COMMENTS OF THE PRIVATE EQUITY GROWTH CAPITAL COUNCIL

HSR Form Changes

The Private Equity Growth Capital Council ("PEGCC") submits these comments on the proposed amendments to the Hart-Scott-Rodino Act ("HSR") Premerger Notification Rules (the "Rules"), the Premerger Notification and Report Form (the "Form"), and associated Instructions to the Form as set forth in the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Trade Commission (the "FTC") on August 13, 2010, and published in the Federal Register at 75 Fed. Reg. 57110 (September 17, 2010).

I. Executive Summary

The PEGCC applauds the FTC's efforts to streamline the Form and reduce the burden on reporting persons by removing certain requirements that are obsolete or likely to yield information of little or no value in assessing the competitive impact of a proposed transaction. Several of the proposed amendments will reduce the burden on reporting persons without compromising the ability of the FTC or the Antitrust Division of the Department of Justice (the "DOJ") (collectively, the "Agencies") to identify potential competitive concerns.

The PEGCC believes, however, that certain of the FTC's proposed amendments to the Rules and Form will increase substantially the burden on reporting persons and agency staff without significantly enhancing the effectiveness of the antitrust review conducted by the Agencies. These proposed changes request information that is broader and more extensive than necessary for the Agencies to determine, especially preliminarily, whether a particular transaction raises competitive issues that merit additional review. It is well established that the

vast majority of transactions notified under HSR do not raise substantive antitrust issues.[1] Several of the proposed amendments will impose undue time and cost burdens on all transactions, not just the very few that raise competitive concerns.

The current HSR form solicits sufficient information for the Agencies to perform an initial competitive analysis of a potential transaction. Item 4(c), in particular, — which captures documents prepared by or for officers or directors used in making the investment decision — is effective in identifying those transactions that raise potential competitive concerns. Most of the additional information requested by the proposed amendments is more properly the subject of an informal request for information within the 30-day HSR waiting period or a request for additional information or documentary material pursuant to 15 U.S.C. § 18a(e) (a "second request").

Consequently, as set forth in more detail herein, the PEGCC recommends that the FTC:

- Delete Item 4(d) from the proposed amendments;
- Remove the requirement in revised Item 5 that reporting persons provide revenue information for products manufactured outside of the United States (the "U.S.") and sold into the U.S.;
- Delete Item 6(c)(ii) from the proposed amendments; and
- Narrow and clarify the definition of "associate" as used in Item 7.

[1] From fiscal years 2000 to 2009, an average of only 3.1 percent of transactions notified each year resulted in a request for additional information or documentary material pursuant to 15 U.S.C. § 18a(e). See Federal Trade Commission and the United States Department of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2009, at 4, Fig. 2, available at http://www.ftc.gov/os/2010/10/101001hsrreport.pdf. Put another way, almost 97% of all transactions notified each year are not subject to an in-depth review by the Agencies. Indeed, over the past ten years, an average of approximately 66% of transactions filed each year received early termination of the statutory HSR waiting period. See Id., Appendix A.

II. The Private Equity Growth Capital Council

The PEGCC is an advocacy, communications, and research organization and resource center established to develop, analyze, and distribute information about the private equity and growth capital investment industry and its contributions to the national and global economy. Established in 2007 and formerly known as the Private Equity Council, the PEGCC is based in Washington, D.C. The PEGCC is composed of thirty-one member firms united by their commitment to growing and strengthening portfolio companies.[2]

Private equity is an important and positive part of the American economy and plays a critical role in driving its growth. The term "private equity" refers to a range of investments that are not freely tradable on public stock markets. Private equity firms establish funds that raise capital from investors — who are referred to as limited partners, or LPs. General partners, or GPs, at the private equity firms invest the LPs' capital. With the combination of LP equity, GP investment, and borrowed funds, the general partners buy companies that they believe could achieve significantly greater growth and profitability with the right infusion of talent and capital.

Private equity firms vary in size and structure, but all typically manage one or more separate investment funds. In many instances, a private equity firm has more than one active primary fund, each focusing on different industries or geographies or different types of investments or asset classes. Each fund typically will invest in a varying number of portfolio

[2] PEGCC members are among the world's best-known and most-respected private equity firms: Apax Partners; Apollo Global Management LLC; Avista Capital Partners; Bain Capital Partners; The Blackstone Group; Brockway Moran & Partners; The Carlyle Group; Crestview Partners; Genstar Capital; Global Environment Fund; GTCR; Hellman & Friedman LLC; The Jordan Company; Kelso & Company; Kohlberg Kravis Roberts & Co.; KPS Capital Partners; Levine Leichtman Capital Partners; Madison Dearborn Partners; MidOcean Partners; New Mountain Capital; Permira; Providence Equity Partners; The Riverside Company; Silver Lake; Sterling Partners; Sun Capital Partners; TA Associates; Thomas H. Lee Partners; TPG Capital (formerly Texas Pacific Group); Vector Capital; and Welsh, Carson, Anderson & Stowe. Kirkland & Ellis LLP represents the PEGCC and assisted in the preparation and submission of these comments.

companies, located both in the U.S. and abroad. Generally, a private equity firm will raise a new fund once the capital from the previously-established fund is likely to be fully committed. The general partner of each fund has a fiduciary duty to manage that fund for the benefit of its particular LPs. Private equity firms typically hold companies between three and seven years, and then sell them, hoping to realize a gain on the sale as a result of the increased value they have created during their period of ownership.

III. Proposed Item 4(d) - Additional Documents

Proposed Item 4(d) raises significant concerns and, consequently, the PEGCC recommends that it be deleted from the amendments to the Form. As currently drafted, Item 4(d) will greatly expand the universe of documents potentially responsive to Item 4, thus substantially increasing the burden on the filing parties. In particular, because Items 4(d)(i) and 4(d)(ii) are not limited to the transaction that is the subject of the HSR filing, these items raise the practical problem of how to locate responsive documents that may exist outside of the files related to a specific transaction without conducting an extensive second request-type document review. Having to search a substantial number of additional files will introduce significant delay into the HSR process. Not only will reporting persons have to spend more time gathering and reviewing potentially responsive information, but the Agencies and the FTC Premerger Notification Office (the "PNO") will have to spend more time processing and analyzing the increased number of documentary attachments to the HSR filings. These additional documents are likely to provide only marginal benefit to the Agencies' review of the transaction while burdening the Agencies' staff with irrelevant, outdated and/or redundant information. This delay is at odds with the

purpose of HSR, which is to provide the Agencies with a brief overview of proposed transactions and their competitive effects. [3]

A. Item 4(d)(i) - Offering Memoranda

The PEGCC recommends that Item 4(d)(i) be eliminated from the proposed Rules. Current Item 4(c) provides for the production of offering memoranda prepared in connection with the transaction that is the subject of the HSR filing. Offering memoranda relating to other transactions will be much less helpful to the Agencies and will expand the HSR filing, and the burden in connection with its preparation by reporting persons and its review by the Agencies, far beyond the HSR Act's intended scope.

Proposed Item 4(d)(i) requires the production of:

> all offering memoranda (or documents that served that function) that reference the acquired entity(s) or assets . . . produced up to two years before the date of filing.

Proposed Item 4(d)(i) is not limited to documents prepared in connection with the transaction or to documents prepared by or for an officer or director and thus, will expand substantially the scope of the necessary document review. Reporting persons generally can comply with Item 4(c) by searching the files of a limited number of persons directly involved in the transaction that is the subject of the HSR filing. Item 4(d)(i), however, will require reporting persons to expand their document review well beyond the current deal team, thus significantly increasing the burden of compliance.[4]

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[3] In enacting HSR, Congress intended that "the premerger data sought by the Government can be compiled rapidly." 122 Cong. Rec. 30,868 (1976) at 30,876. Even in connection with second requests, Congress expected that "lengthly [sic] delays and extended searches should consequently be rare." Id. at 30,877.

[4] Item 4(d)(ii), which also is not limited to documents prepared in connection with the transaction that is the subject of the HSR filing, will raise similar concerns as discussed in the next section.

Private equity firms, in particular, as well as venture capital firms and other firms that focus on investing in companies, analyze numerous potential transactions each year. If the document search is not limited to documents prepared for the current acquisition, an extraordinary number of files, including electronic files, will need to be reviewed, especially since the "prepared by or for an officer or director" limitation contained in Item 4(c) is not part of the proposed Item 4(d)(i). Moreover, the proposed two-year limitation will sweep in potentially outdated and unhelpful documents, since industries can change significantly in two years due to factors such as new entry and rapidly-evolving technologies.

For many PEGCC members, proposed Item 4(d)(i) would be particularly burdensome. Even a private equity firm that might consummate only one or two deals per year likely would review hundreds of potential investments and receive a corresponding amount of due diligence materials every year, virtually all of which would include an offering memorandum. The private equity firms receive these materials pursuant to confidentiality agreements that usually require the firm either to return or destroy all due diligence materials (including offering memoranda) if the firm decides not to pursue the transaction (which is the case the overwhelming majority of the time). Despite the fact that these materials typically are destroyed or returned, they usually continue to reside in the private equity firm's email archives, where they are no longer readily available to the investment staff. The private equity firms are required to maintain these email archives under the books and records requirements of the Investment Advisers Act of 1940, as amended. This email archive usually is carved out of the confidentiality agreement requirement to destroy the materials.

Proposed Item 4(d)(i) would require private equity firms to search their email archives for documents no longer available to the investment staff and then, in most cases, to give notice

to the other party to the confidentiality agreement in order to submit the materials as part of the HSR filing. The other party could sue to intervene and prevent the production of these materials. Reviewing email archives that normally are not readily accessible to the private equity firms will be extremely burdensome. Even in the context of a second request, the Agencies recognize the burden in searching electronic archives and backup tapes that are of limited value and that are "not reasonably accessible" and almost uniformly exclude or limit the search and production of such files.[5] Having to engage in an extensive email archive search and then to pursue a time consuming "notice and opportunity to object" procedure would impose a significant burden on reporting parties, threaten deal confidentiality, and turn what otherwise might be a relatively straightforward HSR reporting and review process into a substantial impediment to a timely and effective deal process.

To the extent that Item 4(d)(i) is intended to secure the production of offering memoranda prepared in connection with the transaction which is the subject of the HSR filing, it is duplicative of Item 4(c). Informal PNO staff interpretations advise that offering memoranda are responsive to Item 4(c) and must be submitted with the HSR filing.[6] As the FTC states in the Statement of Basis and Purpose of the Proposed Amendments to the Rules and the Form (the "SBP"), most parties already submit offering memoranda prepared in connection with the current transaction in response to Item 4(c).[7] If the FTC is concerned that a small number of reporting

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[5] Request for Additional Information and Documentary Material Issued to Weebyewe Corporation (11/30/2000; rev. 7/30/04, 12/14/06, 6/26/07, 2/17/09) at 10-11, available at http://www.justice.gov/atr/public/242694.htm. See also Model Request for Additional Information and Documentary Material (Second Request) (Revised June 2010) at 10-11, available at http://www.ftc.gov/bc/hsr/introguides/guide3.pdf.

[6] See Informal Staff Opinion # 8612014 (1986) ("Offering document must be included as 4(c)."), available at http://www.ftc.gov/bc/hsr/informal/opinion/8612014.htm.

[7] 75 Fed. Reg. at 57115.

persons are not complying with Item 4(c) in this respect, rather than adding proposed Item 4(d)(i) to the Form, a simpler and more appropriate solution would be to revise the instructions to Item 4(c) – which already limit the production to documents prepared in connection with the transaction being notified – specifically to mention offering memoranda.[8]

Precisely because reporting persons generally submit offering memoranda in response to Item 4(c), the FTC states that Item 4(d)(i) "should not create any additional burden" for the reporting persons.[9] Contrary to the FTC's assertion, however, expanding the scope of potentially responsive documents to those prepared outside of the context of the current transaction will increase substantially the number of files that must be reviewed and, consequently, increase the burden on reporting persons. The FTC seemingly, and incorrectly, fails to distinguish between an increase in production and an increase in burden. While in certain instances Item 4(d)(i) may not increase the volume of documents produced by reporting persons, the burden associated with the search efforts required to ensure substantial compliance with Item 4(d)(i) – and Item 4(d)(ii) as well – will be substantially higher than the burden associated with the current Item 4(c) search. The Agencies vigorously enforce substantial compliance with Item 4(c), often by imposing significant monetary fines and by re-starting the HSR waiting period if documents deemed responsive to Item 4(c) are not submitted with the Form.[10] The PEGCC expects that the Agencies will be no less exacting in their approach to proposed Item 4(d).

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[8] The current instructions to Item 4(c) could be revised to read, in relevant part: "...product or geographic markets, *including offering memoranda*, and indicate (if not contained in the document itself...)."

[9] 75 Fed. Reg. at 57115.

[10] In 1996, 1999, and 2001, the Agencies imposed civil penalties of approximately $3 million to $4 million in each of several cases where the FTC staff subsequently discovered (after consummation of the acquisition) that the acquiring person had failed to submit several documents responsive to Item 4(c). In one of the cases, the acquiring person's failure apparently was the result of a careless internal search and not a deliberate decision to disregard the

The PEGCC understands that the FTC Premerger Notification Office (the "PNO") has indicated that it will apply to proposed Item 4(d) the informal interpretations relating to current Item 4(c). While this guidance will relieve reporting persons from the burden of providing document drafts, it will not limit significantly the document search or production burden. For example, because proposed Item 4(d)(i) is not limited to documents created in connection with the current transaction, reporting persons will need to produce separate versions of an offering memorandum prepared for different potential bidders—not merely the version prepared for the ultimate buyer, as Item 4(c) requires. Such documents have limited additional value. They often are exact duplicates except for minor differences, such as dates. Inclusion of such documents will increase the overall production volume and thus the burden on the parties in preparing the Form, without providing the Agencies with any meaningful additional information.

Proposed Item 4(d)(i) requires the production not merely of offering memoranda as such, but of all documents "that served [the] function" of offering memoranda. By way of example, the SBP advises that "an existing presentation" circulated to a prospective buyer "to provide an overview of the company . . . would be the equivalent of an offering memorandum . . . and must be submitted."[11] This requirement potentially will encompass whole new categories of documents that may have been shared with the buyer as part of due diligence in connection with the current transaction, as well as due diligence documents provided to potential purchasers in connection with transactions other than the one for which the HSR filing is being submitted. Consequently, ordinary course documents can become responsive to Item 4(d)(i) if they have

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Rules. In a 2007 case, the DOJ imposed a $550,000 civil penalty for failure to submit any Item 4(c) documents with the HSR filing notwithstanding that the transaction raised no substantive issues and the Agencies had granted early termination of the HSR waiting period. Civil penalties for failure to comply with the Act's reporting and waiting period requirements currently are up to $16,000 per day during the period of non-compliance.

[11] 75 Fed. Reg. at 57115.

been provided to any prospective purchaser. The reporting person will have to make a subjective assessment of the purpose of each individual document to determine whether it falls within Item 4(d)(i).

B. Item 4(d)(ii) - Materials Prepared by Investment Bankers, Consultants or Other Third Parties

The PEGCC recommends that Item 4(d)(ii) be eliminated from the proposed amendments. Competition-related documents that are prepared in connection with the transaction that is the subject of the HSR filing already are required to be produced in connection with Item 4(c). To expand the scope of the document search required by HSR beyond the transaction that is being notified imposes a markedly increased burden on reporting persons.

Proposed Item 4(d)(ii) raises issues of overbreadth and undue burden similar to proposed Item 4(d)(i). Item 4(d)(ii) requests the production of :

> all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors . . . for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing market shares, competition . . . and that also reference the acquired entity(s) or assets.

Item 4(d)(ii) requires production of responsive documents created up to two years before the date of filing.

Proposed Item 4(d)(ii) will require reporting persons to search all officer and director files within the two year time period prior to filing, as opposed to just the officer and director files related to the current transaction that are searched for purposes of Item 4(c). Since "officers and directors" include not just those of the top-level entities involved in a transaction, but also all officers and directors of entities included within the reporting person, the files of officers and directors of all portfolio companies that might possibly have any relevant documents relating to

the general industry in which the target operates will need to be searched. Since private equity firms tend to focus on certain industries, every file maintained by an officer or director conceivably could contain responsive documents. Thus, Item 4(d)(ii) will greatly expand the scope of the document search currently called for by Item 4(c), and could result in the production of a substantial volume of additional documents.

Proposed Item 4(d)(ii) also will sweep in numerous ordinary course documents that will be of little value in analyzing the notified transaction and, moreover, may not reflect the reporting person's view of the industry. For example, an unsolicited investment banker presentation, unrelated to any transaction, prepared as a business development document as early as two years prior to the HSR filing and sent to a private equity fund manager likely would not influence the reporting person's analysis of a current deal. Nonetheless, this document would be responsive to Item 4(d)(ii). While possibly helpful to the Agencies in providing general industry background, these materials are not transaction-specific and consequently are more properly the subject of a voluntary request for additional information within the 30-day waiting period or a second request.

The SBP incorrectly states that "[m]any parties already submit such competition-related third party materials along with their HSR Filings" and concludes that Item 4(d)(ii) will create no substantial additional burden.[12] In general, parties submit such competition-related third party materials with their HSR filings only when prepared to analyze the current transaction as required by Item 4(c). The PEGCC believes that few reporting persons submit materials that do

[12] 75 Fed. Reg. at 57115.

not relate to the transaction that is the subject of the HSR filing. Consequently, proposed Item 4(d)(ii) will impose a substantial additional burden on reporting persons.

Additionally, proposed Item 4(d)(ii) could be interpreted to include outside counsel as "consultants" or "advisors" of the reporting person. Antitrust counsel often create documents that describe the entities or assets to be acquired and discuss competition-related topics. The burden on the reporting person to gather and review attorney-client privileged documents, whether related to the current acquisition or to prior acquisitions, and index them on a privilege log, would be substantial. Moreover, as drafted, proposed Item 4(d)(ii) could sweep in privileged documents prepared in connection with intellectual property or non-merger antitrust litigation and thus unrelated to any transaction whatsoever. Such an extensive privilege log will not assist the Agencies in analyzing the transaction.

Proposed Item 4(d)(ii) also raises serious confidentiality concerns, some of which are discussed in connection with proposed Item 4(d)(i). The PEGCC believes that many reporting persons will be reluctant to initiate such expansive document searches among personnel that may have no connection with or knowledge of the current transaction. To do so would increase insider-trading risks and the opportunity for media leaks. This situation arises frequently in connection with tender offers and other time-sensitive transactions that often are not announced until immediately prior to or shortly after the HSR filing is submitted. Although most private equity funds are not publicly-traded and thus do not have disclosure obligations under the securities laws, they often desire confidentiality for their transactions and may not want officers and directors of portfolio companies not involved in the transaction to know about the deal. Reporting persons will face a difficult choice between the importance of confidentiality and transaction timing if Item 4(d)(ii) is adopted.

C. Item 4(d)(iii) - Documents Discussing Synergies and/or Efficiencies

The PEGCC recommends that Item 4(d)(iii) be eliminated from the proposed amendments. Documents responsive to Item 4(d)(iii) are relevant primarily in connection with the small minority of transactions that raise competitive concerns. In such cases, these documents can be obtained through an informal request for information within the 30-day waiting period or through the second request process.

Proposed Item 4(d)(iii) requests production of:

> all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies . . . prepared by or for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition.

Item 4(d)(iii), by its terms, is limited to documents prepared for the purpose of evaluating or analyzing the current transaction, and consequently, poses less of a burden on reporting persons than Items 4(d)(i) and 4(d)(ii). Nonetheless, the PEGCC believes that to require production of synergies/efficiencies documents with the initial HSR filings is unwarranted.

While synergies and efficiencies can be useful to evaluate a transaction with possible anticompetitive effects, they are less helpful in identifying the existence of a competitive issue in the first instance. Since the vast majority of HSR filings are submitted in connection with transactions that do not raise competitive concerns, it is premature and unnecessarily burdensome to require this documentation in connection with all transactions. If the Agencies determine that a proposed transaction may raise competitive concerns, they can request these documents informally within the initial 30-day HSR waiting period or as part of the second request process.

Despite the FTC's suggestion to the contrary, compliance with proposed Item 4(d)(iii) will increase the burden on reporting persons. The FTC states that "[m]any parties already submit [synergy/efficiency documents, and thus] this item should present little additional burden for them . . . ."[13] The PEGCC believes, however, that most reporting persons generally do not submit synergy or efficiency studies unless they otherwise satisfy the Item 4(c) criteria. Consequently, compliance with proposed Item 4(d)(iii) will require reporting persons to review and produce synergy and efficiency documents that otherwise would not be produced in response to Item 4(c).

The qualification in Item 4(d)(iii) that ["f]inancial models without stated assumptions need not be provided" does not meaningfully reduce the burden on reporting parties.[14] Often these financial models do contain stated assumptions, including growth rates, revenues streams, etc. Equally as often, reporting persons cannot determine easily what assumptions, if any, are incorporated therein and will produce such documents out of an abundance of caution. Such behavior will result in the production of more documents, but not necessarily those containing useful information.

IV. <u>Revised Item 5 - Products Manufactured Outside the U.S.</u>

The PEGCC recommends that the requirement to report revenues related to foreign manufactured products imported into the U.S. be removed from revised Item 5. The FTC's proposal increases the burden on reporting persons that manufacture products abroad and import them into the U.S. without substantially aiding the Agencies' analysis of the transaction.

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[13] 75 Fed. Reg. at 57115.

[14] <u>Id</u>.

Item 5 of the Form requires reporting persons to identify their revenues by North American Industry Classification System ("NAICS") codes. While the PEGCC concurs with the FTC's proposal to limit the burden of Item 5 by eliminating the base year reporting requirement, other proposed amendments to Item 5 raise concerns. Among the changes to Item 5, the FTC proposes to require reporting persons to identify by 10-digit NAICS product code the revenues for each product they manufacture outside of the U.S. and sell into the U.S. This proposal will expand significantly the reporting person's burden in connection with Item 5, which already is recognized as one of the most burdensome, time consuming, and complex items on the Form.[15]

Foreign persons and foreign offices and operations of U.S. persons do not have U.S. census reporting obligations, as do their U.S. counterparts, and thus, generally are unfamiliar with the NAICS code system. Consequently, these entities typically do not maintain revenue information in NAICS code format. Determining the applicable 10-digit NAICS codes and allocating the appropriate revenues thereto will be time consuming and burdensome. This burden is multiplied in the case of private equity firms with foreign funds or U.S. funds that hold either foreign portfolio companies or U.S. portfolio companies with foreign subsidiaries. In addition, the proposed changes to Item 5 will make it conceptually difficult to advise clients as to what revenue should be reported on the Form. The current Item 5 requires the reporting person to provide information regarding operations conducted in the U.S. Under the revised rule, this relatively straightforward guidance is no longer applicable, as reporting persons will need to

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[15] See, e.g., Federal Trade Commission, Bureau of Competition, Back to Basics Workshop, (October 23, 2008) at 134, available at http://www.ftc.gov/bc/workshops/hsr/hsrpresentation.pdf; Hart-Scott-Rodino Premerger Notification Program, The Most Frequently Asked HSR Questions, #7, (citing Item 5 deficiencies as among the most frequent), available at http://www.ftc.gov/bc/hsr/faq.shtm.

analyze their worldwide operations to identify sales of foreign-manufactured products into the U.S.

The additional requirement that sales made directly into the U.S. to third parties be reported in a manufacturing code, while sales made into the U.S. through a wholesale or retail establishment included within the reporting person be reported in both manufacturing and wholesale or retail codes, will further complicate matters for foreign entities that are unfamiliar with the HSR process. Item 5 currently requires reporting persons that manufacture products at a U.S. plant and then sell such manufactured products through a U.S. wholesaling or retailing operation located apart from the plant to report such revenues under both manufacturing and wholesaling or retailing NAICS Codes. This double listing of a reporting person's manufactured products under both manufacturing and wholesale or retail codes is confusing and burdensome, as many companies do not track intercompany revenues by product. It is counter-productive to extend this confusion and burden to revenues from foreign sales into the U.S. Moreover, the SBP does not explain how this double listing will benefit the Agencies' analysis of the transaction or how such benefits outweigh the burden of compliance with this proposed requirement.

V. "Associate" Reporting, Proposed Item 6(c)(ii), and Expanded Item 7

The FTC proposes to expand Items 6(c) and 7 by requiring information related to "associates" of the acquiring person. By incorporating the "associate" concept into the Rules and the Form, the FTC significantly increases the burden and complexity of complying with Items 6(c) and 7. More importantly, the proposed definition of "associate" is so vague and confusing as to be unworkable. The PEGCC recommends that the FTC eliminate proposed Item 6(c)(ii) and narrow the definition of "associate" for purposes of Item 7, as set forth below.

A. "Associate" Definition

Proposed Rule 801.1(d)(ii) defines an "associate" for purposes of Items 6(c) and 7 of the Form:

> an associate of an acquiring person shall be an entity that is not an affiliate of such person but: (i) Has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a "managing entity"); or (ii) Has its affairs and/or investments, directly or indirectly, managed, directed or overseen by the acquiring person; or (iii) Directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or (iv) Directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.

The SBP states that the "associate" concept has been introduced in order to gather information on related entities that are not controlled for HSR purposes, specifically master limited partnerships, families of investment funds, and limited partnerships managed by the same general partner.[16]

As currently drafted, the definition of "associate" not only is overly broad, but also is unduly complex and confusing. The phrase "the right, directly or indirectly, to manage, direct, or oversee" affairs of the acquiring entity is so expansive as to provide little guidance regarding the relationships to be covered. An expansive definition of "associate" would result in information that would have no conceivable competitive significance and would impose a significant burden on the reporting person to obtain.

As evidenced by the detailed examples set forth in the SBP, application of the FTC's definition of "associate" is highly complex. If the "associate" concept is incorporated into the

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[16] 75 Fed. Reg. at 57112. For corporations, control is defined as either (i) holding 50% or more of the outstanding voting securities of the corporation, or (ii) having the contractual right to designate 50% or more of the board of directors of the corporation. For partnerships and LLCs, control is defined as either (i) having the right to 50% or more of the profits of the entity, or (ii) having the right to 50% or more of the assets of the entity upon dissolution. 16 C.F.R. § 801.1(b).

Rules, the PNO will have to allocate additional time and resources to respond to numerous requests for guidance regarding what entities fall within this definition.

B. Item 6(c)(ii) - Holdings of "Associates"

The PEGCC recommends the elimination of proposed Item 6(c)(ii) and its reporting obligation in connection with minority holdings of "associates." This information is of minimal competitive significance, especially when compared to the substantial burden of identifying what entities qualify as "associates" and then securing the required information from such entities, which may have little, if any, relationship to the acquiring person.

Item 6(c)(ii) requires the acquiring person to report minority holdings of its "associates" to the extent that these entities derive revenue in the same 6-digit NAICS industry code as the acquired entities or assets. The information requested in proposed Item 6(c)(ii) is of minimal competitive significance. Since persons holding minority interests in an entity often cannot exert any control over that entity, information regarding such holdings will have little impact on the Agencies' analysis of a transaction. This is especially true in connection with proposed Item 6(c)(ii), where the holder of the minority interest is an "associate" that is not included within the reporting person.

Moreover, as the FTC recognizes, it will be difficult for an acquiring person to determine in what NAICS codes an entity derives revenue if the acquiring person does not control that entity.[17] In connection with 6(c)(ii), this difficulty is multiplied—not only does the acquiring person not control the entity with the NAICS code overlap(s), but the minority interest in this entity is held by an "associate" that the acquiring person similarly does not control. It will be

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[17] See 75 Fed. Reg. at 57118.

extremely challenging for an acquiring person to gather information regarding minority holdings of "associates," as currently expansively defined in the proposed Rules. The PEGCC believes that investment advisers, for example, will be hesitant to provide information on their own minority holdings and will be even more reluctant to cooperate in securing such information from other clients whom they advise that are unrelated to the acquiring person, particularly where such "associates" may have significant minority holdings. In addition, having to shift limited personnel and resources to these collection and recordkeeping functions would detract from private equity's main purpose — to grow portfolio companies and benefit the overall economy.

C. Item 7 - NAICS Code Overlaps with "Associates"

In applying the "associate" concept to Item 7, the FTC intends to capture information regarding NAICS code overlaps between the target and: (1) LPs that have the same GP as the acquiring person; and (2) investment funds that are under common management with the acquiring person.[18] The PEGCC recognizes that such information might be helpful to the Agencies in their review of a transaction, but has concerns regarding the overbreadth and complexity of the proposed definition of "associate."

The proposed amendments to Item 7 that relate to "associates" raise issues of burden similar to those discussed in connection with proposed Item 6(c)(ii), particularly for private equity firms. The PEGCC recognizes that private equity firms face less of a burden in determining the NAICS codes in which portfolio companies of their own funds report than in connection with other potential "associates." The increased burden to gather NAICS code

[18] See 75 Fed. Reg. at 57111-57112.

information on all "associate" entities as currently defined in proposed Rule 801.1(d)(ii) – some of which may have a minimal relationship to the acquiring person – significantly outweighs any relevant information gathered in connection with the small percentage of transactions that pose competitive issues. Here again, the PEGCC believes that the FTC, in considering the burden associated with the proposed requirement, incorrectly focuses on the likely volume of data reported, as opposed to the effort required to obtain the data.

For the reasons set forth above, the PEGCC urges the FTC to limit the scope of an "associate" in proposed Rule 801.1(d)(ii), and to consider the following alternative definition:

> an entity that is not an affiliate of the acquiring person but: (i) That has the authority to make management or investment decisions on behalf of the acquiring person or entity ("managing entity"); or (ii) For which the acquiring person has the authority to make management or investment decisions; (iii) That controls or is controlled by a managing entity; or (iv) For which a managing entity has authority to make management or investment decisions.

This proposal would exclude entities that merely "advise" the acquiring person/entity or are "advised by" the acquiring person/entity and also those entities that merely "oversee" the affairs of the acquiring person/entity or have their affairs "overseen" by the acquiring person/entity. Moreover, this definition would capture the two types of entities that the FTC has identified as raising the most concerns: master limited partnerships and investment funds under common management. Alternatively, the PEGCC suggests that the FTC limit the definition of "associate" to the two types of entities described in the preceding sentence.

VI. Conclusion

The PEGCC believes that the HSR requirements must balance the desire for additional relevant information against the costs and other burdens imposed on reporting persons. Several of the FTC's proposed changes to the Rules and Form achieve this balance and the PEGCC

commends the FTC for its efforts to reduce the burden on reporting persons. Certain of the proposed amendments to the Rules and the Form, however, go far beyond what can be justified in an initial notification – whose main purpose should be to elicit information sufficient to determine whether a more in-depth competitive analysis is necessary – by imposing substantial additional burdens on all reporting persons that will yield useful information in only a limited number of transactions. Especially in the private equity context, where transactions must be closed expeditiously when funding is available, timing can be critical and undue delay can scuttle an otherwise pro-competitive deal. In particular, Item 4(d), Item 6(c)(ii) and revised Items 5 and 7 will impose significant collection and production burdens on transactions that raise no competitive issues whatsoever. This additional information, while potentially helpful in connection with a problematic transaction, is more properly sought through a voluntary request during the HSR waiting period or through a second request, but in each case limited to only those transactions that raise competitive issues, as opposed to all transactions that must be notified under HSR.