May 26, 2026

VIA ELECTRONIC SUBMISSION

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

Re: Comment Regarding Making Improvements to the Premerger Notification and Report Form

Dear Ms. Tabor:

The American Investment Council ("AIC") appreciates the opportunity to respond to the Request for Public Comment ("Request") issued by the Federal Trade Commission, together with the Department of Justice's Antitrust Division (together, the "Agencies"), regarding the effectiveness of the Hart-Scott-Rodino Act's premerger notification requirements.[1] AIC submits this letter on behalf of our membership, which includes private equity and private credit firms.[2]

The private equity industry is a pillar of the modern American economy, a catalyst of competition and innovation, and a critical partner to small businesses. In 2024, the industry was responsible for approximately 7% of U.S. GDP.[3] It employed 13.3 million workers earning $1.1 trillion in wages and benefits across every American community, both rural and urban.[4] Most of these businesses—85%—had fewer than 500 employees.[5] The capital and financing the private equity industry provided helped these companies increase productivity, grow, hire, build, innovate, and, ultimately, compete against entrenched incumbents.[6] Many were emerging technology companies on the cutting edge of critical areas like cybersecurity, life sciences, and infrastructure.[7]

[1] *See* FTC, *Federal Trade Commission and Department of Justice Seek Public Comment on the Premerger Notification and Report Form* (Mar. 25, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/03/federal-trade-commission-department-justice-seek-public-comment-premerger-notification-report-form.

[2] For purposes of this letter, we generally use the term "private equity" to encompass private equity funds, private credit funds, and other private investment vehicles.

[3] *See* EY, *Economic Contribution of the US Private Equity Sector in 2024*, at 5 (Mar. 2025), https://www.investmentcouncil.org/wp-content/uploads/2025/03/EY-AIC-2024-Economic-contribution-of-the-US-private-equity-sector.pdf.

[4] *See id.*

[5] *See id.* at 10.

[6] *See, e.g.*, Greg Brown, Robert Harris & Shawn Munday, *Capital Structure and Leverage in Private Equity Buyouts*, 33 J. Applied Corp. Fin. 42, 51–53 (2021); Joshua Cox & Bronwyn Bailey, *Private Equity Investment and Local Employment Growth: A County-Level Analysis*, 22 J. Alt. Invs., No. 3, at 42 (Winter 2020); Jakob Wilhelmus & William Lee, *Private Equity IPOs: Generating Faster Job Growth and More Investment*, Milken Inst. (2019); Cesare Fracassi, Alessandro Previtero & Albert Sheen, *Barbarians at the Store? Private Equity, Products, and Consumers*, 77 J. Fin. 1439, 1455–59 (2022); Shai Bernstein & Albert Sheen, *The Operational Consequences of Private Equity Buyouts: Evidence from the Restaurant Industry*, 29 Rev. Fin. Stud. 2387 (2016).

[7] *See* AIC, *Financing American Innovation: Private Equity's Role in the Innovation Economy* 6 (Feb. 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/02/aic_tech_investments_final.pdf; AIC, *Improving*

As a result of the industry's success, nearly 90% of U.S. public pensions serving 34 million public sector workers and retirees have enjoyed returns that far outperformed other asset classes.[8]

We recognize and appreciate the Agencies' commitment to effective merger enforcement and their efforts to ensure that the premerger notification program continues to serve the public interest. We offer the following comments in that spirit.

AIC and our members had significant concerns about the version of the HSR Form that took effect on February 10, 2025 (the "2025 Form"), which is why AIC joined other litigants in challenging the 2025 Form as unlawful and not reflecting Congress's intent to advance the government's need for notification of pending mergers without unduly hindering lawful business transactions.[9] While the 2025 Form was in effect, merging parties across thousands of transactions[10] incurred materially greater costs in money and time, which deterred productive activity, dampened incentives for businesses and investors, and diverted capital toward compliance costs. The 2025 Form risked hindering innovation and slowing the growth of the American economy, to the ultimate detriment of the consumers whom the antitrust laws are intended to benefit. Finding that the 2025 Form exceeded the Agencies' statutory authority, the U.S. District Court for the Eastern District of Texas vacated it earlier this year and reinstated the HSR Form that had been in effect with minor modifications for the first 47 years of the HSR program (the "Restored Form").[11]

The Restored Form accomplishes the legitimate goals of the HSR Act as identified by Congress. As the district court held, the statute's text, structure, history, and purpose make clear that the information required in the initial notification—which *every* filing party must submit—must be limited.[12] In particular, the Agencies may require information *only* if it is "necessary and appropriate" to screen whether the transaction is one of the very few that pose a possible competitive concern and warrant further investigation. The Restored Form does exactly that: it requests the information that is necessary and appropriate to screen the transaction for a possible competitive concern, while seeking to minimize the burden imposed on *every* filing party. To the extent that the Agencies now seek to make additional revisions to the premerger notification form,

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Medical Technologies: Private Equity's Role in Life Sciences 2 (Mar. 2022), https://www.investmentcouncil.org/wp-content/uploads/2022/04/aic-life-sciences-report2-1.pdf; AIC, *Building America's Infrastructure: How Private Equity Improves Local Communities* 4 (Dec. 2024), https://www.investmentcouncil.org/wp-content/uploads/2024/12/2024-AIC-Infrastructure-Report.pdf.

[8] *See* AIC, *2024 Public Pension Study* 2 (July 2024), https://www.investmentcouncil.org/wp-content/uploads/2024/07/2024-AIC-Pensions-Report_final.pdf; Comm. on Cap. Mkts. Regul., *Expanding Opportunities for Investors and Retirees: Private Equity* 13 (Nov. 2018) (citing numerous studies that "consistently find that private equity buyout funds outperform public market alternatives . . . *net* of fees").

[9] *See* Am. Compl. for Declaratory and Injunctive Relief, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK (E.D. Tex. May 8, 2025), Dkt. No. 27.

[10] *See* FTC, *Premerger Notification Program*, https://www.ftc.gov/enforcement/premerger-notification-program [hereinafter "FTC PNO Website"].

[11] *See* Mem. Op. and Order, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK (E.D. Tex. Feb. 12, 2026), Dkt. No. 75.

[12] *See id.* at 15–17 ("Plaintiffs argue that this phrase ['necessary and appropriate' in the HSR Act] constrains the FTC's authority, prohibiting it from demanding certain documents or information from all HSR filers if doing so would impose significant costs while doing comparatively little to enable the agency to determine whether to issue a Second Request. . . . The FTC, on the other hand, argues that 'necessary and appropriate' is a capacious standard giving the agency broad discretion to determine what information to require in a premerger notice—without conducting a cost-benefit analysis. . . . Precedent supports Plaintiffs on this point." (cleaned up)); *see also id.* at 25–26.

they must do so in compliance with the district court's order. That means treating the 2025 Form as invalid, vacated, and without any legal effect. To the extent any changes to the form are necessary and appropriate, those changes must be made to the Restored Form as the baseline.

With that background, we have reviewed the modifications suggested in the Request. In general, we do not believe significant modifications to the Restored Form, which has effectively served the screening function contemplated by Congress under the HSR Act, are warranted. Troublingly, however, the modifications suggested in the Request indicate the Agencies may be taking a step backwards after their recent loss in federal court. These changes would impose significant costs and burdens on the beneficial economic activity that AIC's members undertake—the vast majority of which pose no conceivable competitive concern—without a clear countervailing benefit. Transactions are, of course, a prerequisite to the private equity industry's creation of value. They provide the necessary credit and capital for businesses to compete, innovate, and grow.[13] The possibility of a future transaction encourages entrepreneurs and early-stage investors to take the risks that drive American growth.[14] Nearly all of the modifications would also go well beyond the Agencies' statutory authority and are inappropriate for administrative rulemaking.

The HSR Act does not permit requiring information in the notification merely because it *might* be relevant to the legality of the transaction—that is what the in-depth review process triggered by a "second request" is for. Instead, the premerger notification must be limited to seeking only the information that is necessary and appropriate to determining whether a transaction warrants broader scrutiny. The HSR Form and antitrust enforcement cannot and should not be used to address policy goals in areas unrelated to competition. Congress imposed these limits to prevent exactly what the 2025 Form did: using the required premerger notification to collect a broad range of information that—in only a small fraction of filings—may prove relevant to an in-depth investigation. More in-depth requests placed on all filers are unlikely to meaningfully improve the screening function that Congress intended for the HSR Act,[15] yet they impose substantial costs on the nation's businesses and economy by requiring extensive information for every reportable transaction. Nor does the HSR Act allow the Agencies to impose additional filing requirements to attempt to improve their odds of prevailing in litigation—the investigative and discovery tools already available to the Agencies are far more than sufficient to that task, which is not within the statutory scope of the HSR Act.

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[13] *See, e.g.*, Wilhelmus & Lee, *supra* note 6, at 14 ("Comparing their revenue-generating capabilities, PE-backed IPOs, on average, have consistently produced more revenues cumulatively during the two years after their IPO than non-PE-backed companies."); Fracassi, Previtero & Sheen, *supra* note 6, at 1486 ("Overall, our evidence in consumer product markets does not support the traditional view of PE firms relying largely on 'cut to the bone' strategies. Rather, we document a large increase in product offerings and geographic availability.").

[14] *See, e.g.*, Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity Around the World*, abstract (Nat'l Bureau Econ. Rsch., Working Paper No. 24082, 2017), https://www.nber.org/papers/w24082 ("We find evidence of a strong positive association between VC investments and lagged M&A activity, consistent with the hypothesis that an active M&A market provides viable exit opportunities for VC companies and therefore incentivizes them to engage in more deals."); Jessica Melugin, *M&As Are A-Okay*, Competitive Enter. Inst. (Apr. 11, 2023), https://cei.org/studies/mas-are-a-okay (summarizing the literature on the benefits of mergers and acquisitions in the tech industry).

[15] *See* Mem. Op. and Order at 26, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK ("The FTC does not argue that the [2025 Form] would eliminate or substantially curtail investigations or Second Requests. Nor does the agency attempt to specify or substantiate how exactly the [2025 Form] will save time and resources.").

Pursuing the concepts identified in the Request would raise the same problems that led to the finding that the 2025 Form was illegal. Modifying the filing requirements along the lines the Request suggests would, with no empirical justification as required by the statute, impose substantial new burdens on all transactions—more than 90% of which present no antitrust concerns[16] and, indeed, often *improve* competition. It would also in many instances require statutory amendment. Even to the extent any of the contemplated requirements could be adopted without statutory amendment, they would—much like the 2025 Form that was struck down—introduce additional vagueness to the Form and filing requirements.

Finally, the need to implement Congress's requirements regarding foreign subsidies under the Merger Filing Fee Modernization Act of 2022 does not justify unrelated modifications. Rather than undertaking another broad and unjustified overhaul of the HSR Form, these requirements can be added to the Restored Form with minor revisions. In the process, the Agencies should fix a few other issues that even under the Restored Form continue to impose unnecessary burden.

[16] *See* FTC, *Hart-Scott-Rodino Annual Report: Fiscal Year 2024*, at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/FY24-HSR-ANNUAL-REPORT-FOR-TRANSMITTAL-TO-CONGRESS.pdf [hereinafter "2024 HSR Annual Report"] ("[I]n fiscal year 2024, the agencies received clearance to conduct an initial investigation in 9.3% of the total number of transactions reported.").

TABLE OF CONTENTS

I. THE RESTORED FORM ACCOMPLISHES THE HSR ACT'S PURPOSES 6

A. The HSR Act Imposes Two Clear Limitations on the Information that Can be Required in the Initial Premerger Notification. 6

1. Only Information that is "Necessary" for the Initial Screening Can be Requested........ 6

2. The Information Requested Must be "Appropriate," Meaning the Costs Must Not Significantly Outweigh the Benefits. 7

B. The Restored Form is Properly Limited to Information that is Necessary and Appropriate. 8

C. The 2025 Form's Burdens Were Not Justified by Commensurate Benefits....................... 8

II. THE CHANGES CONTEMPLATED IN THE REQUEST LACK SUFFICIENT EMPIRICAL OR LEGAL SUPPORT. 9

A. Requiring Additional Filings for Modified Transaction Structures Raises Legal and Practical Concerns with No Benefit. 10

1. Adding a New Filing Requirement Through Rulemaking Would Exceed the Agencies' Statutory Authority. 10

2. It Would be Impractical for the HSR Rules to Require Reporting of Structural Modifications. 11

3. Parties Rarely Litigate the Fix, and It Does Not Hamper the Competitive Assessment of Transactions. 12

B. Requiring Notification of "Acquihire" Transactions Raises Legal and Practical Concerns. 17

1. Hiring Employees Cannot Require an HSR Filing. 17

2. Waiving Contractual Rights Cannot Require an HSR Filing. 18

3. Requiring Filing for IP Licensing Would Impose Serious Practical Problems. 19

C. Questions About CFIUS Compliance and Sovereign Wealth Funds Would Raise Legal and Practical Concerns. 19

1. Requiring Information on CFIUS Compliance Exceeds the HSR Act's Grant of Authority and Would be Impractical. 19

2. Filing Parties Cannot Provide Additional Information About Sovereign Wealth Funds. 20

D. The Statute Does Not Permit the Addition of Questions About Transactions Involving Firms for Which DOW is a Customer. 21

E. Any Significant Modification to the Real Estate Exemptions Would Raise Significant Legal and Practical Concerns for No Legitimate Purpose. 22

III. ADDRESSING CONGRESS'S MANDATE REGARDING SUBSIDIES DOES NOT JUSTIFY OTHER EXPANSIONS TO THE REPORTING REQUIREMENTS. 23

IV. THERE IS ROOM FOR IMPROVEMENT IN THE RESTORED FORM. 24

A. The Agencies Should Implement Four Minor Fixes.. 24
B. The Agencies Should Address Long-Standing Issues in the Filing Requirements. 25
1. Share Purchases by Existing Officers and Directors Should be Exempted. 25
2. Transactions Short of Acquisitions of Control Should be Exempted. 25
3. Prior Treatments of Debt Should be Restored. 26

I. THE RESTORED FORM ACCOMPLISHES THE HSR ACT'S PURPOSES

A. The HSR Act Imposes Two Clear Limitations on the Information that Can be Required in the Initial Premerger Notification.

The HSR Act authorizes the FTC, with the concurrence of the Assistant Attorney General for the Antitrust Division, to specify the content of the premerger notification form required by the Act. The notification form may "contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws."[17]

As the district court emphasized, this provision imposes two important limitations on the information that may be required.[18] First, the information must be "necessary" to enable the Agencies to conduct an *initial* screening to assess whether a transaction *may* violate the antitrust laws and thus requires further scrutiny. Second, requiring the information from *all* filing parties must be "appropriate," which prevents demands that impose significant costs on filing parties with little benefit to the Agencies' initial assessment of the transaction. As the district court emphasized, the statutory framework does not permit the initial notification to encompass all information that could theoretically be relevant or useful to a final competitive assessment of the acquisition.[19] This holding was directly in line with the legislative history of the HSR Act, not to mention common sense.

1. Only Information that is "Necessary" for the Initial Screening Can be Requested.

As the Senate Report that accompanied the passage of the HSR Act explained, Congress created the premerger notification program to solve the midnight merger problem and give the Agencies a chance to decide whether to initiate enforcement actions against transactions before it is too late to "unscramble" them.[20] The program "represent[ed] a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays."[21] It was intended to "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[22]

[17] 15 U.S.C. § 18a(d)(1).
[18] *See* Mem. Op. and Order at 16–19, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK (explaining the limitations imposed by the statutory phrase "necessary and appropriate").
[19] *See id.* at 24–26.
[20] 122 Cong. Rec. H8139 (daily ed. Aug. 2, 1976) (statement of Rep. Rodino).
[21] S. Rep. No. 94-803, at 65 (1976).
[22] *Id.* at 66.

As the district court emphasized, Congress struck that balance with a two-step structure laid out in the text of the Act.[23] First, under Section 18a(d), parties engaging in a reportable transaction must provide a "notification" to the Agencies. In the initial notification, the Agencies may require the parties to provide only information that is "necessary" to enable the Agencies to *preliminarily* assess whether the proposed acquisition may be unlawful and therefore requires further scrutiny. The Agencies generally have thirty days to perform this screen. *Then* the Agencies may issue a "second request" under Section 18a(e), through which they may seek a broader array of information. This two-step structure avoids needless burden on the vast majority of reportable transactions that pose no competitive concerns. It also ensures that "the Antitrust Division and the FTC efficiently allocate their finite resources to those transactions that *truly* warrant antitrust scrutiny."[24]

2. The Information Requested Must be "Appropriate," Meaning the Costs Must Not Significantly Outweigh the Benefits.

Congress's use of the phrase "necessary and appropriate" also ensures that the information required in the initial notification does not unduly burden the filing parties by imposing a much higher cost than its benefit to the Agencies. The Supreme Court has held that, where it is used as "an instruction to an administrative agency," "the phrase 'appropriate and necessary' requires at least some attention to cost."[25] The Supreme Court has also explained that, as a matter of ordinary meaning, "[n]o regulation is 'appropriate' if it does significantly more harm than good."[26] That is, information in the HSR Form may not be significantly more costly and burdensome for all filing parties to produce than it will be beneficial to the Agencies' initial screening of the transaction. In invalidating the 2025 Form, the district court noted the importance of this cost-benefit analysis and found that it had not been undertaken.[27]

Other aspects of the legislative history of the original Act and of its amendments in 2000 further confirm the statute's requirement to avoid placing unnecessary burdens on filers. To avoid "plac[ing] too much of a burden on commerce,"[28] Congress rejected a version of the bill that would have imposed an automatic temporary restraining order on all reportable transactions, recognizing the "severe disincentive to mergers generally" that would have resulted.[29] Similarly, the sponsors of the 2000 amendments sought to "achieve a more effective and efficient merger review process

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[23] *See* Mem. Op. and Order at 3–4, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK ("If an agency determines during the thirty-day period that a particular transaction needs further scrutiny, then the agency may require the submission of additional information or documentary material." (internal quotations omitted)).

[24] 146 Cong. Rec. 24253 (daily ed. Oct. 25, 2000) (statement of Sen. Hatch) (discussing the 2000 amendments to the HSR Act) (emphasis added).

[25] *Michigan v. EPA*, 576 U.S. 743, 752–53 (2015); *see also* Mem. Op. and Order at 17, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK.

[26] *Michigan v. EPA*, 576 U.S. at 752.

[27] *See* Mem. Op. and Order at 19–20, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK ("In sum, the HSR Act requires that any benefits to the FTC in mandating additional information in the premerger notice 'reasonably outweigh' the costs. . . . Plaintiffs argue that the FTC failed to conduct any cost-benefit analysis and that the [2025 Form] therefore exceeds the FTC's statutory authority. . . . Plaintiffs have the better argument." (citation omitted)).

[28] Andrew G. Howell, *Why Premerger Review Needed Reform—And Still Does*, 43 Wm. & Mary L. Rev. 1703, 1716 (2002).

[29] S. Rep. No. 94-803, at 213 (internal quotations omitted).

by eliminating unnecessary burden, costly duplication and undue delay"[30] and to "ensure that business is not faced with unduly burdensome or overbroad requests for information."[31]

B. The Restored Form is Properly Limited to Information that is Necessary and Appropriate.

The Restored Form makes a reasonable trade-off between the burden imposed on the filing parties and the Agencies' need for information necessary and appropriate to their initial screening. As the district court explained, "[t]his Form, with only minor adjustments, has governed mergers and acquisitions for nearly fifty years," and "[o]ver the years, the FTC and DOJ have repeatedly stated that the Form was 'highly effective' in 'giving the government the opportunity to investigate and challenge mergers.'"[32] As recently as 2023, the FTC reiterated the effectiveness of the Restored Form, explaining that "[i]n the majority of cases, [the FTC] can make a reasonable judgment within a few days about whether a merger is potentially anticompetitive based on information provided in the HSR filing."[33]

A more burdensome HSR Form is therefore not warranted. The vast majority of notifiable transactions impose no competitive concern, and the Agencies do not investigate them in any depth. Of the 2,031 transactions notified in 2024, just 9% required even an initial investigation, and only 3% then resulted in a second request.[34] And that was a busy year: on average from 2015 to 2024, just 2.5% of transactions resulted in a second request.[35] In other words, 97.5% of transactions for which HSR Forms are filed do not raise a competitive concern that the Agencies believe is worth an in-depth investigation.

C. The 2025 Form's Burdens Were Not Justified by Commensurate Benefits.

The 2025 Form required information whose costs to filing parties were not shown to be justified by commensurate benefits to the Agencies' review process. As the district court concluded: "Even assuming that the FTC's discussion of costs and benefits constituted a cost-benefit analysis, the Court finds that the agency failed to show that the benefits of the [2025 Form] reasonably outweighed its costs."[36] Even under the Agencies' conservative estimates, the cost to complete the 2025 Form is roughly triple the costs to complete the Restored Form.[37] At an hourly rate of $583 for "executive and attorney compensation," the increase in costs equates to over $39,644 per filing, or a total of more than $139 million per year.[38] The Chamber of Commerce of the United States of America's survey of antitrust practitioners estimated that the average amount

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[30] 146 Cong. Rec. 24253 (daily ed. Oct. 25, 2000) (statement of Sen. Hatch).
[31] 146 Cong. Rec. S11240 (daily ed. Oct. 27, 2000) (statement of Sen. Kohl).
[32] Mem. Op. and Order at 4, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK (quoting FTC, *Annual Report Fiscal Year 2001* (corrected April 2008)).
[33] FTC, *Congressional Budget Justification Fiscal Year 2024*, at 55–56 (Mar. 13, 2023).
[34] *See* 2024 HSR Annual Report, *supra* note 16, at 1, 5.
[35] *See id.* at 5 (taking the average of the percentages shown in Figure 3). Harkening back to 2001 to 2020, only about 3% of HSR-reportable transactions received a second request, closely in line with more recent data. *See* Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001–2020*, 85 Antitrust L.J. 1, 10 (2023).
[36] Mem. Op. and Order at 20, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK.
[37] *See id.*
[38] *Id.*

of time to prepare the revised premerger form pursuant to the 2023 Proposed Rulemaking ("2023 NPRM")[39] would actually be well over twice the FTC's estimate.[40] Although the 2025 Form ultimately decreased the burden on filers relative to the 2023 NPRM, the Chamber of Commerce's estimate is likely not far off—and significantly more accurate than the FTC's underestimation.

Despite these costs, the FTC has not identified a specific transaction in the HSR Act's nearly fifty-year history that the Restored Form failed to flag but that would have been discovered by the 2025 Form. Nor has the FTC articulated why imposing these added costs on the 97.5% of transactions that do not raise competitive concerns[41] is justified. To date, the Agencies have not identified a specific benefit that would result from the additional requirements of the 2025 Form or that could not be realized by focusing on the relatively small number of transactions that warrant further consideration.

II. THE CHANGES CONTEMPLATED IN THE REQUEST LACK SUFFICIENT EMPIRICAL OR LEGAL SUPPORT.

We understand and support the Agencies' interest in ensuring that the premerger notification process captures the information needed for effective screening. As an initial matter, several of these modifications are framed as potential changes to the 2025 Form. But the 2025 Form has been vacated as unlawful and has no legal effect. If the Agencies determine that some modifications to the Form are necessary and appropriate, that analysis must start with the Restored Form as a baseline, not the 2025 Form. Ultimately, several potential modifications identified in the Request raise significant concerns about the burdens they would impose relative to their necessity, thus exceeding the Agencies' statutory authority under the HSR Act. The contemplated modifications are:

- Structural Transaction Modifications. "To ensure the Agencies have sufficient time and information to evaluate and engage with the parties on remedy proposals that materially alter the structure of the originally-proposed transaction, and to preserve the resources of the parties, the Agencies, and the federal courts, *the Agencies are exploring whether, and under what circumstances, . . . late-breaking remedy proposals should be subject to new or supplemental HSR filing requirements*."

- Non-Traditional Transaction Structures. "To ensure [the Agencies] are conducting premerger review consistent with the statutory requirements of the HSR Act, *the Agencies are evaluating whether changes to the [2025 Form] and the Commission's HSR regulations are appropriate to address 'acquihires,' 'reverse acquihires,' certain sales/purchase of non-exclusive intellectual property licenses, and other novel transaction forms.*"

[39] *See Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178 (proposed June 29, 2023).
[40] *See* Pls.' Mot. for Summ. J. at 20–21, *Chamber of Com. v. FTC*, No. 6:25-cv-9-JDK (E.D. Tex. Aug. 1, 2025), Dkt. No. 44.
[41] *See* 2024 HSR Annual Report, *supra* note 16, at 1, 5.

- Committee on Foreign Investment in the United States ("CFIUS") Compliance and Information on Sovereign Wealth Funds. "To better understand the involvement of foreign governments and other foreign persons in reportable transactions, *the Agencies are considering whether to request that filers provide information regarding their compliance with any legal obligations relating to CFIUS, and whether the current Form captures sufficient information on sovereign wealth funds and the sovereigns with which they are affiliated.*"

- Transactions Involving Firms for which the Department of War ("DOW") is a Customer. "To facilitate closer and more efficient coordination between the Agencies and DOW, and to ensure a competitive defense supply chain, *the Agencies are considering whether to request information from filers regarding their contracts with, or direct and indirect sales to, the United States, regardless of whether there is currently a horizontal competitive overlap between the merging firms*."

- Single-Family Housing Acquisitions. "President Donald J. Trump instructed the heads of the Agencies to 'review substantial acquisitions, including series of acquisitions, by large institutional investors of single-family homes in local single-family housing markets for anti-competitive effects.'[42] *The Agencies are reviewing whether to make changes to the Commission's HSR regulations to carry out this directive.*"

We discuss each of these contemplated modifications in turn. As explained below, none of these modifications would be warranted.

A. Requiring Additional Filings for Modified Transaction Structures Raises Legal and Practical Concerns with No Benefit.

The Request states that "the Agencies are exploring whether, and under what circumstances, . . . late-breaking remedy proposals should be subject to new or supplemental HSR filing requirements." This appears to refer to the fact that at times parties modify transactions to address concerns raised by the Agencies—for example, by acquiring fewer assets than originally contemplated, divesting assets and thus not acquiring them, or committing to other relief. In a handful of litigated cases over the last few decades, courts have declined to enjoin transactions in part because the transaction structure had been modified to avoid potential competitive effects—which is the required outcome when the Agencies cannot prove that the transaction will in fact substantially lessen competition.

1. Adding a New Filing Requirement Through Rulemaking Would Exceed the Agencies' Statutory Authority.

The HSR Act does not allow the addition of a new filing requirement through rulemaking. As the Supreme Court has made clear, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[43] The

[42] Exec. Order No. 14376, Stopping Wall Street from Competing with Main Street Homebuyers, 91 Fed. Reg. 3023, 3024 (Jan. 23, 2026).
[43] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

authority delegated by Congress is clear. In the HSR Act, Congress required that transacting parties that meet certain criteria must "file notification pursuant to rules under subsection (d)(1)."[44] The waiting period described in subsection (b)(1) then articulates that the waiting period of 30 days "begin[s] on the date of the receipt by [the Agencies]" of either (i) "the completed notification," or (ii) "if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance."[45] The HSR Act imposes *one* filing obligation for each acquisition. Nothing in the statute's text permits the Agencies to require multiple filings for a transaction that has already been notified or to impose an additional waiting period that further delays and impedes consummating a transaction. Only Congress can impose new filing requirements.[46]

2. It Would be Impractical for the HSR Rules to Require Reporting of Structural Modifications.

The HSR Act allows a party to engage in a transaction up to the described notification threshold for a designated amount of time. As the FTC Premerger Notification Office ("PNO") describes, "when notification is filed, the acquiring person is allowed one year from the expiration of the waiting period *to cross the threshold stated in the filing*."[47] In other words, the notification details the parameters of a proposed transaction, and while the parties must certify their good-faith intention to carry out the transaction as described in the notification, it imposes only an *upper limit* on what the party can acquire within a year of the waiting period expiring—not a *promise* to undertake the exact transaction notified.

For an acquisition of voting securities that is less than control, the filing permits the acquiring party, within five years of expiration of the waiting period, to acquire voting securities up to but not crossing the next-higher notification threshold, including substantially less than what was notified. Section 803.7 of the HSR rules provides an example:[48] Party A files notification of a proposed acquisition of $100 million of voting securities of Party B. No competition concern could conceivably be triggered if "[o]ne year after the expiration of the waiting period, 'A' has acquired *less than* $100 million (as adjusted) of B's voting securities."[49] Similarly, under long-standing guidance, a filing to purchase 50% or more of the voting securities of an issuer (which is the acquisition of control for HSR purposes) allows that acquiring party not only to acquire "all or any part of the *stock* of the issuer or any entity controlled by the issuer," but also to purchase "all or any part of the *assets* of the issuer and the entities it controls."[50] This guidance is common

[44] 15 U.S.C. § 18a(a).
[45] 15 U.S.C. § 18a(b)(1).
[46] Attempting to impose some sort of supplemental filing requirement when parties offer behavioral commitments rather than structural remedies—which comprises an even smaller subset of the handful of cases in which remedies were litigated—lacks any statutory support whatsoever and would be impossible to administer.
[47] FTC Premerger Notification Off., *What Is the Premerger Notification Program?: An Overview* 5 (Aug. 2024), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf (emphasis added).
[48] *See* 16 C.F.R. § 803.7(a).
[49] *Id.* (emphasis added).
[50] FTC, *Premerger Notification Practice Manual* 414–15 (Sep. 30, 2014) [hereinafter "FTC *Green Book*"] ("[I]f a filing is made to acquire 50 percent or more of the voting securities of an issuer, the PNO specifically has said that the acquiring person can acquire all or any part of the stock of the issuer or any entity controlled by the issuer within one year of the expiration or termination of the applicable waiting period; the PNO also has stated that where notification

sense: the Agencies are on notice that the entire target will be acquired, and that notice necessarily encompasses acquiring parts of the target too.

For an acquisition of assets, under current guidance, the acquiring party similarly may acquire all of the identified assets *or fewer than all of what was notified*.[51] In a filing for an acquisition of *all* assets of the target, "the acquiring person can acquire all of the voting securities *or any part* of the assets of that person or entity within a year of expiration or termination of the waiting period."[52] In addition, an increase in the value of the identified assets does not trigger a new filing requirement.[53] Indeed, to avoid the trouble of refiling due to an increase in the notified transaction value, the PNO currently recommends that parties *overreport* assets if there is a chance they will be part of the transaction: "The PNO advises parties to include assets in the original filing even if they are not expected to be part of the final transaction because *their later elimination will not affect the filing or waiting period*."[54] The fundamental scheme contemplates that parties can always acquire less than what they originally notified in their filing.

There is no need to deviate from this long-standing practice, and, indeed, it would be difficult, if not impossible, to articulate a requirement to file when the scope of transaction is reduced. Effectively requiring parties to promise to undertake the *exact* transaction notified would create unreasonable hurdles for filers when transaction structures change for reasons having nothing to do with antitrust considerations. Questions of what type or extent of a change would trigger the requirement to file again would be confounding. Even if such a rule could be articulated, requiring parties to submit an additional or supplemental filing every time they change a detail of the transaction would create a potentially endless process, not to mention the significant filing fees presumably required, which today reach as high as $2.46 million.

Such a requirement would also serve no useful purpose. If a party acquires less than what it originally notified to the Agencies, there is by definition no danger that the Agencies overlook a potential antitrust risk that was not already encompassed in the notification.

3. Parties Rarely Litigate the Fix, and It Does Not Hamper the Competitive Assessment of Transactions.

The Agencies already considered whether to require an HSR filing for transactions that result from enforcement actions and answered "no." There is no empirical support for modifying the HSR rules[55] to target "litigate the fix" situations. The issue arises in a tiny number of transactions and, by definition, such transactions are already under Agency investigation or in

has been filed to acquire 50 percent or more of an issuer's voting securities, that acquiring person can acquire all or any part of the assets of the issuer and the entities it controls within a year of expiration or termination of the waiting period.").

[51] *See id.* at 414 ("Generally, if the assets actually being acquired are among the assets identified in the original filing, no new filing will be required. However, if assets are being acquired that were not among those identified in the original filing, then a new filing is required.").

[52] *Id.* at 415 (emphasis added).

[53] *See id.* at 413 ("[T]he PNO does not require an amendment or refiling for a change in the acquisition price, so long as the same Section 801.1(h) threshold level applies to the revised transaction.").

[54] *Id.* at 417 (emphasis added).

[55] *See* 16 C.F.R. § 802.70.

litigation. Indeed, in the last ten years, of the 22,330 reported transactions,[56] the Agencies obtained relief in the form of a consent decree, abandonment, or litigated victory in just 225 transactions.[57] The merging firms defeated the Agencies in litigation in just 13 transactions.[58] Out of those cases, remedies proposed by the parties have been identified as relevant to the outcome in the court's decision in only 7 cases.[59] In other words, this issue has arisen in 0.03% of HSR filings over the last decade.[60] Even focusing only on the minute fraction of HSR filings that end up in litigation: there were 71 litigated cases;[61] a "fix" was only litigated in 15 cases,[62] which is 21% of cases;[63] and the Agencies prevailed in 7 of those and settled one.[64] And, of the litigated cases, several were vertical transactions with behavioral remedies that would not be practical to subject to some kind of reporting requirement in any event, further narrowing the already-minute number of cases that the Agencies have proffered as justifying this proposed wholesale change to the HSR rules.

It is simply not correct that "late-proposed remedies deny the Agencies a meaningful opportunity to evaluate the competitive effects of the restructured transaction or the proposed remedial divestiture in the way that Congress intended under the HSR Act." The premise makes no logical sense—the Agencies' investigation necessarily encompasses the "fixed" transaction, which is a subset of the notified transaction. All litigate-the-fix cases are transactions that the Agencies identified as worthy of further review based on the initial notification, after which they were investigated in depth through requests for information in a voluntary access letter and a second request before ending up in litigation. A new or subsequent HSR filing would be entirely superfluous—each of these transactions is already subject to engagement with the Agencies well after the initial HSR filing. To the extent the Agencies want more time to consider proposed remedies, the way to get more time is not to require an expensive "redo" of the initial HSR filing and the second request. Rather, in the rare instances where more time is legitimately needed, the Agencies can negotiate with the parties or involve the court presiding over the merger challenge.

[56] *See* 2024 HSR Annual Report, *supra* note 16, at 1 (showing there were 20,229 transactions reported from 2015 to 2024); FTC PNO Website, *supra* note 10 (showing there were 2,101 transactions reported from October 2024 to September 2025, which covers the period of fiscal year 2025).

[57] From 2016 to 2025, there were 66 abandoned deals, 144 consent decrees, and 15 litigated victories.

[58] The 13 transactions are Time Warner/AT&T in 2018, Evonik/PeroxyChem in 2020, Sabre/Farelogix in 2020, Jefferson Health/Albert Einstein Healthcare in 2021, UnitedHealth/Change Healthcare in 2022, U.S. Sugar/Imperial Sugar in 2022, Booz Allen/Everwatch in 2022, Meta/Within Unlimited in 2023, Microsoft/Activision in 2023, HCA Healthcare/Louisiana Children's Medical Center in 2023, Novant Health/Community Health Systems in 2024, Tempur Sealy/Mattress Firm in 2025, and GTCR/Surmodics in 2025.

[59] The 7 transactions are Time Warner/AT&T in 2018, Sabre/Farelogix in 2020, Evonik/PeroxyChem in 2020, UnitedHealth/Change Healthcare in 2022, Microsoft/Activision in 2023, Tempur Sealy/Mattress Firm in 2025, and GTCR/Surmodics in 2025.

[60] Calculated as 7 transactions in which the merging firms defeated the Agencies in litigation and in which remedies proposed by the parties have been identified as relevant to the outcome in the court's decision divided by total reported transactions of 22,330.

[61] There were 7 in 2016, 6 in 2017, 3 in 2018, 7 in 2019, 12 in 2020, 6 in 2021, 10 in 2022, 9 in 2023, 5 in 2024, and 6 in 2025.

[62] The 15 transactions are the 7 transactions in footnote 59 as well as Staples/Office Depot in 2016, Halliburton/Baker Hughes in 2016, Aetna/Humana in 2017, Penguin Random House/Simon & Schuster in 2022, Illumina/Grail in 2023, Assa Abloy/Spectrum Brands in 2023, JetBlue/Spirit in 2024, and Kroger/Albertsons in 2024.

[63] Calculated as 15 litigate-the-fix cases divided by 71 litigated cases.

[64] The 7 cases are Staples/Office Depot in 2016, Halliburton/Baker Hughes in 2016, Aetna/Humana in 2017, Penguin Random House/Simon & Schuster in 2022, Illumina/Grail in 2023, JetBlue/Spirit in 2024, and Kroger/Albertsons in 2024. Assa Abloy/Spectrum Brands in 2023 settled.

The Agencies also frequently take advantage of their broad powers to issue civil investigative demands.

Timing considerations are also not a real issue based on empirical experience. Table 1 below describes the Agencies' timeline to review commitments offered by the transacting parties in essentially all recent litigate-the-fix cases. In each, the transacting parties offered a commitment that minimized the alleged competitive harm of the transaction. These commitments were announced well before any trial, hearing, or court decision, which allowed ample time for the Agencies to review the transaction in light of the remedies the parties proposed. Of course, the table is based on publicly available information and may understate the notice provided to the Agencies. Moreover, to the extent parties offer belated remedies, courts are fully capable of responding in ways that protect the Agencies' resources.[65] Thus, the record does not support the proposition that the Agencies lack sufficient time to review proposed remedies.

[65] *See* David Gelfand, Leah Brannon & Gabriel Lazarus, *Litigating the Facts*, The Antitrust Source: Am. Bar Ass'n 3 (Apr. 2024), https://www.americanbar.org/content/dam/aba/publications/antitrust/source/2024/april/litigating-the-facts.pdf (noting a district court's declination to consider a party's late-proposed remedy where "the parties waited until after discovery closed to propose a divestiture"). In *FTC v. Ardagh*, No. 13-1021 (D.D.C. 2013), Transcript of Pre-Hearing Conference (Sep. 24, 2013), the court explained, "I'm not buying into the fact that two weeks is enough for you to give a decision about whether the FTC is satisfied or not satisfied" with the defendants' proposed remedy. *Id.* at 31. Thus, the court declined to consider the proposed remedy: "I think the most I can do at this point is say we will go ahead with the hearing as scheduled. It will concern the issues that I understood it to concern before I came out here today, i.e., we will not be discussing any divestiture of plants that one side sort of knows about and the other side doesn't. It's not going to be fruitful for me to hear any testimony on that." *Id.* at 35.

Table 1: Timeline for Agencies to Review Commitments in Recent Litigate-the-Fix Cases

Filing Parties	Year	Court	Review Timeline
Staples/Office Depot[66]	2016	D.C.	Defendants publicly announced a divestiture in February 2016, about one month before trial.
Halliburton/ Baker Hughes[67]	2016	Delaware	Defendants began offering divestitures in April 2015. The government did not sue to block the deal until April 2016, one year later.
Aetna/Humana[68]	2017	D.C.	Defendants entered into a divestiture agreement in August 2016. Trial began in December 2016, four months later.
Time Warner/AT&T[69]	2018	D.C.	Defendants offered a commitment about one week after the government filed its complaint in November 2017. Trial began in March 2018, four months later.
Evonik/PeroxyChem[70]	2019	D.C.	Defendants entered into a divestiture agreement in August 2019. The court held a preliminary injunction hearing in November 2019, three months later.
Sabre/Farelogix[71]	2020	Delaware	Defendants offered commitments in August 2019. Trial began in January 2020, five months later.
Illumina/Grail[72]	2021	FTC Part 3	Defendants offered a commitment in March 2021. The FTC Part 3 hearing began in August 2021, five months later.
Penguin Random House/Simon & Schuster[73]	2022	D.C.	Defendants offered a commitment in September 2021. Trial began in August 2022, eleven months later.

[66] *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 137 n.15 (D.D.C. 2016); *Staples, Office Depot Agree to Sell More than $550 Million in Contracts to Essendant*, MLex (Feb. 16, 2026), https://www.mlex.com/mlex/articles/2048411.

[67] Complaint, *United States v. Halliburton Co.*, No. 1:16-cv-00233-GMS (D. Del. Apr. 6, 2016); *Halliburton to Sell Businesses to Get Approval for Baker Hughes Bid*, MLex (Apr. 7, 2015), https://www.mlex.com/mlex/articles/2088484.

[68] *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 17 (D.D.C. 2017).

[69] *United States v. AT & T Inc.*, 310 F. Supp. 3d 161, 217 n.30 (D.D.C. 2018).

[70] *FTC v. RAG-Stiftung*, 436 F. Supp. 3d 278, 289–90 (D.D.C. 2020).

[71] *United States v. Sabre Corp.*, 452 F. Supp. 3d 97, 131–32 (D. Del. 2020).

[72] *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1044–45 (5th Cir. 2023).

[73] *United States v. Bertelsmann SE & Co.*, 646 F. Supp. 3d 1 (D.D.C. 2022); Serafina Smith, *New Bidding Policy Would Allow Penguin Random House, Simon & Schuster to Compete After Merger, Penguin CEO Says*, MLex (Aug. 5, 2022), https://www.mlex.com/mlex/articles/2177699.

Filing Parties	Year	Court	Review Timeline
UnitedHealth/ Change Healthcare[74]	2022	D.C.	Defendants offered a divestiture in January 2022. Trial began in August 2022, seven months later.
Microsoft/Activision[75]	2023	N.D. Cal.	Defendants offered commitments "immediately upon the merger's announcement" in January 2022 and entered into a binding commitment in February 2023. A preliminary injunction hearing began in June 2023, seventeen months after the initial offer.
Assa Abloy/ Spectrum Brands[76]	2023	D.C.	Defendants entered into a divestiture agreement in December 2022. Trial began in April 2023, four months later.
JetBlue/Spirit[77]	2023	Mass.	Defendants first made commitments in June 2022. Trial began in November 2023, seventeen months later.
Kroger/Albertsons[78]	2024	Oregon	Defendants offered an upfront commitment in October 2022 when the transaction was announced. A preliminary injunction hearing began in August 2024, almost two years later.
Tempur Sealy/ Mattress Firm[79]	2024	S.D. Tex.	Defendants offered upfront commitments in May 2023 when the transaction was announced and revised some of its commitments over time. A preliminary injunction hearing began in November 2024, eighteen months after the initial offer.
GTCR/Surmodics[80]	2025	N.D. Ill.	Defendants offered a commitment in April 2025. The government had the opportunity to review the commitment until the evidentiary hearing began in August 2025, four months later.

Courts have consistently held that there is nothing unlawful about merging parties proposing remedies and have declined to find that this practice violates the HSR Act or places the

[74] *United States v. UnitedHealth Grp. Inc.*, 630 F. Supp. 3d 118, 128 (D.D.C. 2022).
[75] *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069, 1077, 1082 (N.D. Cal. 2023).
[76] *United States v. Assa Abloy AB*, No. 1:22-cv-02791-ACR (D.D.C.); *Assa Abloy Agrees to Divest Emtek, Smart Residential Businesses in US in Connection with Spectrum HHI Acquisition*, MLex (Dec. 2, 2022), https://www.mlex.com/mlex/articles/2089852.
[77] *United States v. JetBlue Airways Corp.*, 712 F. Supp. 3d 109, 134 (D. Mass. 2024).
[78] *FTC v. Kroger Co.*, 2024 WL 5053016, at *4 (D. Or. Dec. 10, 2024).
[79] *FTC v. Tempur Sealy Int'l, Inc.*, 768 F. Supp. 3d 787, 858–59 (S.D. Tex. 2025).
[80] Ruling, *FTC v. GTCR BC Holdings, LLC*, No. 1:25-cv-02391 (N.D. Ill. Nov. 10, 2025), Dkt. No. 451.

Agencies at a procedural disadvantage.[81] To the contrary, courts exercising their equitable jurisdiction over requests for injunctive relief have repeatedly held that their appropriate inquiry is into the transaction that is actually before them.[82]

B. Requiring Notification of "Acquihire" Transactions Raises Legal and Practical Concerns.

The Request states that "the Agencies are evaluating whether changes to the [2025 Form] and the Commission's HSR regulations are appropriate to address 'acquihires,' 'reverse acquihires,' certain sales/purchase of non-exclusive intellectual property licenses, and other novel transaction forms." It is unclear what modifications are under consideration as these terms have been applied to a wide range of transactions. For example, "acquihire" transactions can be classified generally into three categories: (1) employee hiring, (2) waiver of contractual rights, and (3) licenses of intellectual property.

In general, such transactions are not subject to the HSR Act, which is limited to the acquisition of voting securities and assets, not other forms of business collaboration including the hiring of employees.

1. Hiring Employees Cannot Require an HSR Filing.

An acquihire transaction often entails hiring specialized talent from another company that is not putting the human capital at issue to its best use.[83] Such transactions cannot be reportable because they do not qualify as acquisitions of voting securities, non-corporate interests, or assets—the only transactions that are reportable under the HSR Act.[84] Employees are not "assets": the antitrust laws are unequivocal that "[t]he labor of a human being is not a commodity or article of commerce."[85] Since hiring employees does not meet any of the categories for HSR reporting, there is no legal basis for requiring a premerger notification filing, and the Agencies cannot, as the district court held, amend the HSR Act through rulemaking.

Furthermore, requiring a filing for hiring employees would impose serious harm on labor market competition. Transactions that merely entail the hiring of employees reflect labor market competition in full force: employers compete for workers on any number of dimensions, including higher wages, better benefits, and improved job quality. The ability of employees to freely choose their employer is the essence of labor market competition, drives up wages, and ensures American workers are deploying their skills as efficiently as possible. Imposing the 30-day HSR waiting period—or worse—would detrimentally impact workers who are looking to switch employers, for

[81] *See, e.g.*, *FTC v. RAG-Stiftung*, 436 F. Supp. 3d at 304 ("Defendants have the burden to show that a proposed divestiture will replace the merging firm's competitive intensity. To evaluate whether a divestiture will do so, courts consider the likelihood of the divestiture; the experience of the divestiture buyer; the scope of the divestiture, the independence of the divestiture buyer from the merging seller, and the purchase price.").

[82] *See, e.g.*, Ruling, *FTC v. GTCR BC Holdings, LLC*, 1:25-cv-02391, at 25:10–14 (Transcript of Nov. 10, 2025) ("[T]he relevant transaction is the proposed acquisition agreement with the proposed divestiture, given that there is no contingency with the proposed divestiture if the transaction is not enjoined.").

[83] *See, e.g.*, John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 Duke L.J. 281 (2013).

[84] *See* 15 U.S.C. § 18a(a), (b)(3)(A); *see also* 16 C.F.R. § 801.1(f)(1)(ii) (defining non-corporate interests).

[85] 15 U.S.C. § 17.

whom timing and speed are often critical. FTC Chairman Ferguson has noted the importance of these issues: "[T]he FTC's authority includes protecting [] American consumers in their roles as *workers*. A healthy labor market is critical to the country's success."[86] Nor is there any feasible way of valuing the hiring of employees for the purpose of the size-of-transaction test. Imposing an HSR requirement on hiring would put substantial obstacles in the way of competition for employees and create needless friction in the labor market. Raising the cost of hiring makes it harder for Americans to switch jobs and would drive down wages.

2. Waiving Contractual Rights Cannot Require an HSR Filing.

Acquihires may also involve the waiver of certain contractual rights against employees, such as noncompete clauses and trade secret protections.[87] Again, these do not qualify as acquisitions of voting securities, non-corporate interests, or assets and therefore are not reportable under the HSR Act and rules as they currently exist.[88] Further, changing the HSR rules to define "assets" to include waivers is not feasible; "waivers" of right are not assets as a matter of law, as courts have recognized.[89]

Even if, contrary to law, waivers of rights could be considered assets, requiring the reporting of such waivers under the HSR Act would create insurmountable practical difficulties. As an initial matter, it would be impossible to value such waivers. The rights at issue are commonly included in employment agreements. They are not traded or exchanged for value. In addition, any requirement to file an HSR notification for a waiver would seemingly extend to the transfer of any contractual right. Such a requirement would explode the scope of HSR filings because, every day, countless contracts change hands, and such transactions virtually never have any impact on competition. It would not be feasible to articulate an HSR filing requirement that distinguishes waivers of contractual rights that *could* potentially harm competition from those that reflect every day contracting, serving also as a trap for the unwary. Practical issues aside, requiring such filings would be at cross-purposes to the Agencies' general disapproval of noncompete clauses and other restrictions on employment. Chairman Ferguson has stated a view that noncompete agreements "tend to suppress competition, to the detriment of workers and consumers alike."[90] Imposing filing requirements on *waiving* those rights would, according to the Agencies' own views, delay and impede transactions that are procompetitive on their face.

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[86] Memorandum from Chairman Andrew N. Ferguson re: Directive Regarding Labor Markets Task Force at 1 (Feb. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/memorandum-chairman-ferguson-re-labor-task-force-2025-02-26.pdf.

[87] *See, e.g.*, Coyle & Polsky, *supra* note 83.

[88] *See* 15 U.S.C. § 18a(a), (b)(3)(A); *see also* 16 C.F.R. § 801.1(f)(1)(ii) (defining non-corporate interests).

[89] *See, e.g.*, *S. Concrete Co. v. U.S. Steel Corp.*, 394 F. Supp. 362, 374 (N.D. Ga. 1975) ("The court finds that characterizing the right of first refusal for the purchase of stock granted to a guarantor of a loan furnished by a third party as an 'acquisition' within the purview of § 7 of the Clayton Act stretches the language of this section to absurd lengths and, further, that such characterization could have serious deleterious effects on the commercial transactions of corporations and lending institutions.").

[90] Andrew N. Ferguson, *Moving Forward: Protecting Workers from Anticompetitive Noncompete Agreements* at 6 (Jan. 27, 2026).

3. Requiring Filing for IP Licensing Would Impose Serious Practical Problems.

Acquihires may also involve IP licensing.[91] Under long-standing precedent, only transfers of *exclusive* licenses are considered acquisitions of assets.[92] Expanding the scope of this to include *non-exclusive* licenses would create unintended consequences similar to those described above. It would not be possible to avoid sweeping in a vast array of licensing agreements that have no competitive concerns, serving also as a trap for the unwary. Imposing additional compliance costs on these normal business transactions would only impede competition.

C. Questions About CFIUS Compliance and Sovereign Wealth Funds Would Raise Legal and Practical Concerns.

The Request states that "the Agencies are considering whether to request that filers provide information regarding their compliance with any legal obligations relating to CFIUS, and whether the current Form captures sufficient information on sovereign wealth funds and the sovereigns with which they are affiliated." Both modifications could not be undertaken without a change to the HSR Act itself and, in any event, would not serve the screening purpose of the HSR Act, which should not and cannot address policy goals unrelated to issues of competition.

1. Requiring Information on CFIUS Compliance Exceeds the HSR Act's Grant of Authority and Would be Impractical.

CFIUS is a U.S. governmental organization within the Department of the Treasury that assesses the national-security implications of foreign investment in the United States.[93] A review of a transaction by CFIUS is not an assessment of a merger's effect on competition. Requiring information about CFIUS compliance would, accordingly, not meet the requirement of the HSR Act that the modification be "necessary and appropriate to enable the [Agencies] to determine whether such acquisition may, if consummated, violate *the antitrust laws*."[94] The Agencies' involvement would also interfere with a well-developed and well-functioning process of other federal agencies and invade the authority vested in them, encroaching on issues unrelated to competition.

Such a modification would also be unworkable. Only 325 transactions were reviewed by CFIUS in 2024,[95] while 2,031 transactions were reported under the HSR Act.[96] For most of these

[91] *See, e.g.*, Coyle & Polsky, *supra* note 83.

[92] *See, e.g.*, *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 183 (S.D.N.Y. 1960) ("The Court concludes that by entering into and performing the *exclusive* long-term license-distribution arrangement, Screen Gems acquired a part of Universal's assets within the meaning of Section 7 of the Clayton Act." (emphasis added)); *see also* FTC *Green Book*, *supra* note 50, at 56 ("If the license grants the licensee the *exclusive* right to use a patent to develop a product, manufacture the product, and sell the product without restriction, then the PNO considers the license to be the transfer of an asset potentially subject to HSR reporting." (emphasis added)).

[93] *See* 50 U.S.C. § 4565; *see also* U.S. Dept. Treasury, *CFIUS Enforcement*, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-enforcement (stating that the purpose of CFIUS enforcement is "to protect U.S. national security").

[94] 15 U.S.C. § 18a(d)(1) (emphasis added).

[95] CFIUS, Annual Report to Congress Report Period: CY 2024, at 15, https://home.treasury.gov/system/files/206/2024-CFIUS-Annual-Report.pdf.

[96] *See* 2024 HSR Annual Report, *supra* note 16, at 1.

transactions, the decision to notify CFIUS of a transaction is voluntary. Only a small subset of transactions reviewed by CFIUS trigger a mandatory CFIUS filing. As a result, most HSR filers are unable to "provide information regarding their compliance with *any legal obligations* relating to CFIUS" as contemplated in the Request because for the vast majority of cases, there is *no* legal obligation that could be reported on the HSR Form. The person certifying the accuracy of the HSR filing under penalty of perjury, who typically is not a regulatory lawyer, may also feel the need to confirm this point with CFIUS counsel in every deal no matter how far removed from national-security issues it is. This would further raise the cost of preparing an HSR filing, a burden that would fall particularly hard on smaller filing entities.

2. Filing Parties Cannot Provide Additional Information About Sovereign Wealth Funds.

It is also unclear what the Agencies are contemplating regarding sovereign wealth funds. There is no need to require such funds to identify the sovereigns to which they are affiliated, as that information is generally public.[97] If, on the other hand, the concept would be to require sovereign wealth fund filers to capture other investments of its sovereign, such a requirement would be inconsistent with the HSR Act, impractical, and would upset the delicate balance that has been struck in respect of governments in the overall HSR rubric.

The HSR Act itself specifically exempts "transfers to or from a Federal agency or a State or political subdivision thereof."[98] Principles of comity have led the Agencies to treat foreign governments and agencies in the same way. As such, direct acquisitions by or from a government—including a foreign government—are exempt because governments are not considered to be "entities" in the first instance.[99] To require a sovereign wealth fund to provide information about the sovereign's other holdings and activities would end-run these long-held principles and would exceed the Agencies' statutory authority. It would require such filings to reveal confidential information of a foreign sovereign, with potential diplomatic and national-security implications, despite there being no discernable benefit to the Agencies' *competitive* assessment of the transaction. As discussed in the previous section, Congress delegated concerns about national security and foreign investment to CFIUS within the Department of the Treasury.[100] The HSR Form is not the way to address these issues unrelated to competition.

Putting those complications aside, it would be essentially impossible to comply with such a requirement. As a practical matter, filing parties cannot provide information that they do not possess; indeed, the HSR rules explicitly recognize and accommodate this.[101] Sovereign wealth

[97] *See, e.g.*, Alberta Inv. Mgmt. Corp., *Governance*, https://www.aimco.ca/who-we-are/governance ("AIMCo is a Crown corporation of the Province of Alberta."); Korea Inv. Corp., *History*, https://www.kic.kr/en/about-kic/20th-anniversary ("Korea Investment Corporation (KIC) was established as the sovereign wealth fund of Korea on July 1, 2005.").

[98] 15 U.S.C. § 18a(c)(4).

[99] *See* 16 C.F.R. § 801.1(a)(2) ("[T]he term entity shall not include any foreign state, foreign government, or agency thereof (other than a corporation or unincorporated entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce).").

[100] *See* 50 U.S.C. § 4565.

[101] *See* 16 C.F.R. § 803.4.

funds lack access to the confidential financial information of their sovereigns, much less have the ability or authority to share the confidential information of foreign governments with the U.S. federal government. Imposing such a requirement on sovereign-affiliated filers would generate avoidable friction about the completeness of filings and meaningfully chill sovereign-linked investment, which would have substantial negative effects on foreign investment in the United States. To the extent such an entity were to attempt a filing, it would be incomplete and subject to the whims of the Agencies in accepting or rejecting the filing as such. The HSR process should not make compliance unreasonably difficult, but adding these additional requirements would do just that while at the same time discouraging many beneficial transactions and, at a minimum, injecting considerable uncertainty into the process.

D. The Statute Does Not Permit the Addition of Questions About Transactions Involving Firms for Which DOW is a Customer.

The Request states that "the Agencies are considering whether to request information from filers regarding their contracts with, or direct and indirect sales to, the United States, regardless of whether there is currently a horizontal competitive overlap between the merging firms." If modeled after the 2025 Form, the contemplated modification would require parties to report certain pending requests for proposals from and awarded procurement contracts with DOW or any member of the U.S. intelligence community. Much like certifying compliance with CFIUS, this contemplated modification is inconsistent with the HSR Act and thus unlawful. It would also be impossible to comply with such a requirement.

As an initial matter, such a requirement would not satisfy the standard for information to be included in the initial premerger notification, which is that it be "necessary and appropriate to enable the [Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws."[102] Whether a filer has contracts with or sells products to DOW in itself is not a competitive issue unless there is a competitive overlap between the parties, and the Request does not foresee requiring an overlap. Requiring the reporting of all such DOW contracts or sales would therefore do nothing to advance the assessment of whether the transaction would affect competition, and therefore would not be "necessary and appropriate." To the extent the Agencies want to query DOW about transactions, they certainly may do so, just as they query customers in investigations on a regular basis. To the extent the motivation is national security-related, such requirements would go beyond the purposes of the HSR Act and be inappropriate for that reason.

Furthermore, compiling such information would be highly burdensome, if it could be done at all. Companies do not necessarily have granular information about contracts with DOW available in a readily accessible form, especially if the contracts are classified. Moreover, to the extent that the requirement were to extend, as the Request appears to contemplate, to requiring information on "indirect sales to . . . *the United States*," filers would be required to divine whether products that they sell to non-governmental customers are on-sold to *any* government entity, within DOW or otherwise. For example, if Company F sells coffee filters to a distributor, which then sells those filters for use in the break room at the Department of the Interior, then Company F would be required to report those sales in an HSR filing even though it likely has no knowledge

[102] 15 U.S.C. § 18a(d)(1).

of the distributor's sales. At best this would be highly burdensome, but more likely it would be impossible.

Rather than adding an additional question to the HSR Form, which would require *all* filers to undertake the burden of attempting to require the requested information for the very occasional transaction that could be of concern, DOW can continue to review relevant transactions by examining the filings that are submitted directly to the agency under Section 857 of the National Defense Authorization Act for Fiscal Year 2024.[103] The current system in which only relevant filers submit a copy of their HSR Form to DOW ensures that pertinent transactions are flagged for national-security concerns without imposing a compliance burden and thus costs on *all* HSR-reportable transactions.

E. Any Significant Modification to the Real Estate Exemptions Would Raise Significant Legal and Practical Concerns for No Legitimate Purpose.

The Request states that "[t]he Agencies are reviewing whether to make changes to the Commission's HSR regulations to . . . 'review substantial acquisitions, including series of acquisitions, by large institutional investors of single-family homes in local single-family housing markets for anti-competitive effects.'"[104] Under the current rules, acquisitions of residential real estate are exempt.

Before modifying such long-standing rules, it is incumbent on the Agencies to demonstrate that such acquisitions have, to date, had a negative effect on competition. Generally speaking, eliminating potential buyers (e.g., "large institutional investors") from a market does not *help* competition in such a market; it hurts it. From a seller's perspective, having more potential buyers is highly desirable and procompetitive. Having more buyers should also tend to increase investment in the sector, leading to more production and better maintenance. And placing a "merger" tax on such transactions can only lead to less investment.

The apparent concern is that large institutional buyers of residential real estate may make it harder for other buyers, presumably individuals, to acquire single-family homes. Even if that were the case—and we are not aware of evidence supporting it—the antitrust laws are not the appropriate means to address this issue. The antitrust laws encourage competition and, as noted, barring certain parties from participating in a market is not the way to enhance competition. Rather, it suppresses competition.

To the extent the Agencies legitimately are concerned that an increase in "institutional investor" activity in "local single-family housing markets" may be reducing competition, they should first study that issue through the FTC's Section 6(b) power. Simply assuming the result and imposing costs on real-estate transactions on a hypothesis would be poor public policy. Indeed, without empirical evidence of an antitrust concern requiring the attention of the Agencies, it would not be "necessary and appropriate"—and would thus be unlawful—for the Agencies to require filings for real-estate acquisitions.

[103] Nat'l Def. Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 857, 137 Stat. 136, 346 (2023).
[104] Exec. Order No. 14376, Stopping Wall Street from Competing with Main Street Homebuyers, 91 Fed. Reg. at 3024.

In fact, available data do not support the premise that "large Wall Street investors [are] crowding out families seeking to buy homes."[105] As the Government Accountability Office reported in 2024, institutional investors—those owning 1,000 or more properties—owned just 3% of all single-family rental homes nationally in 2022.[106] More recent data from 2025 similarly shows that 96% of all investment properties in the United States are owned by investors holding no more than ten properties—in other words, small owners that are not the concern of the cited Executive Order.[107] Private equity firms are not acquiring a meaningful share of the housing market.

Making the acquisition of single-family homes reportable would also not serve any purpose because very few, if any, would meet the $133.9 million HSR reporting threshold. Thus, even were it true, despite the evidence, that one private equity firm or another acquired a large portion of the single-family homes in some local market, unless they acquired more than $133.9 million from the same seller, which is not likely, no filing would be required. If the exemption were more generally eliminated as it applies to commercial real estate or multi-family real estate, the effect would be to increase the cost of such transactions while not capturing the transactions that apparently may be of interest.[108]

Ultimately, if there is a public-policy issue to be addressed here, the HSR Act is not the way to address it.

III. ADDRESSING CONGRESS'S MANDATE REGARDING SUBSIDIES DOES NOT JUSTIFY OTHER EXPANSIONS TO THE REPORTING REQUIREMENTS.

The Merger Filing Fee Modernization Act of 2022 requires that HSR filing parties "that received a subsidy from a foreign entity of concern shall include in such notification content regarding such subsidy."[109] The notification shall "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable [the Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws."[110] The Agencies should of course comply with this mandate, but one new Congressional requirement did not and does not itself justify the inclusion of unrelated additions and changes to the HSR Form or related rules.

To comply with this mandate, the Restored Form could be updated slightly to require the reporting of such subsidies. The Agencies should take care, however, to limit this disclosure

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[105] *Id*. at 3023.
[106] U.S. Gov't Accountability Off., GAO-24-106643, Rental Housing: Information on Institutional Investment in Single-Family Homes at 13 (2024).
[107] BatchData, *Q3 2025 Investor Pulse: Setting the Record Straight on Investor Home Purchases* (2025).
[108] There are likely hundreds of real-estate transactions every year that exceed the current HSR filing threshold of $133.9 million. *See, e.g.*, Diana Olick, *Commercial Real Estate Deals Are Slowing, but These Two Beleaguered Sectors Are Shining*, CNBC (Nov. 4, 2025), https://www.cnbc.com/2025/11/04/commercial-real-estate-deals-are-drying-up-but-two-sectors-shine-moodys.html (reporting 29 commercial real estate deals valued at over $100 million in September 2025 alone).
[109] 15 U.S.C. § 18b(b).
[110] 15 U.S.C. § 18b(c).

requirement, as Congress put it, to "such documentary material and information . . . [that] is necessary and appropriate . . . to determine whether such acquisitions may, if consummated, violate the antitrust laws." In doing so, the Agencies should consider how the receipt of a subsidy could contribute to a transaction "violat[ing] the antitrust laws." For example, subsidies received by the acquiring person but not the target should not be subject to disclosure as they would have no bearing on whether the transaction violates the antitrust laws. Subsidies not related to products or services identified as overlaps should likewise not require disclosure. There should be a significant dollar threshold for any subsidy before it is subject to reporting.

IV. THERE IS ROOM FOR IMPROVEMENT IN THE RESTORED FORM.

If the Agencies intend to conduct rulemaking to update the Restored Form—which AIC believes is unnecessary—they should take the opportunity to *remove* unnecessary burdens and filing requirements.

A. The Agencies Should Implement Four Minor Fixes.

Four minor technical changes would improve the Restored Form: (1) the use of 2022 NAICS codes, (2) a "range" format for reporting U.S. revenues, (3) the elimination of NAPCS codes for manufacturing revenues, and (4) the continued use of item numbers. These small adjustments would reduce the burden on filers without hampering the Agencies' ability to screen transactions.

Using the most current NAICS codes (presently the 2022 codes) would help filers use available information to complete the Form. It would be helpful if that change were adopted in any future revision of the Form and that the NAICS codes be kept current to the most recent available.

Allowing revenue *ranges* rather than precise dollar figures would reduce burden without depriving the Agencies of any needed information.

The elimination of the NAPCS-code reporting requirement would also reduce burden on some filers by eliminating the often time-consuming process of identifying specific manufacturing codes, which filers often do not have available. The NAPCS codes are also more detailed than necessary for the Agencies to conduct their initial screening process since they require product-level reporting regardless of whether there is a need for such a level of reporting due to potential overlaps.

Item numbers are better for everyone, including the Agencies' staff. The elimination of item numbers in the 2025 Form only made it more difficult for the people doing the work of preparing and reviewing HSR Forms to communicate with each other.

B. The Agencies Should Address Long-Standing Issues in the Filing Requirements.

As discussed above, there is no reason to broaden the scope of reportable transactions. To the contrary, the Agencies should adjust their regulations and/or guidance to eliminate reporting requirements in the following scenarios.

1. Share Purchases by Existing Officers and Directors Should be Exempted.

Any transaction involving share purchases by existing officers, directors, and employees of the issuer should be exempted. Such transactions involve no competitive concerns since the purchasers are individuals with direct personal stakes in the company. We are unaware of any case brought in the entire history of the HSR Act alleging that any such purchase posed a substantive antitrust issue.

Despite the lack of benefit, the filing requirement for these transactions imposes a cost on individuals and serves as a trap for the unwary. As the FTC explains on its website, even the most well-meaning individuals are often penalized for failure to file because they are simply unaware of this obscure scenario requiring HSR filing.[111] For example, an individual may have the obligation to file an HSR Form when options in their compensation package vest despite having taken no affirmative step that changed the status of their holdings, and this obligation will recur every five years (along with an obligation to pay the filing fee) even if their holdings do not increase significantly—all of which imposes cost and burden on transactions that pose no competitive concerns.

Since notifying the Agencies of these transactions does not help identify any potential violations of the antitrust laws, they should be exempted from the requirement to file. At a minimum, acquisitions by such officers or directors should be considered acquisitions solely for the purpose of investment, exempt under 16 C.F.R. § 802.9.

2. Transactions Short of Acquisitions of Control Should be Exempted.

Any transaction short of an acquisition of control should be exempted as it is in virtually every other jurisdiction. For example, under the European Commission Merger Regulations, only a "concentration"—defined as "a change of control on a lasting basis"—requires premerger notification.[112]

The main purpose of premerger notification is to give the government the ability to challenge a transaction before it is consummated because, after it is consummated, unscrambling the transaction is difficult. No such issue exists with minority acquisitions, which can easily be undone after the fact if an antitrust concern is identified. Moreover, when there is no control, the risk of competitive effects is too low to justify the burden of a filing. If the Agencies' concern is

[111] *See* FTC, *Common Failure to File Scenarios*, https://www.ftc.gov/enforcement/premerger-notification-program/post-consummation-filings-hsr-violations/common-failure ("Acquisitions by company executives, officers, and directors: Some individuals in these positions are not at all aware of the HSR Act and potential filing obligations.").

[112] Commission Regulation 139/2004, art. 3, 2004 O.J.(L 24) 7 (EC).

about aggregation, then the concern is unfounded: the HSR rules already require aggregation of existing holdings, so to the extent an acquiring party makes multiple minority investments in the same issuer, once the aggregated holdings cross the threshold, a filing will be required in any case.[113]

Under HSR, however, minority acquisitions of even minuscule positions of a corporation's voting securities can require a filing. The rule is different for non-corporate entities, however. For such entities, the acquisition of less than 50% of the right to profits of the entity or the right to assets on dissolution, which the HSR regulations define as control, is *not* reportable. There is no evidence that anticompetitive transactions of non-corporate entities have fallen through the cracks relative to transactions of corporate entities due to the lack of a premerger notification requirement. We are also not aware of any concerns raised by transactions involving minority interests in non-corporate entities.

The burden of requiring notification of acquisitions of minority interests in corporations thus outweighs the benefits. Indeed, the Agencies have brought virtually no substantive enforcement actions against such acquisitions in the entire history of the HSR Act.

The history of the Act and common sense demonstrate that all transactions involving acquisitions of less than 50% of an entity, whether it is a corporate or non-corporate entity, should be exempted.

3. Prior Treatments of Debt Should be Restored.

The HSR Act exempts "acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities."[114] Despite the clear statutory language, the FTC has taken the position that the acquisition of third-party debt is not exempt on the basis that the statutory provision applies only to "mortgages" and "deeds of trust," in effect reading out the words "bonds" and "obligations which are not voting securities" from the statutory text.

Apparently because this rule would require filing for many such acquisitions of debt, the FTC has provided guidance that the acquisition of debt is exempt so long as the seller is remaining in the business of extending credit or trading such debt instruments.[115] Conversely, if a party is exiting the business of extending credit or trading debt instruments, the acquisition is deemed not to be in the ordinary course of business of the buyer and thus not exempt, despite the plain language of the statute to the contrary. This was not always the position of the FTC. Before the adoption of Formal Interpretation 9 in 1980, the FTC's position was, consistent with the statute, that the acquisition of debt was always exempt.[116]

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[113] 16 C.F.R. §§ 801.13–15.

[114] 15 U.S.C. § 18a(c)(2).

[115] *See* FTC, *2503004 Informal Interpretation* (Mar. 18, 2025), https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/2503004.

[116] *See* FTC, *Formal Interpretation No. 9* (Mar. 20, 1980), https://www.ftc.gov/legal-library/browse/hsr-formal-interpretations/formal-interpretation-no-9.

Although any relief from filing requirements is welcome, the guidance is not faithful to the statute and should be discarded in favor of what the statute actually says, which is that acquisitions of "bonds . . . or other obligations" are exempt. The circumstances of the seller are irrelevant.

In addition, the FTC's recent guidance on the treatment of debt as consideration introduced unnecessary ambiguity.[117] The Agencies should reaffirm the PNO's long-standing guidance, which stated: "The PNO's general position with regard to voting securities is that the dollar value of the liabilities of the acquired entity is not included in the purchase price in calculating the size of transaction."[118] The established guidance clearly articulates the method for calculating the size of a transaction, and it effectively allows the Agencies to fulfill their initial competitive screening of a proposed transaction.

* * *

As discussed above, AIC believes that the Restored Form and regulatory structure is sound. There are a few areas that could be improved to reduce the burden on filers as well as certain types of transactions that should be exempted altogether. But there is insufficient basis to expand the scope of the HSR filing requirements to encompass additional categories of transactions, including those identified in the Request. The Congressional mandate to collect subsidy information can be implemented with a simple adjustment to the Restored Form.

Congress deliberately designed the HSR premerger notification program to avoid burdening transactions with extensive costs. Any modifications to the Restored Form should be guided by Congressional intent and should avoid requiring *all* filers to supply information that is relevant to only a small number of filings, if any.

AIC stands ready to answer any questions and would be pleased to engage with the Agencies on any of the issues discussed.

Respectfully submitted,

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[117] *See* FTC, *The Treatment of Debt as Consideration* (Aug. 26, 2021), https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/treatment-debt-consideration ("[W]hile the Bureau acknowledges that not all debt retired as a part of a proposed transaction is consideration, the full or partial retirement of debt should be included in calculating the Acquisition Price in any instance where selling shareholder(s) benefit from the retirement of that debt. This approach better reflects the intent of the Rule as reflected in the 1978 SBP.").

[118] FTC *Green Book*, *supra* note 50, at 97–98.