UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
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Statement of Commissioner Melissa Holyoak

Final Premerger Notification Form and the Hart-Scott-Rodino Rules
Commission File No. P239300

October 10, 2024

I. Introduction

The Commission issued its *Notice of Proposed Rulemaking for the Premerger Notification, Reporting and Waiting Period Requirements which implements the Hart-Scott-Rodino Antitrust Improvements Act* ("NPRM") on June 29, 2023.[1] The contents of the NPRM were harrowing and generated (justifiably) substantial outcry from many commentors. Many of the contemplated filing requirements, if implemented, would have been beyond the Commission's legal authority, arbitrary and capricious, unjustifiably burdensome, and just plain bad policy.[2]

The Commission worked together on the monumental task of modifying the NPRM into the Final Rule,[3] ensuring the Final Rule does not suffer from the many legitimate criticisms raised by the commentors. The Final Rule modifies many provisions in the NPRM while taking great care to avoid unduly burdening merging parties or chilling the many procompetitive transactions that happen each year. To be clear, this Final Rule does not align exactly with my preferences. But I have worked to curb the excesses of the NPRM in meaningful ways that would not have happened absent my support. These significant modifications resulted in a Final Rule that is not only

[1] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (proposed Jun. 29, 2023) (to be codified at 16 C.F.R. pts. 801 and 803) (hereinafter NPRM).
[2] Out of the gate, the NPRM made broad assertions about increasing concentration as a justification for the unprecedented and wide-sweeping proposed changes. NPRM, *supra* note 1, at 42179. The concentration literature upon which it relied, *id.* at 42179 n.7, however, has been heavily criticized and debunked. *See, e.g.*, Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33 J. ECON. PERSPECTIVES 23 (2019); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST MAGAZINE, Fall 2018. Most notably, the literature cited by the NPRM does not use well-defined antitrust markets in its assessment or conclusions. Further, even if increasing concentration had been a reality, it only has a limited role in analyzing competitive effects. *See infra* note 57.
[3] Fed. Trade Comm'n, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 3, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf (hereinafter Final Rule).

consistent with the agencies' statutory grant of authority, but will also close certain informational gaps that affect the agencies' ability to conduct effective premerger screening.

Commissioner Ferguson, in section III of his statement, describes in detail the benefits of certain provisions that the Commission included in the Final Rule. These provisions that he describes fill information gaps in the agencies' current ability to fulfill their missions under the HSR Act. I agree with Commissioner's Fergusson's assessments and applaud the Commission's efforts to include these new requests in the Final Rule.

Simultaneous with today's issuance of the Final Rule, the Commission has also announced that it will lift its suspension of early termination when the Final Rule takes full effect. The suspension itself has been in place for more than three-and-a-half years, even though the suspension was supposed to be "temporary" and "brief."[4] I have been baffled by this unjustified delay and disappointed that it took the promulgation of this Final Rule to lift the suspension of early termination. One of the virtues of the Final Rule is that certain provisions will allow staff to more quickly identify which mergers should receive early termination, a significant benefit to both staff and merging parties. So I guess late is better than never.

For the remainder of my statement, I write to demonstrate the dramatic differences between this Final Rule and the proposed rule set forth in the NPRM, and also to elaborate on some of the changes, in addition to lifting the early termination suspension, that drove my decision to vote in favor of the Final Rule. My overview of the Final Rule is not a substitute to the text of the Final Rule or the analysis in the Statement of Basis and Purpose ("SBP"),[5] both of which should be consulted by all filers.

Of the twenty-nine primary proposals in the NPRM, ten were rejected entirely, including, among others, the request for labor information, the obligation to produce draft transaction documents, and the requirements to create organizational charts. Of the remaining nineteen proposals, the Final Rule includes just two without modification; we have made meaningful changes to the other seventeen requirements.

[4] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

[5] Fed. Trade Comm'n, 16 CFR Parts 801 & 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose (Oct. 3, 2024) (hereinafter SBP).

Table 1—Rejected Proposals

NPRM Provision	Results in Final Rule
Labor Market/Employee Information	Proposal rejected
Drafts of Transaction-Related Documents	Proposal rejected
Organizational Chart of Authors and Recipients	Proposal rejected
Other Types of Interest Holders that May Exert Influence	Proposal rejected
Expand Current 4(d)(iii) to Include Financial Projections to Synergies and Efficiencies	Proposal rejected
Deal Timeline	Proposal rejected
Provision of Geolocation Information	Proposal rejected
Identification of Messaging Systems	Proposal rejected
Litigation Hold Certification Language	Proposal rejected
Identification of F/K/A Names	Proposal rejected

For example, the prior acquisition proposal that called for ten years of prior acquisitions without any size threshold was reversed in the Final Rule to request only five years of acquisitions, and reinstated the $10 million threshold—returning to the time period adopted in 1987[6] and dollar threshold that had existed since the original rules in 1978.[7] The NPRM proposal that would have required the filers to identify *and produce* all agreements between the merging parties has been modified significantly in the Final Rule to simply require the filers to check boxes to indicate whether they have a few types of agreements between them—*nothing* has to be produced or described. The Final Rule similarly modifies the NPRM's overlap and supply "narratives" to require only "brief" descriptions instead. And, among other revisions, the Final Rule's overlap and supply descriptions requirement makes clear that antitrust analysis is *not* required.

Further, many of the modifications exempt "Select 801.30 Transactions" from having to report certain information required by the Final Rule. Select 801.30 Transactions are acquisitions of third parties' voting securities where the acquirer does not gain control, no agreements between the acquiring and acquired person govern the transaction, and the acquiror does not have the ability

[6] 52 FR 7066 at 7078 (Mar. 6, 1987) ("[The Commission] believes that this change can be made without harming the agencies' ability to conduct a thorough antitrust review since an account of the acquiring person's acquisitions over the past five years will give adequate notice of possible trends toward concentration.").

[7] 43 FR 33450 at 33534 (July 31, 1978) ("The item permits the omission of prior transactions that did not involve the acquisition of more than 50 percent of the voting securities or assets of a person with preacquisition sales or assets of $10 million, since smaller acquisitions are likely to be less significant from an antitrust standpoint."). Unlike prior iterations of the rules, the Final Rule does require the acquired entity to also identify prior acquisitions and clarified that an acquisition of "all or substantially all" of the assets of a business must be reported.

to appoint or serve on a board.[8] The Final Rule likewise exempts transactions where there is no horizontal overlap or supply relationship from certain information requirements, and sets a *de minimis* threshold to exclude the requirement to describe supply relationships where the sale or purchase of the product, service, or asset represents less than $10 million in revenue in the most recent year. Table 2 highlights some of the main modifications that have been made in the Final Rule (again, this list is not exhaustive and does not substitute for the text of the Final Rule).

Table 2—Select Modified NPRM Proposals

NPRM Provision	Select Modification in Final Rule
Prior Acquisitions[9]	Among others, retain the five-year lookback and $10 million sales/assets threshold that existed in prior iterations of the HSR rules.
Other Agreements Between the Parties[10]	Among others, filers are not required to produce or describe agreements between the parties; instead, they must only, via checkbox, identify types of agreements between them, if any.
Officers, Directors, and Board Observers[11]	Among others, (1) exclude reporting on board observers; (2) limit to acquiring person only; (4) limit to officers/directors of entities in overlap industries as described by the text of the Final Rule.
4(c) Documents by/for Supervisory Deal Team Lead(s)[12]	Limit to only apply to <u>one</u> individual (<u>not</u> the plural "leads" like in the NPRM) supervisory deal team lead, as defined in the text of the Final Rule.
Supply Relationships[13]	Among others, (1) require only "brief" descriptions rather than a narrative; (2) exclude "Select 801.30 Transactions"; (3) impose a *de minimis* threshold and (4) limit descriptions to a business assessment rather than an antitrust analysis (*see* SBP).
Overlap Products and Services[14]	Among others, (1) require only "brief" descriptions rather than a narrative; (2) exclude "Select 801.30 Transactions"; and (3) limit description to a business assessment rather than an antitrust analysis (*see* SBP).

[8] The Final Rule defines Select 801.30 Transactions as "[a] transaction to which § 801.30 applies and where (1) the acquisition would not confer control, (2) there is no agreement (or contemplated agreement) between any entity within the acquiring person and any entity within the acquired person governing any aspect of the transaction, and (3) the acquiring person does not have, and will not obtain, the right to serve as, appoint, veto, or approve board members, or members of any similar body, of any entity within the acquired person or the general partner or management company of any entity within the acquired person. Executive compensation transactions also qualify as select 801.30 transactions." 16 C.F.R. Part 803, Appendix B at 1.

[9] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 14-15.

[10] *See id.* at 9.

[11] *See id.* at 5.

[12] *See id.* at 1.

[13] *See id.* at 10.

[14] *See id.* at 9-10.

NPRM Provision	Select Modification in Final Rule
Ordinary Course Documents (Periodic Plans and Reports)[15]	Among others, limit to exclude "Select 801.30 Transactions" and limited to only require documents provided to Chief Executive Officers.
Identification of Limited Partners[16]	Among others, limit disclosure requirements for limited partners who do not have management rights.
Description of Entity Structures and Organizational Chart for Funds and MLPs[17]	Among others, eliminate requirement to create an organizational chart.
Transaction Diagram[18]	Among others, exclude "Select 801.30 Transactions" and only necessary if diagrams previously existed (*i.e.*, no need to create diagrams).
Mandatory Identification of Foreign Jurisdiction Reporting by Both Parties[19]	Limit to acquiring person.
Requiring a draft agreement or term sheet and transaction specific agreements for filings on non-definitive agreements[20]	Clarify scope and provide more details about the information required.
Transaction Rationale[21]	Among others, exclude "Select 801.30 Transactions."
Voluntary Waivers for State AGs and International Enforcers[22]	Allow filers to voluntarily check two separate boxes that would permit certain disclosures.
Defense or Intelligence Contracts[23]	Among others, limit to contracts generating $100 million or more of revenue and only if there is an Overlap or Supply Relationship.
Document Log Requirements[24]	Among others, limit requirement to identify authors to certain and limited circumstances.
Adjustments to NAICS revenue reporting[25]	Modified to limit scope.

[15] *See id.* at 9.
[16] *See id.* at 4-5.
[17] *See id.* at 5.
[18] *See id.* at 8.
[19] *Compare id.* at 7 (requiring disclosure for acquiring person) with Final Rule, *supra* note 3, Acquired Person Instructions (not requiring disclosure of transactions subject to international antitrust notification).
[20] *See* Final Rule, *supra* note 3, Acquiring Person Instructions, at 9.
[21] *See id.* at 8.
[22] *See id.* at 15-16.
[23] *See id.* at 15.
[24] *See id.* at 2.
[25] *See id.* at 10-11.

Notably, only two of the main proposals in the NPRM were adopted without modification: the requirements to translate foreign-language documents and to report subsidies from foreign entities of concern, which was mandated by the Merger Filing Fee Modernization Act of 2022.[26] All other proposals were rejected or significantly modified. Taken together, the dramatic revisions to the proposed rule set forth in the NPRM result in a Final Rule that I can support. The decisions made to scale back the proposed requirements in the NPRM will limit burden, aligns the Final Rule with the Commission's legal authority under the HSR Act, and is tailored to address information gaps that have hampered the agencies' premerger review.[27]

Sections II through IV of my statement explain why three proposals in the NPRM were especially problematic to me, and why their elimination or substantial revision was critical to my vote on this Final Rule: (II) Labor Market/Employee Information, (III) Drafts of Transaction-Related Documents, and (IV) Ten Years of Prior Acquisitions Without any Size Thresholds. To be clear, by focusing on these three proposals I do not mean to diminish the importance of the other changes reflected in the Final Rule. Each of the many revisions that scaled back the proposed requirements in the NPRM contributed to my vote to issue the Final Rule. Finally, I discuss in section V some additional considerations that led me to support the Final Rule, including important limitations in the Final Rule that ensure the Final Rule will not result in fishing expeditions.

Before proceeding, I want to discuss the Commission's authority to issue today's Final Rule, an issue that is critical to me as a Commissioner.[28] The HSR Act obligates the Commission, "with the concurrence of the Assistant Attorney General," to issue rules that require information to be submitted in HSR filings that will "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."[29] While this mandate affords some discretion to the Commission, this discretion is not unbounded. Critically, Congress did not give the Commission authority to promulgate rules to gather information generally, or to merely heap burden upon merging parties in an effort to dissuade acquisitions. Rather, the Act explains that the purpose of HSR filings, and the rules determining the content of filings, is for the agencies "to determine whether such *acquisition* may, if consummated, violate the *antitrust laws*."[30] Many proposals in the NPRM—including the three discussed below—have been rejected or substantially

[26] *See* 15 U.S.C. § 18b (requiring the Commission to promulgate a rule requiring HSR filings to include information on subsidies received from certain foreign governments or entities that are identified as foreign entities of concern); Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (2023) (reflecting the appropriations bill that included the Merger Filing Fee Modernization Act of 2022).

[27] The incremental burden estimated in the NPRM decreased from 107 hours to only 68 hours in the Final Rule, a result that was critical to my decision. NPRM, *supra* note 1, at 42208 (reporting 107 incremental hours); SBP, *supra* note 3, at § VIII, 386 of 406 (reporting 68 incremental hours).

[28] *See, e.g.*, Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, Matter Number P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.

[29] 15 U.S.C. § 18a(d).

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

modified to ensure the Final Rule includes only new requirements that are consistent with the text and structure of the HSR Act.

II. Labor Market Information

The NPRM contained many problematic proposals. Chief among them was its proposal to collect information from filers about labor markets.[31] As proposed, filers would report three different types of information related to labor:

- "Largest Employee Classifications[:] Provide the aggregate number of employees . . . for each of the five largest occupational categories" based upon 6-digit SOC classifications;[32]
- "Geographic Market Information for Each Overlapping Employee Classification[:] Indicate the five largest 6-digit SOC codes in which both parties . . . employ workers [and also provide] each ERS commuting zone in which both parties employ workers with the 6-digit classification and provide the aggregate number of classified employees in each ERS commuting zone; and"[33]
- "Worker and Workplace Safety Information[:] Identify any penalties or findings issued against the filing person by the U.S. Department of Labor's Wage and Hour Division (WHD), the National Labor Relations Board (NLRB), or the Occupational Safety and Health Administration (OSHA) in the last five years and/or any pending WHD, NLRB, or OSHA matters."[34]

All three of these requirements ("Labor Proposal") were completely rejected in the Final Rule. Chair Khan asserts in her statement that "the Final Rule *pares back some* of the labor market requirements."[35] Despite this confusing statement, the text of the Final Rule makes clear that *all* (not "some") of the labor requirements have been fully *removed* (not "pare[d] back"). And for good reason. Despite repeated and extensive efforts to make harm in labor markets a standard component of merger enforcement, no evidence exists to justify including the Labor Proposal in the Final Rule. Accordingly, the Labor Proposal was rightfully excluded from the Final Rule and, absent new evidence, has no place in any future rulemaking that the Commission may contemplate.

To be sure, a merger may theoretically create anticompetitive effects in a relevant labor market.[36] A post-merger entity might, for example, be able to lower wages for workers when the merger eliminates a critical employment option for workers. Such a scenario is more likely when the merger involves specialized workers who may have fewer comparable alternatives than less

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[31] NPRM, *supra* note 1, at 42197.
[32] *Id.* at 42215. SOC codes are "Standard Occupational Classification" codes used by the Bureau of Labor Statistics of the Department of Labor. *See id.* at 42210.
[33] *Id.* at 42215.
[34] *Id.* Filers also had to provide, "[f]or each identified penalty or finding . . . (1) the decision or issuance date, (2) the case number, (3) the JD number (for NLRB only), and (4) a description of the penalty and/or finding." *Id.*
[35] Statement of Chair Lina M. Khan, Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300, and Regarding the FY2023 HSR Annual Report to Congress Commission File No. P859910 at 5-6 (Oct. 3, 2024) (emphasis added) (hereinafter Statement of Chair Khan).
[36] Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1032 (2019).

skilled workers.[37] Theory aside, the Labor Proposal would have asked for information generally unhelpful for determining whether an acquisition violates the antitrust laws.

First, the "worker and workplace safety information" would have provided no measurable benefit to the agency in its initial determination of whether the proposed merger violates the antitrust laws. To support burdening all filers with providing this information, the NPRM asserted that "[i]f a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job."[38] No evidence, empirical or otherwise, was presented to support this assertion. And I am not aware of any supportive literature and have never seen a court opinion that suggests such evidence indicates competitive harm from a merger under Section 7 of the Clayton Act (or any other antitrust violation under the Sherman Act or otherwise). Instead, this proposal seems like an overt way to harass firms with any workplace failure under the guise of an antitrust investigation. As the Supreme Court observed, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'"[39] We simply do not have authority under the HSR Act to require filers to submit information about workplace safety.

Second, the proposed request for Standard Occupational Classification ("SOC") codes would have been of—at most—limited value because SOC codes by themselves are not sufficient to define a relevant labor market for antitrust purposes.[40] Phrased differently, they are not tethered to the hypothetical monopolist test which has been applied by the agencies and courts in various iterations of the merger guidelines for decades.[41] Depending on the merger, SOC codes may be too broad to accurately assess labor competition,[42] limiting their predictive value for assessing competitive harm. The NPRM itself appeared to acknowledge the limited value of SOC codes: "[t]he use of [SOC] codes as a screening tool is not intended to endorse their use for any other

[37] *Id.* at 1038.
[38] NPRM, *supra* note 1, at 42198.
[39] *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)); *cf. Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008) ("Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim. 'Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws,' without proof of 'a dangerous probability that [the defendant] would monopolize a particular market.'" (alteration in original) (quoting *Brooke Grp.*, 509 U.S. at 225)).
[40] *See Comment of U.S. Chamber of Com.*, Doc. No. FTC-2023-0040-0684 at 34 (hereinafter *U.S. Chamber Comment*) ("The data sought by the proposed rules defines labor markets imprecisely at best.").
[41] *See Fed. Trade Comm'n v. Advoc. Health Care Network*, 841 F.3d 460, 468-70 (7th Cir. 2016) (using the hypothetical monopolist test to inform market definition); *Fed. Trade Comm'n v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 167 (3d Cir. 2022) (similar).
[42] *E.g.*, Jose Azar et al., *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOR ECON. 101886, 5 (2020). ("[T]he 6-digit SOC is too broad of a market according to the [small significant non-transitory reduction in wage test].").

purpose, such as defining a relevant labor market."[43] In fact, just a few examples demonstrate the limited value that SOC codes would provide to the Commission:

> Attorneys working across diverse areas of expertise are broken down into attorneys (23-1011 Lawyers) and … well, attorneys, although there is a separate category for Judges, Magistrate Judges, and Magistrates (23-1023), who are likely lawyers, too. To paraphrase Shakespeare (or a character in "Henry VI, Part 2"), let's kill all the widgets.
>
> To the best of my recollection, the agencies tend to slice the professional salami a little thinner than that when hiring staff.
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> Physicians fare a little better, although 10 categories of specialist physicians, plus "family medicine physicians" and "physicians, all other" leave out some specialties (like, say, surgery and ophthalmology) and make no room for subspecialties, which might be of interest if you're hiring a cardiothoracic surgeon to do a quad bypass or an orthopedic surgeon to do a hip replacement (or both, but you care which surgeon does which procedure).[44]

Third, the agencies have not relied upon the Economic Research Service ("ERS") commuting zones to allege a relevant labor market,[45] and based upon this limited experience, they cannot be considered sufficiently applicable to require all filers to provide the ERS data proposed by the NPRM. Further, the NPRM proposal on ERS commuting zones relied upon data from 2000—yes, 24-year-old data—even though more recent iterations are available.[46] And newer data confirm that the older data fail to reflect current market realities, including the widespread transition to telework.[47] Given that there is no evidence that forcing all filers to provide the proposed labor market information would assist the agencies in determining whether the filed-for acquisition violates the antitrust laws, the Commission lacks authority to request the information under the HSR Act.

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[43] NPRM, *supra* note 1, at 42197; *see Comment of International Center for Law & Economics*, Doc. No. FTC-2023-0040-698 at 15 ("Given the systematic misfit between the proposed 'Labor Markets' section and any actual labor markets, given the agencies lack of experience in analyzing the local labor-market effects of proposed mergers, and given the hard questions of when or under what conditions such labor-market effects might be both material and unlikely to covary with product-market effects, we suggest that the screening utility of the new information remains unclear.").

[44] Daniel J. Gilman, *Antitrust at the Agencies Roundup: Kill all the Widgets Edition*, Truth on the Market (Aug. 4, 2023), https://truthonthemarket.com/2023/08/04/antitrust-at-the-agencies-roundup-kill-all-the-widgets-edition/ (ellipses in original).

[45] The Commission did not use SOC codes or ERS commuting zones in their complaint allegations that reference concerns in labor markets in its recent litigations. *See* Compl., *In re Tapestry, Inc., & Capri Holdings Ltd.*, No. 9429 (F.T.C. Apr. 22, 2024); *see* Compl., *In re The Kroger Co. & Albertsons Cos., Inc.*, No. D-9428 (F.T.C. Feb. 26, 2024). And the DOJ did not rely upon ERS commuting zones in *United States v. Bertelsmann SE & Co. KGaA See* Compl., *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1 (D.D.C. 2022); see also *infra* note 48 (explaining why *Bertelsmann* is not properly considered a case about harm in a labor market, but rather a monopsony input case).

[46] *Comment of Wachtell, Lipton, Rosen & Katz*, Doc. No. FTC-2023-0040-0670 at 8.

[47] *Id.*

Even if one were to assume that the agencies had the authority to request the proposed labor market information, it was nonetheless properly excluded from the Final Rule because it was a solution in search of a nonexistent problem. The agencies have never brought a standalone labor challenge to an acquisition.[48] And this is not for lack of trying. Officials at the Commission,[49] Department of Justice,[50] and state enforcers[51] have stated their desire to focus on harms to the labor market, especially in mergers, since at least 2018, but the expended resources so far have been to no avail.

Granted, the Commission has included tagalong labor claims in addition to traditional theories of harm.[52] And, in a press release, the Commission has taken credit for protecting against harms in the labor market even though the actual complaint being announced by the press release did not allege harm in a labor market.[53] But these few and obscure outliers do not justify the

[48] Some have considered *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 1 (D.D.C. 2022) to be a labor-market case. I disagree. On balance, this was more of a traditional monopsony input case. *Id.* The primary concern was whether there would be sufficient outlets for best-selling books. *Id.* I am also unaware of merger challenges by private parties where the plaintiffs alleged harm in a labor market. *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 571 (2018) ("[W]e [have not] found a reported case in which a court found that a merger resulted in illegal labor market concentration."). The Commission, as reflected in the SBP, also classifies *Bertelsmann* as an input monopsony case. SBP, *supra* note 5, at § II.B.2, 32 of 406.

[49] *See* Testimony of Fed. Trade Comm'n Chair Joseph Simons, US Congress, *Oversight of the Enforcement of the Antitrust Laws*, Senate Judiciary Committee, 2018, available at https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws (staff instructed to "look for potential effects on the labor market with every merger they review").

[50] Assistant Attorney General Makan Delrahim, Remarks at the Public Workshop on Competition in Labor Markets 3 (Sept. 23, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-public-workshop-competition ("With respect to mergers, the Division also has challenged transactions where the merged firm would likely have the ability to depress reimbursement rates to physicians, including the Anthem/Cigna merger challenge."); *Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets* (Oct. 29, 2019), available at https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house ("[L]abor competition issues are a high priority for Assistant Attorney General Delrahim and for the Antitrust Division. We have devoted significant resources to enforcement and advocacy in this area recently."); *id.* ("The Division has also been busy developing and implementing screens to help agency staff detect mergers that are likely to create or enhance monopsony power in labor markets. Over the last 18 months, the Division has developed important new specifications for Second Requests and Civil Investigative Demands to determine whether a transaction will create or enhance labor monopsony. Moreover, the Division has leveraged improved search and review technology to identify labor competition concerns in merger and non-merger investigations.").

[51] Testimony of Rahul Rao before Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. Hours of Rep. (Oct. 29, 2019), available at https://www.govinfo.gov/content/pkg/CHRG-116hhrg45126/html/CHRG-116hhrg45126.htm. ("Labor is an input, and it is a critical input. It's one that directly affects people's lives in that, when there's a monopoly power, the effect is increase in prices for consumers. When there is monopsony power of a dominant buyer, it decreases wages for workers.").

[52] *See* Compl., *In re The Kroger Company and Albertsons Companies, Inc.*, No. D-9428 (F.T.C. Feb. 26, 2024).

[53] *See* Press Release, Fed. Trade Comm'n, *FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm* (Jul. 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm (stating that "[t]his deal isn't about creating efficiencies; it's about crippling the competition, which . . . could lead to layoffs for good paying American manufacturing jobs in nearly a dozen states," even though nothing in the complaint suggests any harm in the labor markets); *see also* Compl. *In re* Tapestry, Inc., and Capri Holdings Limited, No. 9429 (F.T.C. Apr. 22, 2024) (discussing labor issues but not alleging violations of the law based upon harm in labor markets).

widespread proposal to include labor market information in the Final Rule, especially information (*e.g.*, SOC codes) that has never been used in any of the agencies' filings (litigated or otherwise).

Moreover, the NPRM did not identify any economics literature that justified the request for labor information.[54] As explained by Albrecht *et al.*:

> [D]espite growing interest in the use of antitrust law to address labor monopsony, such efforts are not supported by empirical and theoretical foundations sufficient to bear the weight of these galvanized efforts. . . .
>
> Empirical data concerning the magnitude and impact of labor monopsonies is inconsistent. Evidence on the extent of labor-market power is mixed, with studies reaching divergent conclusions depending on the data, methodology, and markets analyzed.[55]

The NPRM also asserted that alleged increases in concentration justified its proposals, including its proposal for labor information.[56] While concentration levels may have a role in antitrust enforcement (*e.g.*, merger presumptions), general and imprecise observations of increased concentration are a slender reed upon which to base such a significant expansion of HSR authority.[57] These limitations also apply in the labor context. "Many factors other than

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[54] *See* NPRM, *supra* note 1, at 42197-98.

[55] BRIAN C. ALBRECHT ET AL., LABOR MONOPSONY AND ANTITRUST ENFORCEMENT: A CAUTIONARY TALE, ICLE WHITE PAPER NO. 2024-05-01 at 1 (2024); *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 Harv. L. Rev. 536 (2018) ("[W]e have not found a reported case in which a court found that a merger resulted in illegal labor market concentration."). I also note that a variety of articles sometimes cited to support increased antitrust scrutiny in labor markets fail to justify imposing a request for labor information in HSR filings—nor does the literature necessarily support broader enforcement of antitrust laws in labor markets. *See* Anna Stansbury & Lawrence H. Summers, "The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy" at 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/papers/w27193 (identifying decreased ability to unionize, *not* monopsony power, as the source of declining labor share of income); David Berger et al., *Labor Market Power*, 112 Am. Econ. Rev. 1147 (2022) (at 1 in SSRN version) ("[We] conclude that changes in labor market concentration are unlikely to have contributed to the declining labor share in the United States."); Chen Yeh at al., *Monopsony in the US Labor Market*, 112 Am. Econ. Rev. 2099, 2099 (2022) ("[T]he growing gap between worker pay and productivity might be more about technological change than about employers' bargaining power—a very different issue than the monopsony problem that antitrust law could (potentially) address."); *id.* ("[T]he correlation between markdowns and employment concentration is quite modest, both cross-sectionally (across local labor markets) and in the aggregate over time."); *id.* at 2125 ("[A]t least within manufacturing—cross-sectional and temporal variation in local employment concentration may not necessarily reflect variation in employer market power as measured by markdowns."); David Arnold, *Mergers and Acquisitions, Local Labor Market Concentration, and Worker Outcomes* at 2 (Oct. 29, 2021) ("The evidence . . . does not support the conclusion that lack of antitrust scrutiny for labor markets has been a major contributor to labor market trends such as the falling labor share or stagnant wage growth. Most mergers do not generate large shifts in concentration and I find no evidence that the number of anticompetitive mergers in labor markets has been increasing over time."); Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. Rev. 397, 397 (2021) ("For unskilled workers, we do not find evidence of differences in wage growth post-merger, irrespective of the change in employer concentration induced by the merger.").

[56] NPRM, *supra* note 1, at 42179 ("This concentration may reflect decreased competition, which can result in higher prices for consumers, decreased innovation, reduction in output, and *lower wages for workers*." (emphasis added))

[57] *See* Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSP. 69, 75-76 (2019) (increased concentration "does not prove that competition in that market has

concentration can affect wages, such as differences in firm productivity, local labor-market conditions (*e.g.*, urban vs. rural), and institutional factors like unionization rates."[58] Further, as explained by Berry *et al.*:

> A main difficulty in [the monopsony power literature] is that most of the existing studies of monopsony and wages follow the structure-conduct-performance paradigm; that is, they argue that greater concentration of employers can be applied to labor markets and then proceed to estimate regressions of wages on measures of concentration. [S]tudies like this may provide some interesting descriptions of concentration and wages but are not ultimately informative about whether monopsony power has grown and is depressing wages.[59]

In short, the economic literature does not provide any conclusive evidence on the viability or likelihood of merger harms in labor markets that would justify the NPRM's proposals regarding labor information.

Finally, the Commission's HSR rulemaking authority does not extend to heaping burdens upon merging parties as a fishing expedition in the hopes of developing new merger enforcement theories. Instead, if labor market concerns exist, then the Commission should conduct merger retrospectives or utilize its 6(b) authority to investigate the issue. The Commission has done neither, and it cannot rely on the need for general information gathering as a basis for demanding that all merging parties provide this information.

And no doubt, the NPRM's proposal would have come with a substantial and unjustifiable burden upon filers and also the agencies. *First*, firms do not typically maintain SOC codes in the ordinary course of business.[60] Investing in the expertise to generate and report the codes would have required substantial resources.[61] And smaller businesses who make filings infrequently will

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declined."); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 722–23 (2018) ("Sheer size and market power are just not the same thing."); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th ed. 2005) ("[P]erhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct."); Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1, 10 (2003) ("The [structural] paradigm was overturned because its empirical support evaporated."); Fiona Scott Morton, *Modern U.S. Antirust Theory and Evidence Amid Rising Concerns of Market Power and Its Effects*, WASH. CTR. FOR EQUITABLE GROWTH at 24 (May 29, 2019) ("[I]t is widely understood that either vigorous competition could cause concentration to increase or increased concentration could reduce competition."); Cristina Caffarra & Serge Moresi, *Issues and Significance Beyond US Enforcement*, MLEX MAGAZINE, Apr.-June 2010, at 41, 42–43 ("Most economists would agree that market shares and the HHI often are poor indicators of market power."); Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 BOSTON UNIV. L. REV. 489 (2021) ("The pursuit of business concentration or bigness for its own sake will injure consumers far more than it benefits small business, the intended beneficiaries."); Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 978 (1991) ("[O]nce a market has between three and five firms, the next entrant has little effect on competitive conduct. . . . These data show that prices fall when the second and third firms enter and then level off."); Albrecht et al, *supra* note 55 at 17 n.76 (providing additional supporting citations).

[58] Albrecht et al., *supra* note 55 at 17.

[59] *Id.* at 18 (quoting Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSP. 44, 57 (2019)).

[60] *See, e.g.*, *Comment of Wachtell, Lipton, Rosen & Katz*, Doc. No. FTC-2023-0040-0670 at 8.

[61] Comment of *American Bar Association's Antitrust Law Section*, Doc. No. FTC-2023-0040-0723 at 10-12.

be particularly disadvantaged compared to frequent filers. *Second*, the agencies' staff would have borne the burden of this additional information. Staff have limited experience working with SOC codes, and utilizing the data would have required aid from already extremely overtaxed economist staffers. But shifting resources has an opportunity cost, particularly when Congress has flatlined our budget, significantly limiting staff's capacity to take on new work.[62] Thus it is unclear how the Commission would have found resources to utilize the information. This substantial, unjustified burden to filers and the agencies made it impossible for me to support any rule that included the Labor Proposal.

As a final comment on the Labor Proposal, I recognize that excising it from the Final Rule may not have been the desired outcome for some of my colleagues on the Commission.[63] I nonetheless commend them for agreeing to this unanimous outcome, and I am equally pleased that the Chair rescinded the most recent Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations.[64] These efforts reflect an evolution in thinking by the Commission toward evidence over rhetoric.[65]

III. **Drafts of Transaction-Related Documents.**

Historically, filers have *not* been required to provide drafts of transaction-related documents with their filings.[66] The production and review of drafts typically occurs during a full-phase investigation, usually after the reviewing agency issues a second request.[67] The NPRM proposed abandoning this practice and requiring that drafts of responsive documents be produced as well.[68] The NPRM explained that requiring the production of drafts would allow staff to have "documents that reflect pre-transaction assessments of business realities, as opposed to 'sanitized'

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[62] Given current budgetary constraints at the Commission and reduced hiring, this is unlikely to change either. Fed. Trade Comm'n, *FTC Appropriation and Full-Time Equivalent (FTE) History*, available at https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation (demonstrating that the FTC budget went down from 2023 to 2024); Caroline Nihill, *FTC Modernization, Enforcement Efforts Jeopardized by Cuts, Officials Say*, FEDSCOOP (Jul. 10, 2024) ("Commissioner Rebecca Slaughter noted that proposed fiscal year 2025 budget cuts would result in the agency passing 'up important investigations and enforcement matters' in addition to considering furloughs and workforce reductions."); *see also* Statement of Chair Khan, *supra* note 35, at 5-6.

[63] *See* Statement of Chair Khan, *supra* note 35, at 3-4; *see generally* Statement of Commissioner Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter, Regarding Amendments to the Hart-Scott-Rodino Rules and Premerger Notification Form and Instructions (Oct. 10, 2024).

[64] Press Release, Fed. Trade Comm'n, FTC, DOJ Partner with Labor Agencies to Enhance Antitrust Review of Labor Issues in Merger Investigations (Aug. 28, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-doj-partner-labor-agencies-enhance-antitrust-review-labor-issues-merger-investigations (discussing Chair Khan's unilateral decision to enter a memorandum of understanding with the Department of Labor, National Labor Relations Board, and the Department of Justice); Press Release, Fed. Trade Comm'n, Statement on Memorandum of Understanding Related to Antitrust Review of Labor Issues in Merger Investigations (Sep. 27, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/statement-memorandum-understanding-related-antitrust-review-labor-issues-merger-investigations (rescinding the same memorandum of understanding).

[65] Chair Khan and Commissioner Bedoya each write to express continued support for the now jettisoned Labor Proposal. I respect their enthusiasm for the idea. But between the decision to reject the Labor Proposal and rescind the memorandum of understanding, the public should rely more on revealed versus expressed preferences.

[66] NPRM, *supra* note 1, at 42194. One exception has been when a draft was sent to the board of directors. *Id.*

[67] *Id.*

[68] *Id.*

versions."[69] Many commentors on the NPRM opposed this requirement.[70] The Commission ultimately rejected this proposal, which was critical to my vote.

Simply put, the likely burden of producing drafts would have outweighed any perceived benefit. Depending upon the practice of the individuals drafting the documents, and how many people are involved in preparing different sections of the documents, there may be "dozens or even hundreds of iterative drafts."[71] No question, filings would be much larger under the proposal.[72] Forensic collections, that is a full collection of an individual's emails or documents, are incredibly burdensome. They not only require resources from a technical team to collect the materials; they also require time from the individual businesspeople and then, in most cases, counsel, to review the collected materials, identify responsive documents, conduct privilege reviews, prepare more expansive privilege logs, and prepare the documents for production. The status quo for HSR filings, where generally only final versions are produced, typically does not require a forensic collection. But if all drafts became a requirement for all transactions, then forensic collections, with all their costs, would become standard practice for almost *all* HSR filings.[73] The use of online collaborative workspaces further complicates the issue—and adds burden—because when multiple parties simultaneously revise the same document, it becomes difficult to know which versions constitute drafts.[74]

To defend the proposal, the NPRM argued that drafts are more likely to contain a "smoking gun."[75] As evidence to support this claim, the NPRM observed that the drafts produced during a second request have more salacious content.[76] But receiving all drafts amounts to building a haystack around a needle. Even if some drafts contain some interesting content, that content does not support the NPRM's proposed expansive production obligations for two reasons. *First*, earlier drafts of transaction documents sometimes contain information that may not have been finalized, may occasionally reflect incorrect assumptions, and in some situations may be based on iterations of the transaction that were not part of the final, executed agreement.[77] Not every change to a draft document is nefarious. Many of the drafts, compared to the final version, would consist of minor or inconsequential edits, excessive repetition, or incomplete thoughts that will require much effort for staff to review.[78] The dramatic increase in the number of documents associated with each filing would have been sufficiently onerous that staff would be simply unable to scrutinize the differences among drafts as they triage dozens of filings each week.

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[69] *Id.*
[70] *See, e.g.*, *U.S. Chamber Comment*, *supra* note 40, at 21-22.
[71] Comment of Foley & Lardner LLP, Doc. No. FTC-2023-0040-0653 at 11 (hereinafter *Foley Comment*).
[72] *Id.* ("The proposed instruction could potentially increase the size of at least some HSR filings by a factor of ten or twenty.").
[73] *U.S. Chamber Comment*, *supra* note 40, at 21-22.
[74] *Id.*
[75] NPRM, *supra* note 1, at 42194.
[76] *Id.*
[77] *See Comment of Wachtell, Lipton, Rosen & Katz*, Doc. No. FTC-2023-0040-0670 at 11-12; *Foley Comment*, *supra* note 71, at 11-13.
[78] *Id.* at 12.

Second, for each of the alleged "smoking gun" drafts identified in a second request by staff, other information contained in the HSR filings already prompted the staff to issue a second request. Phrased differently, the agencies already had enough information, without the drafts, to decide to issue a second request in each of those cases. And beyond bald assertions, the NPRM did not provide any evidence demonstrating that the drafts would have made a difference in the decision whether to issue a second request.

In summary, the extensive burden resulting from the production and review by staff of drafts would have outweighed any benefits of the requirement. I struggle to imagine any circumstance in which all draft documents would become a "necessary and appropriate" input for the agencies' initial review of proposed mergers, and therefore believe that the inclusion of this requirement in any future revision would exceed the Commission's rulemaking authority. I would not have supported a Final Rule that required drafts and am heartened by the removal of this provision.

IV. Prior Acquisitions

The NPRM proposed radical changes to the prior acquisition request in the 2011 Rule. The proposed changes included: (1) expanding the lookback period for reporting prior acquisitions from five years to ten years; (2) eliminating the prior *de minimis* exception that required reporting only for prior acquisitions that "had annual net sales or total assets greater than $10 million"; (3) requiring the acquired entity to also report prior acquisitions; and (4) requiring that acquisitions of substantially all of the assets of a business be treated the same as acquisitions of securities or non-corporate interests.[79] My vote was conditioned on the Commission eliminating the first two of these proposed changes. I write to explain why I believe it was proper to remove those requirements from the Final Rule and why the Commission should not revisit these proposals in future revisions to the HSR rules.

Prior acquisitions may, in limited circumstances, be relevant to analyzing the filed-for transaction, but consideration of these prior transactions comes with risk of government overreach. A prior acquisition may be relevant to analyzing a filed-for transaction when the competitive effects of the prior acquisition have not yet manifested. For example, if a firm acquired a rival and integration was ongoing or existing contractual terms prevent the effects of the merger from being fully realized, a prior acquisition may help the agencies better understand the dynamics and competitive effects of the filed-for transaction. Once firms have completed integration, realized efficiencies, and implemented any strategies they plan to orchestrate, prior acquisitions provide almost no value[80] to the agencies as they assess the competitive conditions surrounding the filed-

[79] NPRM, *supra* note 1, at 42203.

[80] As one exception, the agencies have considered the ability to realize efficiencies in past transactions as evidence of the likelihood of achieving efficiencies in the current transaction. But even that information becomes stale and loses probative value at some point.

for transaction because at that juncture, the condition of the current market will reflect the effects of past transactions.[81]

For the last thirty-seven years, the Commission has determined that five years of prior acquisitions, with a threshold based upon the sales and assets of the entity that was acquired, was justifiable.[82] I do not seek to relitigate thirty-seven years of precedent. The question is whether the rulemaking record contained sufficient evidence to justify the request to reach ten years of prior acquisitions without any size threshold. I conclude that it did not.

The HSR Act limits the information that can be required under the Commission's HSR Rules to "documentary material and information relevant to *a* proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether *such acquisition* may, if consummated, violate the antitrust laws."[83] Based upon this text, HSR Rules can seek *only* the information the agencies need to screen for potential violations of the antitrust laws arising from consummation of the *filed-for transaction*.[84]

Since 1987, the Commission has required only five years of prior acquisitions.[85] Despite the Commission making no efforts to change this rule for thirty-seven years, the NPRM contended that it needed the additional five years of prior acquisitions "because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration."[86] Further, the NPRM alleged that "changes to the economy and the varied acquisition strategies of filing parties" justified "a more detailed consideration of how numerous past acquisitions, including those in related sectors, affect the competitive landscape of the current transaction under review."[87] The Supreme Court has explained that when an agency "depart[s] from a prior policy," "the agency must show that there are good reasons for the new policy."[88] And "a more detailed justification" is required when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy."[89] Beyond bald and conclusory assertions, however, neither the NPRM nor the rulemaking

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[81] Dan O'Brien, *The 2023 Merger Guidelines: A Giant Leap in the Wrong Direction*, CONSUMER TECHNOLOGY ASSOCIATION (Jun. 2024) ("[T]he acquisition history is irrelevant to the current merger except to the extent it provides information about the current merger's likely competitive effects."); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 332 (1962) ("[T]he statute prohibits a given merger only if the effect of that merger may be substantially to lessen competition.").

[82] NPRM, *supra* note 1, at 42203.

[83] 15 U.S.C. § 18a(d)(1) (emphasis added).

[84] *Id.*

[85] Premerger Notification; Reporting and Waiting Period Requirements, 50 Fed. Reg. 38742, 38769 (Sep. 24, 1985) (to be codified at 16 C.F.R. pts. 801, 802, and 803).

[86] NPRM, *supra* note 1, at 42203.

[87] *Id.*

[88] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (Scalia, J.).

[89] *Id.*; *see also id.* at 537 (Kennedy, J., concurring) ("Where there is a policy change the record may be much more developed because the agency based its prior policy on factual findings. In that instance, an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.").

record presented "good reasons" that justified the production of ten years of prior acquisitions, let alone "a more detailed justification" that is required in this circumstance.[90]

Insofar as the NPRM's proposal required the production of information in order to investigate past transactions—*i.e.*, not the *filed-for* transaction—under theories of serial acquisitions or otherwise,[91] the Commission lacks the authority to gather that information via an HSR filing. Because neither the NPRM nor the rulemaking record provided evidence that ten years would be relevant to analyzing the effects of the *filed-for* transaction, the NPRM's proposal did nothing more than attempt an end-run around the HSR Act's reportability requirements.[92] Congress already specified which transactions must be reported to the agencies, and the Commission cannot gather information that does not help the agencies analyze the filed-for transaction.[93] Sensibly, the Final Rule does not adopt the proposed changes to the lookback period. In the SBP for the Final Rule, the Commission explains that the information required for prior acquisitions is limited to what the agencies need to analyze the anticompetitive effects of the filed-for transaction.[94]

The proposed removal of the $10 million threshold also suffered deficiencies. The $10 million threshold has been the threshold for prior acquisitions since the original HSR Rules in 1978.[95] But the NPRM disregarded this forty-six-year history where the threshold, despite inflation, has been the same. To justify abandoning the threshold, the NPRM pointed to "the Commission's technology acquisition study [that] revealed that between 39.3% and 47.9% of transactions were for target entities that were less than five years old at the time of their acquisition."[96] It then stated, without citation, "[g]iven the relative nascency of these acquired companies, the Commission believes that excluding prior acquisitions of firms that have not yet

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[90] *Id.* at 515. In 1987, when the Commission adopted the rule that required filers to report five years of prior acquisitions, it explained:

> The Commission believes that this change can be made without adversely affecting the agencies' ability to conduct a thorough antitrust review. The Commission believes than an accurate account of the acquiring person's acquisitions over the past five years will adequately put it on notice of possible trends toward concentration in the affected industry.

Premerger Notification; Reporting and Waiting Period Requirements, 50 Fed. Reg. 38742, 38769 (Sep. 24, 1985) (to be codified at 16 C.F.R. pts. 801, 802, and 803). The simple conclusory statements in the NPRM do not qualify as "a more detailed justification," which is necessary here because the Commission now contradicts its previous factual finding that five years was adequate for review.

[91] *See* NPRM, *supra* note 1, at 42203.

[92] The HSR Act identifies which transactions must be reported—*i.e.*, filed—based upon three tests: the commerce test, size of transaction test, and the size of person test. 15 U.S.C. § 18a(a); *see also* Fed. Trade Comm'n, *Steps for Determining Whether an HSR Filing is Required* (last visited Oct. 4, 2024), https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing.

[93] Under the Administrative Procedure Act, a court reviewing an agency rule can declare it "unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706 (Under the Administrative Procedure Act, a court reviewing an agency rule can deem it "unlawful and set aside agency actions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"). "[N]o matter how important, conspicuous, and controversial the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

[94] *See* SBP, *supra* note 5, at § II.B.5, 61 of 406 (explaining focus is on reportable transaction).

[95] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33450 at 33534 (July 31, 1978).

[96] NPRM, *supra* note 1, at 42203.

had the chance to achieve $10 million in net sales or assets does not provide a comprehensive picture of each filer's acquisition strategy."[97] Nothing cited by the NPRM suggests that just because an acquisition target is less than five years old, that its sales will be below $10 million. Moreover, nothing in the NPRM explained why the age of targets in "technology acquisitions" would be relevant to the whole economy, and yet the proposed rule would have applied universally. Indeed, neither the NPRM nor the rulemaking record presented evidence to justify this dramatic expansion, and without evidence, there is no justification to impose such a requirement on filers.

The NPRM's proposal to double the time period and to remove the $10 million threshold would have added substantial burden to filing parties. The NPRM appeared content with the burden because it provided an expanded ability to analyze non-reportable prior acquisitions, including under theories of serial acquisitions.[98] But as explained, this benefit contravenes the Commission's rulemaking authority. Because the Final Rule must be limited to the Commission's authority, the focus must also be limited to how it assists the agencies' assessment of the filed-for transaction during the initial waiting period. As explained above, the NPRM's prior acquisition expansion would have provided almost nothing that would help the agencies to assess filed-for transactions.

V. Additional Considerations

The changes implemented by the Final Rule request information to analyze *only* the filed-for transaction. The changes are not to authorize the agencies to engage in general fishing expeditions to analyze non-reportable transactions or other allegedly problematic conduct divorced from the effects of the filed-for transaction. The same could not be said for some of the proposals in the NPRM, and those concerns have been rectified in the Final Rule. I understand that potential filers may be skeptical that the information gathered in HSR filings may be collected with an eye toward other purposes. In the Final Rule, each of these provisions is now modified to collect only information that is necessary and appropriate to analyze the filed-for transaction.[99]

The Final Rule requires filers to produce new information about officers and directors within the "stack" of companies. The ultimate rule differs substantially from the NPRM's proposal.[100] Among the key changes, the request only applies to acquiring persons; filers no longer have to provide information about board observers; and the request is limited to only those entities who generate revenue in the same NAICS codes as the target. This information, like all the information requested by the Final Rule, is designed to help staff better analyze the filed-for transaction. The SBP provides a detailed description of why this requested information helps obtain that goal.[101] The purpose of this revision is not a general fishing expedition; it is to

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[97] *Id.*

[98] The NPRM sought to right the wrongs of the so-called 40 years of failed antitrust enforcement. *See* Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy; *see* NPRM, *supra* note 1, at 42203.

[99] To be clear, if a filing demonstrates anticompetitive conduct, such as price fixing, it can prompt another investigation.

[100] *See* app. A.

[101] SBP, *supra* note 5, at § VI.D.3.c., 241-254 of 406.

illuminate complicated and overlapping management structures that may impact the competitive effects of the filed-for transaction.

The additional information about minority shareholders and limited partners has also raised concern. The Final Rule again reflects key changes to the proposals in the NPRM. In particular, the final version eliminates the requirement to create an organization chart and eliminates the requirement to disclose limited partners that do not also have management rights. The complicated nature of this request, especially as included in the NPRM, raised confusion and concern of the Commission's purpose for this request. The SBP goes to great lengths to describe—and illustrate via helpful diagrams—why this information will be important to analyzing the filed-for transactions. The purpose is not to pursue or launch general investigations into theories of harm based upon fringe concepts such as common ownership.[102] Nor do I believe it would be possible to construct such theories based upon the information required by the Final Rule. My vote in support of the Final Rule reflects my understanding and belief that this information will help the agencies to more quickly understand the competitive dynamics of a filed-for transaction, and nothing more.

VI. **Conclusion**

The Final Rule has been scaled back dramatically from the NPRM. And rightly so. I voted in favor of the Final Rule because of the revisions and outright removal of certain proposals in the NPRM. As modified, I believe that the Final Rule is consistent with that statutory grant of authority and will help staff analyze the filed-for transaction and protect consumers without unduly burdening the filing parties.

On a going forward basis, the Commission can and should carefully scrutinize the effect of the Final Rule on our enforcement efforts and on the burden it imposes upon filing parties and the agencies' staff. A thoughtful retrospective will allow the Commission to modify the Final Rule, if necessary, in a principled and evidence-based fashion.

[102] *See, e.g.*, Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L.R. 1267 (2016). Though beyond the scope of this statement, I do note that no court has endorsed such a theory of harm and it has faced scrutiny in the literature. *See* Matthew Backus, Christopher Conlon & Michael Sinkinson, *The Common Ownership Hypothesis: Theory and Evidence*, BROOKINGS ECON STUDIES (Jan. 2019), https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf; Keith Klovers & Douglas H. Ginsburg, *Common Sense About Common Ownership*, 2018 CONCURRENCES REV. 28 (Fall 2018); Thomas A. Lambert & Michael E. Sykuta, *Calm Down About Common Ownership*, REGULATION (Fall 2018).