DECHERT

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Dechert LLP Comments

Making Improvements to HSR Reporting

Dechert LLP submits these comments regarding the effectiveness of the Hart-Scott-Rodino ("HSR") premerger notification requirements, as requested by the U.S. Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, the "agencies") on March 25, 2026. The views expressed herein are those of Dechert based on our experience representing a broad range of clients; however, these comments are not being submitted on behalf of any company or organization. Dechert commends the agencies on their efforts to modernize the HSR filing process. However, we believe that some of the requirements included in the updated version of the HSR Form ("the Updated Form") impose significant burdens on filers that outweigh the usefulness of the information to the agencies.

These comments address both the requirements of the Updated Form that we found to be beneficial and those that we recommend should be modified or eliminated in any future rulemaking because, among other reasons, they impose significant burdens on companies to transactions that pose no harm to competition. Based on our experience counseling clients using the Updated Form, we found that certain of the requirements were too vague, overbroad, or lacking in probative value. We have also identified some of the Updated Form requirements that we found to be beneficial to effective and efficient premerger review, and that we would recommend including in future versions of the HSR Form.

I. Requirements That Impose Significant Burdens That Outweigh the Probative Value

A. Draft Transaction Related Documents

The Updated Form required the filers to submit drafts of transaction-related documents if the draft was reviewed by any member of the board of directors. The agencies' "long-standing position" governing draft documents for HSR filings is that draft documents need not be submitted unless (1) there is no final version of the document, in which case the latest version of the document should be submitted or (2) the draft was shared with the board of directors, in which case the draft should be submitted with the filing. Drafts are inherently less probative because they may contain outdated, misleading, or factually inaccurate information. In order to address the concern cited by many that the submission of all drafts would impose a substantial burden on the filers, the Premerger Notification Office of the FTC provided guidance that earlier drafts shared with an individual serving as a director would only need to be produced if prepared by or shared with the director in their capacity as such.[1] Notably, this guidance was issued after the Updated Form had already taken effect, underscoring that the requirement was ambiguous at the time of filing and placed filers at risk of inadvertent violations.

[1] Federal Trade Commission, HSR Form Changes Q&A (May 12, 2025), HSR Form Changes Q&A | Federal Trade Commission ("If an individual holds both a board (or similar) position as well as other roles within the organization, only those drafts that were shared with the individual in their role as a board member need to be produced.").

By eliminating the bright-line test of submitting earlier drafts of responsive documents only to the extent such earlier drafts were circulated to the entire board of directors, the agencies reverted to the outdated "two hats" theory, which could, at its boundaries, be subjective. This vagueness creates an unwarranted risk of arbitrary and capricious enforcement, and required filers and their counsel to devote substantial additional time to document review and privilege analysis in order to assess whether each individual draft had been reviewed by a board member "in their capacity as such" — a determination that is inherently fact-specific and difficult to apply consistently.

We recommend reinstating the bright-line test under which earlier drafts of responsive documents need only be produced if circulated to the entire board of directors, as this standard provides clear, administrable guidance that eliminates subjective judgment calls and reduces the risk of inconsistent enforcement.

B. Supply Relationship Information for Any Other Business That Competes with Target or Acquiring Person

The Updated Form required information regarding sales and purchases from the other party in the transaction and from any other business that uses the other party's product or service as an input or that competes with the other party to provide a similar product or service. We understand the reasoning and value of knowing if the companies to the transaction have a supply relationship, and we do not object to a requirement to disclose direct supply relationships between the companies to the transaction. But, it is overly burdensome to require the companies to try and determine which other companies might use a party's product or service as an input or compete with a party to provide a similar product or service.

Unlike the direct commercial relationship between the transacting companies — which is typically known to both sides — identifying all third-party companies that may compete in adjacent markets or that use a party's output as an input requires extensive investigation that goes well beyond what filers ordinarily compile when evaluating an acquisition or its competitive effects. In our experience, this portion of the supply relationships requirement was among the most time-consuming elements of the Updated Form, requiring substantial attorney time and close coordination with business personnel across multiple business units.

We recommend limiting supply relationship disclosures to direct commercial relationships between the companies to the transaction, which provides the agencies with objective, probative supply-side information without imposing a search obligation that companies cannot practically fulfill in any consistent or reliable way.

C. Officers and Directors

The Updated Form required the acquiring person to identify all current officers and directors of each entity within the acquiring person that either (i) is in the direct line of ownership from the target entities up to the Ultimate Parent Entity ("UPE"), or (ii) is responsible for an overlap within the Overlap Description or a supply relationship within the Supply Relationships Description, but (iii) only to the extent any such individuals also serve as officers or directors of another entity that

derives revenue in any of the same North American Industry Classification System ("NAICS") industry codes reported by the target.[2]

Identifying all of the officers and directors oftentimes required listing the same individual's roles at multiple subsidiaries within the acquiring person. This could become complicated, particularly for filers with long lists of controlled entities, requiring in some instances hours of attorney and client time to compile a list of individuals that added little probative value to the agencies' assessment of the specific transaction under review. Consider a UPE with hundreds of direct and indirect subsidiaries, which has a NAICS code overlap with the target. Suppose individual X is an officer of the UPE as well as a large number of subsidiaries that report in the same NAICS code as the target. Even if X did not hold any other officer or director positions outside of the acquiring person, depending on the level at which the acquiring entity sits in the structure, this could result in the same internal roles held by X being disclosed in many different permutations, serving little purpose. This information is also not typically compiled in the course of evaluating an acquisition or its competitive impact, and therefore the burden of gathering it was entirely incremental to the HSR filing itself.

We recommend that any future disclosure requirement be limited to individuals (i) currently serving as officers or directors of any entities within the acquiring person that are responsible for an overlap within the Overlap Description, and (ii) only to the extent that such individuals currently hold officer or director positions in entities outside of the acquiring person that generate revenues in the same NAICS code(s) as the target. These limitations would substantially reduce the compliance burden while still providing the agencies with the information most probative of potential competitive concerns.

D. Top 10 Customers for Each Customer Category

The Updated Form improved upon the prior version of the form by having filers identify overlapping products or services (or the lack thereof), along with sales and top 10 customer information specific to any such overlaps. We recognize that NAICS codes do not always provide a clear picture of the competitive overlaps between the companies, and for the most part companies did not find the requirement to identify overlapping products or services to be overly burdensome. However, the Updated Form also required filers to provide a list of the top 10 customers within each customer category (e.g., retailers, distributors, wholesalers) identified by the filer. Based on our experience, the additional request for a list of top 10 customers within each customer category is often a significant burden to many filers, the probative value of which is questionable. This information is not always collected in the ordinary course of business and has proven to be burdensome to gather for many companies; in our experience, compiling top customer data across all relevant product and customer categories has required substantial attorney and business personnel time per filing, often spanning multiple days of coordinated effort depending on the complexity of the filer's business. In addition, depending on the size of the filing party, there are often fewer than 10 significant customers in certain customer categories. Furthermore, this information is not typically compiled when evaluating the competitive impact of a transaction,

[2] Some practitioners have raised concerns that the agencies were using the HSR Act as a means for requiring merging companies to provide information that may help the agencies enforce Section 8 of the Clayton Act, rather than assessing the competitive effects of the reported transaction, the only proper focus under the HSR Act.

making the burden entirely incremental. The probative value of customer information by category in addition to customer information for each overlapping product or service is far outweighed by the burden on the filers.

We understand the probative value of obtaining customer information, including a list of top 10 customers overall, in circumstances where there is an overlap. We therefore are not opposed to keeping that general requirement when there is an overlap, but recommend eliminating the portion that requires identification of the top 10 customers within each customer category. This added requirement is overreaching and the information is typically not tracked in the ordinary course of business nor as part of the consideration of the transaction. The agencies can always request this information in select transactions in a more targeted fashion.

II. Requirements That We Deem to Be Beneficial to Effective and Efficient Premerger Review

A. Supervisory Deal Team Lead

The Updated Form required filers to submit transaction-related documents prepared by or for the supervisory deal team lead(s). By providing a definition of supervisory deal team lead in the Instructions and limiting the requirement to a single individual, the agencies have limited the extra burden on filers. The additional documents received under this requirement provide the agencies with highly relevant information for their analysis of the transaction, and the incremental compliance burden — which is limited by the definition to documents prepared by or for a single identified individual — is modest relative to that benefit. Moreover, this requirement has the potential to reduce Second Request issuances for non-problematic transactions, a benefit that further justifies the associated compliance costs.

B. Overlap Description

The Updated Form required filers to identify their own products and services, including those that are in development or pre-revenue, which compete with the products and services of the other party that are known to the filer.

Having the filers list each principal category of products and services that competes with the other party seems more effective than the agencies historically looking at the filers' respective NAICS codes as a first step in determining an overlap. Filers often may report under the same NAICS code but not offer overlapping products or services. The narrative overlap description allows the companies to clearly state any known overlaps. In our experience, this requirement has also benefited filers: by giving companies a structured opportunity to explain why their businesses do not, in fact, overlap in any competitively meaningful way despite the common NAICS code, the Overlap Description can reduce the likelihood of an extended investigation (e.g., a pull and refile or Second Request), for transactions that are not problematic.

We believe the compliance costs associated with preparing the Overlap Description — which are generally modest for transactions with straightforward competitive profiles — are outweighed by the efficiency gains for both the agencies and filers in such cases. For transactions with genuine competitive overlaps, the Overlap Description also enables the agencies to focus their review more

quickly on the relevant product and geographic markets, potentially reducing overall review timelines.

C. Streamlined NAICS Code Reporting for Manufacturers

The Updated Form eliminated the requirement for filers engaged in manufacturing to provide revenue by 10-digit North American Product Classification System ("NAPCS") codes. This relieved a burden on the filers as the NAPCS codes did not correspond numerically to the NAICS codes in the absence of the NAICS-NAPCS concordance tables, which were cumbersome, and which the Census Bureau did not update once it fully switched over to 2022 NAPCS codes. The agencies noted in their Notice of Proposed Rulemaking that "NAPCS-based codes have been less useful for the agencies' analysis than the discontinued 10-digit NAICS-based codes and have created significant confusion for both filers and the agencies."[3] Under the Updated Form, product and service overlaps could be more effectively dealt with through the filers' own description of competing products and services.

III. Additional Comments on FTC Requests

A. Under What Circumstances Should a New or Supplemental HSR Filing Be Required for Filers That Propose a Divestiture or Some Other Structural Modification of Their Proposed Transaction?

There should not be a bright-line rule requiring a new or supplemental filing for filers that propose a divestiture or some other structural modification of their proposed transaction. Requiring a new or supplemental filing due to changes in the transaction structure should not be required if there is no change to the UPE and only a subset of the assets from the original filing will be acquired. Such a requirement would add unnecessary delay in the closing of transactions that could unduly harm the filers. This should only be required in rare instances where there has been a significant change to the transaction structure, e.g., a change in the UPE or the addition of material new assets that were not part of the original transaction. Moreover, there are already mechanisms allowing the agencies to obtain additional information about a change to a transaction.

With respect to the specific sub-questions raised by the agencies:

Scope of any supplemental filing. If a supplemental or new filing is required in the rare circumstances described above, it should be limited to information directly pertaining to the structural modification at issue. For example, in the case of a proposed divestiture remedy, the supplemental filing should require only a description of the assets to be divested, identification of the proposed buyer, and a targeted competitive analysis of the restructured transaction. It should not re-open the full scope of HSR review or require re-submission of information already provided in the original filing. To the extent additional information is required, the estimated incremental time and financial costs of compliance with a new HSR filing should be weighed against the specific information requested and need not lead to triggering a full new filing and waiting period.

[3] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. at 42200 https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

Impact on companies' incentives to propose remedies. A broad or automatic supplemental filing requirement may have a chilling effect on certain companies' incentives to propose timely remedies and on the timing with which they do so. Rather than risking a new HSR filing and triggering another waiting period for a settlement that may not be accepted by the reviewing agency, certain filers may be more likely to proceed with litigation. This would undermine the agencies' own interest in encouraging early engagement on remedies. Any supplemental filing requirement should be carefully cabined to avoid this outcome.

Alternatives to a new or supplemental filing. Alternatives to a new or supplemental HSR filing could in many cases achieve the agencies' objectives more efficiently. In our experience, voluntary timing agreements negotiated between the agencies and filers are already used in practice and provide the agencies with adequate time to evaluate remedy proposals without imposing the delays associated with a formal new filing. Specifications in Second Requests also often require responsive documents discussing proposed remedies. We recommend that the agencies prioritize guidance and negotiated timing agreements as the primary mechanisms for addressing late-breaking structural modifications, reserving any new filing requirement for only the most significant changes to a transaction's structure.

B. Should the Form Include Section Numbers?

Yes, the section numbers are helpful in directing filers to the information required. It would be beneficial to have the section numbers correspond to the section numbers in the original HSR Form so that items that are unchanged or slightly modified have the same number as before, such as Item 4(c)/4(d). A generation of antitrust practitioners have developed institutional knowledge organized around the existing numbering system, particularly with respect to the documentary requirements under Items 4(c) and 4(d). Disrupting that established numbering — for example, by assigning new numbers to requirements that are substantively unchanged from the prior form — would increase compliance complexity and the risk of error without any corresponding benefit. Maintaining consistent numbering for unchanged or minimally modified provisions, while adopting new numbers only for genuinely new requirements, would preserve the value of existing practitioner expertise while clearly flagging what is new.

Conclusion

We respectfully urge the agencies to carefully consider the concerns raised in these comments along with our recommendations. We believe that addressing these concerns will result in a premerger notification form that is more workable and more effective without unduly burdening merging companies. We appreciate the opportunity to submit these comments and remain committed to engaging constructively with the agencies in any rulemaking process. Should the agencies find it helpful, we would welcome the opportunity to discuss any of the concerns raised in these comments in greater detail.