to remedy in post-merger enforcement actions.[22] In designing the HSR Act, Congress tried to strike the "proper balance [between] the needs of effective enforcement of the law and the need to avoid burdensome notification requirements."[23] So, it structured the HSR Act's premerger notification requirement such that it would "neither deter nor impede the consummation of the vast majority of mergers and acquisitions."[24]

Accordingly, Congress crafted the initial premerger notification and Second Request process described above: If a proposed transaction meets certain threshold reporting requirements, then the merging parties must notify the government of the proposed transaction and provide certain basic information about it. *See* 15 U.S.C. § 18a(a); *id.* § 18a(d)(1). That notification

[22] H.R. Rep. No. 1373, 94th Cong., 2d Sess. 11 (1976) [hereinafter "House Report"]; *see also* S. Rep. No. 803, 94th Cong., 2d Sess. 66 (1976) [hereinafter "Senate Report"]; FTC, *Milestones in FTC history: HSR Act Launches Effective Premerger Review* (Mar. 16, 2015), https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review ("Back in the days before the HSR Act, mergers that were executed in the dark of night to avoid government intervention were referred to as 'midnight deals,' and some resulted in protracted litigation to undo the harmful effects.").

[23] House Report at 67.

[24] Senate Report at 65.

triggers a waiting period—usually 30 days—during which the government can review the premerger notification and decide to either (1) request much more detailed information about the transaction to determine whether it should be challenged under the antitrust laws, *see id.* § 18a(e), or (2) allow the waiting period to expire, clearing the way for the parties to close the deal, *see id.* § 18a(b).

Congress did not expressly define how the initial premerger notification must be made or what it must include. But it set limits on what the FTC could request. Congress directed the FTC to require that premerger notifications "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [FTC and Antitrust Division] to determine whether such acquisition may, if consummated, violate the antitrust laws." *Id.* § 18a(d)(1). It also cautioned that any rules the FTC promulgates must be "consistent with the purposes" of the HSR Act discussed above. *Id.* § 18a(d).

For more than 45 years, merging parties have satisfied the HSR Act's premerger notification requirement by substantially complying with the instructions on the HSR Form. The substantial compliance standard that has been in place for decades is fully consistent with the text and purpose of the HSR Act, which requires parties to submit only a "necessary and appropriate" amount of information to the government to enable it to conduct an initial merger clearance review. This standard does not deprive the reviewing agencies of any information needed to conduct a meaningful antitrust review either. Indeed, if the antitrust agency is unsatisfied with the information it has received and wants more, it can issue a voluntary access letter.[25] In addition, the reviewing agency may may make a Second Request under § 18a(e) to require an invasive, forensic search for documents about the proposed merger.

[25] *See* FTC, Guidance for Voluntary Submission of Documents During the Initial Waiting Period, https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/guidance-voluntary-submission-documents.

In 1978, the FTC issued rules "to carry out the purposes of the HSR Act," 16 C.F.R. §§ 801–03, and created the HSR Form that merging parties must submit to comply with the HSR Act's premerger notification requirement, 16 C.F.R. § 803 App'x A, B. Item 4 of the HSR Form calls for the submission of certain documents to help the agencies evaluate whether a proposed transaction poses antitrust concerns. Specifically, Item 4(c) requests "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, potential for sales growth or expansion into product or geographic markets." 16 C.F.R. § 803 App'x B. Item 4(d) calls for "all Confidential Information Memoranda," "all studies, surveys, analyses and reports prepared by [third party advisors such as investment bankers] . . . for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets," and "all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies." *Id.*

When the FTC introduced the HSR Form, it explained that it "must be read in conjunction with the [HSR Act] and the rules" and that it is "not intended to elicit all potentially relevant information relating to an acquisition." *Premerger Notification; Reporting and Waiting-Period Requirements,* 43 Fed. Reg. 33,450, 33,520 (July 31, 1978). Instead—just as Congress envisioned—the HSR Form was supposed to collect only "the information necessary and appropriate for an initial evaluation" of the transaction. *Id.* The FTC even specifically considered—and rejected—requiring the sort of broad forensic search apparently envisioned by DOJ's interpretation of Item 4 in this action. As the FTC explained, "the submission of a broad[] range of documents would entail searches of historical files by reporting persons . . . and could

produce too large a number of documents for purposes of effective preliminary antitrust review." *Id.* at 33,526. Hunting down and producing such marginally relevant information was unnecessary in the premerger notification process, especially since "additional documents may be sought by either agency in a request for additional information" under 15 U.S.C. § 18a(e) if needed. *Id.*

In the decades since the FTC created the HSR Form, it has consistently rejected any interpretation that would read Item 4 as requiring merging parties to produce literally "all" documents. The agency "frequently receives questions about how to identify responsive documents," and through a series of informal interpretations of its regulations "has excluded categories of documents because of their limited relevance to [its] initial review."[26] For example, merging parties do not need to include informal communications—like text messages, instant messages, chat conversations, videos, and voicemails—with the HSR Form even when they "mention . . . market shares and other 4(c) content."[27] Parties usually do not need to produce draft documents either—again, even when they evaluate or analyze the acquisition with respect to competition and would otherwise be captured by Item 4's broad language.[28] Parties do not need to include 4(c) material that relates to non-reportable portions of a transaction.[29] Nor do they need

[26] FTC, *Resetting Our Views on HSR Items 4(c) and 4(d)* (Nov. 28, 2016), https://www.ftc.gov/enforcement/competition-matters/2016/11/resetting-our-views-hsr-items-4c-4d.

[27] FTC, HSR Informal Interpretation 2007004 (July 17, 2020), https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/2007004 (instant messages); FTC, HSR Informal Interpretation 1906008 (June 26, 2019), https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1906008 (text messages); FTC, HSR Informal Interpretation 1603004 (Mar. 23, 2016), https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/1603004 (videos); FTC, HSR Informal Interpretation 0706019 (June 26, 2007), https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0706019 (voice mails).

[28] *See* FTC, Item 4(c) Tip Sheet (Nov. 28, 2016), https://www.ftc.gov/system/files/attachments/hsr-resources/4ctipsheet.pdf.

[29] *See* FTC, HSR Informal Interpretation 9905012 (May 25, 1999), https://www.ftc.gov/sites/default/files/documents/informal_interpretations/9905012-informal-interpretation/9905012.pdf.

to include regulatory filings or voluntary presentations to regulatory bodies.[30] Put differently, the FTC has made it clear that it neither wants nor needs merging parties to scour their files for every single document that would literally be responsive to a strict reading of Item 4, which means that the HSR Form requires only substantial compliance with its instructions.

As the KKR Defendants have explained, the enforcement provision of the HSR Act expressly provides that the district court may order compliance where a party "fails substantially to comply with the notification requirement under subsection (a)." 15 U.S.C. § 18a(g)(2). The Antitrust Division argues that this provision is irrelevant when it comes to the penalties that may be imposed by this Court, because § 18a(g)(1) imposes escalating daily penalties upon any person "who fails to comply with *any* provision of this action." *Id.* § 18a(g)(1) (emphasis added). It strains credulity to think that Congress intended for the Court to impose penalties on parties who "substantially . . . comply with the notification requirement," but at the same time limited the Court's power to grant equitable relief to where the party "fails substantially to comply." *Id.* § 18a(g)(2).

But even if § 18a(g)(1) were ambiguous if read in isolation, the statute necessarily requires the Court to consider in the first instance what it means for a party "to comply" with the notification requirement under subsection (a). Neither the Antitrust Division, nor the FTC, has ever read compliance with this provision to require the submission of every document that would arguably be relevant to the agency's review of the transaction. Indeed, this action appears to be the first time that DOJ has ever asserted that the penalty provisions impose strict liability and escalating penalties triggered even when a party substantially complies with the notification requirement.

[30] *See* FTC, HSR Informal Interpretation 1301012 (Jan. 17, 2013), https://www.ftc.gov/sites/default/files/documents/informal_interpretations/1301012-informal-interpretation/1301012.pdf.

Confirming that the antitrust agencies require only substantial compliance, the United States has historically sought penalties under 15 U.S.C. § 18a(g)(1) only in cases where it alleged that the defendant's conduct fell below that standard:

- In *United States v. The Hearst Trust*, the defendant allegedly submitted a single 4(c) document, which according to the government, "hindered the ability of the federal antitrust agencies to analyze the competitive effects of the Acquisition prior to consummation." Compl. ¶¶ 19, 25, No. 01-2119 (D.D.C. Oct. 11, 2001).

- In *United States v. Iconix*, the defendant did not submit any 4(c) documents. Compl. ¶¶ 14, 22, 24, No. 07-1852 (D.D.C. Oct. 15, 2007). Even after the FTC notified the defendant that the lack of 4(c) documents "appeared unusual," the defendant allegedly assured the FTC, incorrectly, "that no such documents exist[]." *Id.* ¶ 16.

- In *United States v. Automatic Data Processing, Inc.*, the merging parties allegedly did not submit any 4(c) documents, which "hindered the ability of the [FTC and DOJ] to analyze the competitive effects" of the merger. Compl. ¶¶ 7, 28, 31, No. 96-0606 (D.D.C. Mar. 27, 1996). The government alleged that the officer who certified the accuracy and completeness of the HSR Form "did not know what documents were required by Item 4(c)" and "had no understanding of the statute or rules referred to in the certification." *Id.* ¶ 25. It also alleged that if the defendant had complied with the HSR Act, it would have likely issued a Second Request.

Even in these cases, the government sought only modest penalties, and the defendants chose to settle rather than engage in costly litigation to test the government's allegations in court. *See* Dkt. 83, KKR Reply ISO MTD, at 10. These examples stand in stark contrast to the Antitrust Division's position here—that omitting *any* responsive document from the HSR Form, regardless of whether it has any effect on the agencies' ability to evaluate a transaction, exposes the filing party to daily accruing penalties under § 18a(g)(1). That has never been the government's practice, nor has it ever been the law.

II. The Antitrust Division's Novel Interpretation of the HSR Act Will Chill Private Equity Investment, Ultimately Harming Competition.

If the Court accepts the Antitrust Division's novel interpretation of the HSR Act to require perfect compliance with Item 4's instructions, it will cast a chill on private equity investment in the hundreds of transactions subject to premerger notification requirements every year. This

chilling effect will harm not only AIC's members and the workers, investors, and consumers who benefit from private equity investment, but ultimately competition itself—the very thing that the HSR Act was enacted to protect.

Most directly, the Antitrust Division's perfect compliance standard will raise HSR Act compliance costs. If the Court were to adopt the Antitrust Division's newly minted "perfect compliance" standard, then merging parties would need to consider retaining the kind of litigation-style forensic search companies that are typically employed in connection with Second Requests, which often involve millions of dollars in costs and substantial attorneys' fees to review potentially privileged information. If any documents are redacted or withheld for privilege, the filer must then incur even more costs by filing a statement of reasons for non-compliance.[31]

Even with all these safeguards, perfect compliance can never be guaranteed. Mistakes are inevitable, especially when reviewing a large volume of documents. *See In re Zetia (Ezetimibe) Antitrust Litig.*, 2019 WL 6122012, at *7 (E.D. Va. July 16, 2019) ("Where discovery is extensive, mistakes are inevitable.") (quoting *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 417 (N.D. Ill. 2006)). Faced with increased search costs—and the threat of potentially massive penalties even for inadvertent, harmless errors that have no impact on the reviewing agencies' ability to assess competitive effects—private equity funds would have to factor in these additional and unnecessary transaction costs (and penalty threats) in assessing the potential benefits of a transaction. Indeed, the risk of stratospheric penalties for minor errors may deter investment entirely. Such a tax on otherwise procompetitive activity would reduce the benefits of mergers

[31] *See* 16 C.F.R. § 803.3(d) ("Where noncompliance is based on a claim of privilege, a statement of the claim of privilege and all facts relied on in support thereof, including the identity of each document, its author, the author's title/position, addressee, the addressee's title/position, date, subject matter, all recipients of the original and of any copies, the recipients' titles/positions, the document's present location, and who has control of it.").

and acquisitions and deprive markets, consumers, employees, and investors of the benefits of efficient capital activity.

A perfect compliance standard will also delay much-needed investments. Companies have historically spent about 10.7 days preparing and submitting an HSR Form under the substantial compliance standard.[32] Conducting the type of litigation-style forensic review necessitated by a "perfect compliance" standard would drag this process out significantly. As noted, Second Requests typically take six months to complete—nearly 18 times longer than the time it currently takes to prepare the HSR Form.[33] Any additional delay would directly harm private equity companies and their investors, and it would pose particularly acute harms to target companies desperately in need of investment (as well as their employees and customers). For such companies, "[d]elays of even a day or two can cause significant issues, and delays of several weeks can result in a business failing" as it fails to make payroll.[34]

None of these harms is compelled by—or consistent with—the HSR Act. Congress's aim in creating a premerger requirement was to "neither deter nor impede consummation of the vast majority of mergers and acquisitions,"[35] and it specifically wanted to avoid "unduly burdening business with unnecessary paperwork or delays."[36] By imposing such onerous, costly, and time-consuming requirements on merging parties, the Antitrust Division's "perfect compliance" standard directly contravenes that goal. Worse, it will not result in more effective antitrust

[32] U.S. Chamber Practitioner Survey, *supra* note 2.

[33] *See* AMC Rep. at 163 & tbl. C.

[34] National Venture Capital Association (NVCA), Comment Letter on Proposed Rule to Alter Premerger Notification Requirements (Sept. 27, 2023), https://bit.ly/4mJ7wOb.

[35] Senate Report at 66.

[36] *Id.* at 65.

enforcement, because the vast majority of reportable transactions—about 98%—pose no antitrust concerns and never proceed to Second Requests.[37] Given how infrequently the antitrust agencies actually require extremely detailed information about proposed transactions, there is no reason to adopt a reading of the HSR Act that would require merging parties to conduct forensic searches when preparing the HSR Form—especially when the "substantial compliance" standard gives the antitrust agencies everything they need to determine in short order whether further scrutiny would be warranted. The net effect of the Antitrust Division's novel interpretation of the HSR Act here would be to impose on merging parties, including AIC's members, much greater burdens and costs—under the threat of potentially enormous penalties—with no corresponding benefit to the public as a whole.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

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Respectfully submitted,

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[37] Hart-Scott-Rodino Annual Report, Fiscal Year 2023, App'x A, https://www.ftc.gov/system/files/ftc_gov/pdf/fy2023hsrreport.pdf.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June 2025, a true and correct copy of the foregoing was filed with the Clerk of the United States District Court for the Southern District of New York via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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Exhibit A

PitchBook

US PE deal count by size bucket

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
<$25M	1,466	1,662	1,624	2,130	2,342	2,284	2,433	2,634	2,789	3,077	3,845	4,120	3,650	3,566	631
$25M-$100M	783	944	781	1,004	1,043	1,215	1,313	1,555	1,763	1,722	2,872	2,407	1,971	2,205	447
$100M-$500M	802	923	866	1,050	1,051	1,074	1,298	1,757	1,624	1,507	3,079	2,531	2,037	2,106	460
$500M-$1B	78	108	104	144	126	130	162	138	166	120	180	124	110	120	20
$1B+	36	52	46	70	53	63	91	92	95	80	151	94	84	104	31
Total	3,165	3,689	3,421	4,398	4,615	4,766	5,297	6,176	6,437	6,506	10,127	9,276	7,852	8,101	1,589

As of 3/31/2025