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Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex H)  
Washington, DC 20580

Re: 16 CFR Parts 801-803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

To whom it may concern:

The National Association of Manufacturers (“NAM”) appreciates the opportunity to provide comment to the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) (the “Agencies”) on the proposed amendments to the pre-merger notification rules (the “Rules”) that implement the Hart-Scott-Rodino (“HSR”) Antitrust Improvements Act.<sup>1</sup>

The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM is the largest U.S. manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states. The HSR Rules have a significant impact on manufacturers in the United States. Transactions that undergo antitrust review by the Agencies—including mergers and acquisitions as well as certain capital investments and licensing arrangements—are critical to the growth of manufacturing businesses across the country.

Unfortunately, the proposed amendments to the HSR Rules would stifle job-creating growth in the manufacturing industry without any corresponding benefit to the Agencies, merging parties, or the public. The new and unduly burdensome information and processes required by the amendments represent a major overhaul of established, well-understood standards that have been relied upon by businesses and regulators for more than 45 years. If adopted, the proposal would dramatically increase the information that merging entities would be required to provide to the Agencies before consummating a transaction, including for the vast majority of transactions that pose no antitrust issues and that may increase competition. Manufacturers will experience substantial cost increases as a result, with hundreds of millions of dollars or more being diverted toward lawyers and consultants and away from manufacturing growth. Further, potential transactions will be significantly delayed if the amendments are adopted as proposed, postponing the opportunities and job-creating investments that these transactions can create.

The NAM is concerned that the proposed amendments will not enable the Agencies to better identify and investigate potentially anticompetitive transactions, but rather will delay and disincentivize *all* business combinations in the manufacturing sector. Such an approach ignores the many benefits that mergers and acquisitions (“M&A”) create for manufacturers of all sizes, and the NAM is disappointed that the Agencies appear to be taking steps to limit growth and innovation in U.S. manufacturing. Pro-growth, pro-competitive transactions in manufacturing set the stage for business

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<sup>1</sup> *Premerger Notification; Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178 (29 June 2023). RIN 3084-AB46; available at <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf>.

efficiencies, enhanced product offerings, and reduced costs for customers. Healthy M&A activity in the industry also aids company formation and capital raising earlier in a business's life cycle, as entrepreneurs and early-stage investors often depend on M&A for an exit opportunity. Conversely, limiting business combinations by enforcing the one-size-fits-all standards contemplated by the proposed rule could disincentivize early-stage innovation; the breadth of the proposal could also implicate collaborations and licensing arrangements that are similarly important to innovative businesses.

The NAM respectfully encourages the Agencies to reconsider the approach to pre-merger review embodied in the proposed rule. The proposed amendments appear to establish a presumption that M&A activity is inherently dubious, and they would treat all reportable transactions as deserving of an extensive degree of disclosure and scrutiny far in excess of any actual competitive risks they pose. Rather than seek to stifle business combinations across the board, and the associated opportunities for efficiency, growth, and job creation throughout the manufacturing industry, the Agencies should instead focus their attention on particular transactions that actually pose a threat of competitive harm to American consumers. Limiting new regulatory burdens on the thousands of transactions that pose no threat to consumers will protect businesses' ability to grow and drive economic expansion in the United States.

Manufacturers thus encourage the Agencies to withdraw the proposed amendments. At a minimum, any amendments adopted must be more narrowly tailored than the current proposal. The NAM urges the Agencies to appropriately calibrate the HSR Rules to enable pre-merger review to identify transactions with a greater risk of anticompetitive effects without subjecting pro-consumer transactions to significant costs and delay.

**I. The proposed amendments will dramatically increase costs on manufacturers, effectively imposing a transaction tax on all potential deals.**

In the proposal, the Agencies estimate that the new requirements will increase the time needed to complete an HSR filing by, on average, 107 hours. More complex transactions—which the Agencies recognize account for nearly half of all filings—could see an increase of as much as 222 hours, according to the proposal. Using the Agencies' estimate of 37 hours to complete a filing under the current rules, the proposed amendments represent a four- to seven-fold increase in the time necessary to prepare an HSR filing. And these estimates likely understate the increased burden associated with the proposed changes.

Adding hundreds of hours of work to the filing process will impose a *de facto* tax on each transaction. The expansive nature of the proposed rule and the ambiguity and complexity inherent in many of its provisions will ensure that significant funds are diverted from company growth. And companies are likely to spend far more time on each deal than the conservative estimates made by the Agencies. Indeed, the Agencies' estimates likely understate both the time it takes to comply with the current HSR requirements as well as the time necessary to comply with the proposed amendments, given that the methodology for determining these estimates appears to have been an informal survey of Agency staff. What is clear is that the new transaction tax will apply to every single reportable deal, no matter its size, the market positions of the merging parties, or the likelihood that it would merit additional scrutiny from the Agencies.

In practice, the proposed amendments represent a fundamental overhaul of the HSR filing process, completely upending the norms and practices with which all American companies are familiar. Merging parties, as well as the Agencies themselves, are well-acquainted with the current Rules and what information and procedures are required to satisfy them. But the novel regime being proposed would lead to regulatory uncertainty and result in time and cost increases far in excess of the 222-hour ceiling estimated by the Agencies.

Many of the proposed requirements, discussed in more detail below, represent structural changes to the information necessary for HSR review, such as the expanded document production requirements, the new obligations to provide competition and strategic narratives about a deal, the mandate related to affiliated entities' officers and directors, and the extension of antitrust review to include labor and employment policy goals. The information required by these significant changes to the HSR Form far exceeds what is currently necessary for most of the Agencies' in-depth antitrust investigations, yet it would be required in merging entities' *initial* filings. These requirements will reshape the pre-merger filing process and expand the boundaries of pre-merger review while increasing the cost and time burdens associated with the HSR process accordingly, without uncovering much if any information relevant to the Agencies' competition analysis.

Other provisions in the proposal will necessitate hours and hours of non-substantive recordkeeping, processes, certifications, and verifications. For example, tracking down every officer, board member, or board observer for every subsidiary corporation within a merging entity, which for manufacturers can reach hundreds of individuals, serves no rational substantive purpose. Similarly, companies will be required to identify on a routine basis the name, title, and company of any internal staff members who receive or supervise the preparation of certain third-party documents. There is minimal if any value to the Agencies having this information for every single reportable transaction (and if and when it might have value, the Agencies could simply request it), but collecting and filing a comprehensive list of all the people who may have "supervised" the creation of these documents will require many hours of work.

Overall, the breadth and depth of the proposed amendments will make every reportable transaction similarly costly and burdensome as the limited number of transactions that, under the current Rules, involve some form of follow-up or additional scrutiny from the Agencies. These additional costs will not actually help to expedite transaction review (the purported justification for the proposal); the deluge of irrelevant information required by the proposed amendments will likely do the opposite. Indeed, the Agencies' estimates of the burdens associated with the proposal likely significantly understate its time and cost burden on merging parties. Once an HSR filing is made, this extensive burden will shift to the Agencies, raising the possibility of further delays.

The proposal seeks to align U.S. pre-merger review with requirements in the E.U., but the European Commission receives roughly 10% of the merger filings that the FTC and the Antitrust Division of the DOJ must process. Further, the E.U. allows transactions with limited horizontal overlap or low market share to use a "short form," which is notably not permitted under the one-size-fits-all amendments proposed by the Agencies. Importing E.U.-style merger review to the U.S. is simply not practical for the Agencies or for businesses in the United States.

The NAM respectfully encourages the Agencies not to impose what is effectively a transaction tax on all potential mergers and acquisitions in the manufacturing industry. Further, manufacturers urge the Agencies to reconsider the economic analysis underpinning the proposed rule in order to better reflect the significant delays, and associated cost increases, attributable to the proposal. Armed with more realistic estimates of the rule's time and cost burdens, the NAM encourages the Agencies to rescind or significantly rework the proposed amendments to the HSR Rules.

**II. The proposed amendments will add significant complexity to the HSR filing process, ultimately delaying or disincentivizing transactions that are critical to manufacturing growth.**

M&A activity allows companies of all sizes to evolve and grow, leading to downstream effects that benefit all Americans, including job creation, investment in research and development, and economies of scale and scope that produce lower prices and create greater choice for consumers.

The economic efficiencies driven by successful business combinations allow companies to innovate for the future.

This is true for manufacturers of all sizes. Large companies often seek acquisition targets to expand into new markets or make their supply chain more efficient. These business combinations can expand product offerings for consumers and reduce prices due to increased efficiency. Small businesses benefit from growth opportunities associated with business combinations, and M&A allows their early-stage investors an exit opportunity—ultimately supporting capital formation at all stages of a company’s life cycle, including for entrepreneurs and start-ups. The availability of late-stage capital via M&A attracts early-stage funding and ensures that innovators can raise the capital necessary for next-generation breakthroughs.

The NAM is disappointed that the Agencies have adopted an adversarial stance toward merger activity in the manufacturing industry. Manufacturers strongly support robust enforcement of antitrust law to prevent anticompetitive deals that could harm consumers. However, the proposed amendments will make it more difficult for companies to combine efficiently, as increasing the price of consummating a transaction by definition decreases the value of a deal. The NAM is concerned that the Agencies may be utilizing the HSR Rules, which were authorized by Congress to help the Agencies investigate potentially anticompetitive deals, to chill merger activity writ large. The effect of the amendments will be that business combinations will be more costly and difficult, either delaying transactions or halting them altogether.

Critically, the proposed rule is not appropriately calibrated to the anticompetitive risk of the thousands of deals to which it will apply. At present, approximately 2% of proposed reportable transactions receive a Second Request indicating that the deal may pose some anticompetitive concerns and thus require enhanced scrutiny from the Agencies.<sup>2</sup> In 2021, there were only 65 Second Requests across the 3,520 HSR filings the Agencies received.<sup>3</sup> But under the proposed rule, 100% of HSR transactions will face enhanced filing burdens at the initial filing stage, requiring significant additional work on the part of all merging parties. This approach will do little to protect consumers, as the Agencies already have the ability to flag transactions that may harm consumers, and they exercise such discretion only in the limited instances where there is a plausible antitrust theory of harm. And the new information required under the proposal, while difficult and costly to collect, will not provide much if any useful insight as to a transaction’s competitive effect—particularly for transactions where it is apparent from the materials already collected by the Agencies under the current standards that the transaction is unlikely to raise any anticompetitive concerns. Instead, the proposed rule’s complicated and burdensome requirements will increase costs for merging entities and significantly delay, or even disincentivize, deals that could benefit consumers, workers, and the U.S. economy.

As noted, the proposal estimates that, on average, preparing an HSR filing under the proposed amendments will take quadruple the time currently required. And for more complex transactions, which the proposal estimates account for nearly half of all HSR filings, the process to gather and prepare all the information required under the amendments will take *seven times* as long as it does currently. Such a dramatic expansion in filing requirements represents a significant change in the pre-merger process. Even using the Agencies’ conservative estimates of time increases, filings will be delayed by weeks or months. These delays represent a significant cost increase for merging entities; in addition, putting all reportable deals on hold for weeks on end could threaten the underlying economics of the deal itself—resulting in regulatory overreach chilling competitively

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<sup>2</sup> *FTC, DOJ Issue Fiscal Year 2021 Hart Scott Rodino Premerger Notification Report* (10 February 2023). Federal Trade Commission. Available at <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-doj-issue-fiscal-year-2021-hart-scott-rodino-premerger-notification-report>.

<sup>3</sup> *Ibid.*

neutral and pro-competitive deals. Critically, these delays are in service of collecting information that is not necessary for the Agencies to understand the competitive impact of a potential transaction, particularly given the extensive information already required to be provided under the current HSR Rules and the Agencies' existing ability to request further information.

Further delays are likely beyond what is contemplated by the proposed rule. First, as noted, it is likely that the Agencies' estimates understate the true burden of the proposal. The invasive and complicated nature of many of the new requirements, when applied to companies' complex organizational structures, will likely lead to delays (and associated cost increases) in excess of the Agencies' expectations. For example, new requirements related to Item 4 responsive documents, officers, directors, and board observers of the merging entities' subsidiaries, agreements between the merging parties and their subsidiaries, and horizontal and vertical industry overlaps will necessitate broad and deep investigations that are more difficult and time-consuming than the proposed rule acknowledges. Further, the NAM is concerned that the Agencies' methodology in determining the proposal's impact on timing appears to have consisted solely of an informal "canvas" of Agency staff rather than a more rigorous examination of the new processes and procedures required by the amendments.

Additionally, the breadth, complexity, and opacity of the new requirements raise the possibility that the Agencies will deem merging parties' filings to be incomplete once filed, even when the parties engage in good faith and make a reasonable effort to comply with the HSR Rules. Such a determination would prevent the 30-day review clock from starting, leading to an indeterminate period of back-and-forth between the filers and the Agencies before the filings are deemed to be satisfactorily complete. Such delays are not reflected in the proposed rule's time estimates, but present a significant risk to merging parties—both in terms of the additional costs and time needed to satisfy the new requirements, and the potential that a deal languishes indefinitely waiting for the Agencies to start the 30-day clock.

In short, the burdens under the proposed rule will be substantial. And it is not likely that the new information required under the amendments will provide new useful insights into the competitive impact of a potential transaction: under the current standards, the Agencies can and do request information necessary for their review. The proposed rule notes that the Agencies already find it difficult to process the HSR filings they receive; it is likely that the deluge of new information and documents required by the proposal will make timely pre-merger review even more difficult. Additionally, the disclosures required are in many cases either duplicative of information already required to be filed or disconnected from the actual competitive impacts of a deal—in either case, the costly and burdensome process undertaken by merging parties will not result in useful information for the Agencies' review process.

The Agencies can already access all the information they need for pre-merger review by engaging with merging parties on a voluntary basis during the waiting period or by utilizing the Second Request process. There is simply no need for such a complex and comprehensive overhaul of the HSR Rules.

The NAM is concerned that the proposed amendments to the HSR Rules would chill business combinations that otherwise would benefit growth and job creation in the manufacturing industry—and thus harm manufacturers' ability to provide increased choice and innovative new products to consumers. Accordingly, manufacturers respectfully encourage the Agencies to withdraw, or at a minimum significantly narrow, the proposed rule.

**III. The dramatic expansion of the filing requirements for Item 4(c) and Item 4(d) responsive documents is unnecessarily invasive and burdensome and will not benefit the Agencies or the public.**

The proposed rule would institute key changes to the process of filing responsive documents under Item 4(c) and Item 4(d). First, the proposed amendments would require companies to provide transaction-related documents prepared by or for “supervisory deal team leads,” a significant expansion of the current requirement to provide documents prepared by or for the company’s officers or directors. Second, the proposed amendments would require companies to provide *draft* versions of any transaction-related documents that were provided to any officer, director, or supervisory deal team lead. Finally, the proposal would require the filing of certain reports and documents prepared in a company’s ordinary course of business that may be largely unrelated to the transaction. These expansions of Item 4(c) and Item 4(d) are likely to create substantial burden and confusion at companies preparing an HSR filing.

Requiring merging entities to provide responsive documents that were prepared by or for supervisory deal team leads is a drastic change from the current filing requirement, which is focused solely on officers and directors. The unclear boundaries with respect to which individual(s) might qualify as a supervisory deal team lead will potentially ensnare multiple employees within a company’s M&A and legal teams, leading to significant burdens and confusion related to internal document preservation and retention efforts. Longstanding and well-understood definitions govern who qualifies as company officers and directors, but no such clarity exists with respect to supervisory deal team leads. Further, as the proposed rule concedes, these individuals do not have final decision-making authority, so broadening the document production requirement to include any and all documents reviewed by them would significantly increase the regulatory burden without providing new insights into the thinking of the company’s officers and directors (i.e., the individuals charged with making a decision about a particular transaction with the information presented to them). It remains the case that the most relevant documents are prepared by or for the actual decision-makers within a business, so requiring documents not reviewed by these individuals (i.e., those prepared only for the deal team) will only overwhelm the Agencies with documents that are not useful to their analysis. Indeed, drafts are often edited to *remove incorrect information* before they are finalized and sent to decision-makers.

Despite this lack of benefit, the burden associated with preserving, reviewing, and producing these documents will be substantial. Broadening the definition of responsive documents to include those prepared by or for supervisory deal team leads effectively brings HSR reporting deeper into the day-to-day operations of a company, likely resulting in hundreds if not thousands of new documents being swept into the pre-merger review process. The burden of identifying additional custodians and subsequently tracking these documents, including all draft versions of them (as discussed below), will be substantial—diverting funds from productive uses within a business and reducing the ultimate value of a transaction.

Further increasing burdens on businesses will be the proposed requirement to produce the draft versions of transaction-related documents. Drafts of transaction-related documents that have been reviewed by the board of directors are already required to be provided, as are drafts of documents for which there is not a final version. As such, the proposed expansion will encompass a wide range of versions that contain redundant information or are not relevant to the company’s decision-makers’—or the Agencies’—analysis of a deal’s rationale or competitive impact. The document review and recordkeeping aspects of this provision will be substantial, requiring companies to preserve, identify, and be prepared to produce *all* versions of the same document, no matter how insignificant the incremental changes between versions. Document creation is an iterative process, and it makes little sense to mandate the filing of early versions of a document that may bear little resemblance or relevance to the final version after review by more senior employees or those with

more expertise about the deal or the company's business. Moreover, productivity technology features, such as auto-saving and documents accessible to multiple employees via a shared drive, may create thousands of near-duplicate "drafts" that have immaterial changes within a single person's files.

The proposed rule alleges that later versions of documents, including final versions, are "sanitized," but this misstates the nature of these documents. Rather than "sanitized," final documents are instead more accurate, useful, and reflective of the business's actual perspective on the proposed transaction. To the extent information is removed during the drafting and review process, it may be irrelevant, internal, or incorrect—not "highly relevant, probative, or candid statements about the competitive impact" of the transaction, as alleged by the proposal.<sup>4</sup> Early drafts are simply unlikely to be an appropriate or accurate representation that would be relevant for the Agencies' review, just as they are not likely to be appropriate for company decision-makers' consideration.

The NAM respectfully encourages the Agencies to withdraw the proposed requirements related to Item 4 responsive documents. The current HSR Form already provides useful and relevant documents necessary for the Agencies' initial review: Item 4 documents prepared by or for officers and directors, and draft versions of those documents that have been reviewed by the board or that represent the current version of a responsive document absent a final version. There is no need to dramatically expand these requirements, and doing so will place a tremendous compliance burden on filing entities without materially benefiting the Agencies' review. In fact, the deluge of documents filed pursuant to this requirement will likely hamper effective pre-merger review.

#### **IV. The new competition analysis section of the HSR Form is not appropriately tailored to highlight relevant risks to competition.**

The proposed amendments would create a new section of the HSR Form requiring merging entities to provide a narrative "competition analysis" that would describe their business, any horizontal overlaps with the other party to the transaction, and the supply chain and licensing relationships between the two entities and their subsidiaries. These new requirements would be in addition to the existing requirements that filing persons provide documents that analyze the proposed transaction with respect to topics relevant to a competitive assessment and identify the NAICS codes in which they have overlapping operations. They therefore represent a new and significant burden for filing entities.

The provision related to horizontal overlaps would require a company to describe its current and planned product and service offerings and detail where they compete with those of the other party to the merger. For any identified overlaps, the company would be required to provide detailed sales and customer information, as well as a description of any licensing, non-compete, or non-solicitation agreements between the parties. Notably, the proposal lacks a relevance test or a *de minimis* threshold, so companies will be required to delve deep into complex corporate structures to identify individual products or services offered by their subsidiaries in order to conduct the required analysis. This requirement will be particularly difficult with respect to potential, future horizontal overlaps. Many companies have a pipeline of product ideas that may or may not result in an actual product sold to customers. Indeed, in some cases the individual applications of a technological innovation have not yet been identified. It is not feasible for merging entities with early-stage ideas still in the R&D process to identify potential products that might one day come to fruition and estimate speculative sales data, customer information, and the like.

Similarly difficult will be the proposed requirement that companies report any licensing, non-compete, and non-solicitation arrangements between the two entities or their subsidiaries. These

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<sup>4</sup> Proposed Rule, *supra* note 1, at 42194.

agreements typically are negotiated at a level far below the ultimate parent entity, and there is not a central repository of contracts for filing entities to consult. Lacking access to the level of detail on these arrangements required by the proposal, merging entities will be required to undertake a costly manual investigation for each and every HSR filing. One-off licensing agreements between subsidiaries, for example, are simply not likely to be relevant to the Agencies' competition analysis, and there is no easy way for filing entities to comprehensively track and report them. Further, the Agencies' focus on non-compete and non-solicitation arrangements is far-removed from the Agencies' mission of protecting consumers from potentially anticompetitive mergers. Pre-merger review should remain limited in scope to the competitive impact of a potential deal, not expand to encompass unrelated issues.

Similar issues plague the proposed requirement that merging entities provide detailed information about their supply chain relationships. Modern manufacturing necessitates inputs from a wide range of vendors around the world, and manufacturing supply chains are complex and opaque. Yet the proposed amendments would require a filing entity to report information on any sales and purchases with the other party to the transaction or with *any other business* that might compete with the other party. Specifically, a merging party would have to list sales to any company that it knows or believes uses its product to compete with the other party or uses its product as an input for a product that competes with the other party. For many companies, providing this information will essentially require a *de novo* buildout of a reporting tool.

Businesses within manufacturing supply chains provide goods to a wide range of other companies that may or may not compete with one another. These businesses have little ability to identify each and every company to which they have made a sale, ascertain whether that company competes with a party to the transaction, and analyze whether the merging entity's products are relevant to that competition. As with much of the rest of the proposed rule, this requirement is not appropriately calibrated to reflect the minimal competitive risks that these relationships pose—and, as a result, it will impose significant costs on merging parties without much corresponding benefit to the Agencies' pre-merger review.

The NAM respectfully encourages the Agencies to rescind the proposed competition analysis requirements contemplated by the proposed amendments. Critically, the Agencies can always ask transacting parties to provide information voluntarily on a case-by-case basis and, if necessary, issue a Second Request. At a minimum, these requirements must be more narrowly tailored to identify overlaps and relationships that actually are relevant to an analysis of a transaction's competitive impact. Limiting the competition analysis requirements just to product information relevant to the transaction and the merging entities themselves would reduce the costs associated with the proposed rule and ensure that the Agencies receive only helpful and relevant information.

#### **V. The proposed filing requirements related to labor and employment are an unnecessary departure from traditional merger review.**

The NAM has long encouraged the Agencies to focus antitrust review solely on the consumer welfare standard.<sup>5</sup> However, the proposed amendments would require merging entities to provide new information about their labor and employment practices for every reportable transaction.

Specifically, companies would be required to identify their five largest categories of workers and the number of employees in each. This information likely would be required to be updated with every HSR filing—companies could not rely on an annual report as is allowed for other information about

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<sup>5</sup> See, e.g., NAM Comments on Merger Enforcement (24 March 2022); available at [https://documents.nam.org/tax/nam\\_comments\\_merger\\_rfi.pdf](https://documents.nam.org/tax/nam_comments_merger_rfi.pdf) ("Over the past 40 years, the consumer welfare standard has offered certainty and predictability to businesses and regulators alike—and, most importantly, it has protected consumers from anticompetitive behavior.").



the business (such as the revenue data required under Item 5). Companies also would be required to identify the five largest categories in which both parties to a transaction employ workers and detailed information about the number and locations of those employees. The proposal does not justify this dramatic increase in labor market reporting, and it is not clear that categorizing employees by Standard Occupational Classification and Commuting Zone codes will provide data useful to the Agencies' review of a transaction's labor market impacts.

In addition to this labor market data, companies would be required to identify any penalties or findings issued by the Department of Labor's ("DOL") Wage and Hour Division, the National Labor Relations Board ("NLRB"), or the Occupational Safety and Health Administration ("OSHA") over the preceding five years. Most companies have no existing reporting tool that can pull this information efficiently, so the capability would have to be built specifically for the purpose of complying with the proposed amendments.

It is not clear how these provisions would benefit the Agencies' competition review. Indeed, it is hard to imagine how findings from the DOL, NLRB, or OSHA could be relevant to any policy issues under the purview of the FTC or the Antitrust Division of the DOJ. Rather, these provisions appear designed to prioritize agendas unrelated to competition policy. The NAM respectfully encourages the Agencies to remain focused on protecting consumers from anticompetitive deals—a goal manufacturers strongly support—by rescinding the proposed filing requirements related to labor and employment.

**VI. The far-reaching mandate to report officers, directors, and board observers of merging entities' subsidiaries would be costly and impractical.**

The proposed amendments would require merging parties to identify every officer, director, and board observer of all entities within both the acquiring and acquired entity, as well as all other entities for which those individuals serve (or have served within the preceding two years) as an officer, director, or board observer. As with the proposed labor market data, this information likely would be required to be updated with every HSR filing. For complex businesses with myriad subsidiaries, this requirement will be extraordinarily difficult.

At the parent entity level, there is often not a repository of the potentially hundreds or thousands of subsidiaries that exist within a complicated corporate structure—and certainly not of the individuals who serve as those entities' officers, directors, or board observers. As such, there is not a simple way for merging parties to access this information, which far exceeds what is necessary for compliance with the prohibition on interlocking directorates under Section 8 of the Clayton Act. In fact, the proposed requirement arguably extends to an individual's involvement with non-profit or residential boards, entities that clearly have no bearing on the competitive merits of a transaction.

In short, the task of tracking down and identifying thousands of individual officers, directors, and board observers, as well as the other entities where those individuals might serve, could only be done via exhaustive effort. Given that the proposed requirement's breadth and depth exceeds what is necessary to comply with Section 8 under current law, this is simply not a data set that many large businesses have access to without a significant undertaking. Additionally, the provision's breadth and depth raise the possibility of liability for inadvertent mistakes when compiling the required board lists—or simply for an individual's lapse in memory when disclosing their board involvement. The NAM is disappointed that the proposed rule fails to acknowledge the extreme difficulty of this provision, but in practice it would be extraordinarily costly and infeasible.

Further, and critically, the individuals that would be identified were such tracking feasible would not be relevant to the Agencies' pre-merger review. For many small subsidiaries deep within a large entity's corporate structure, an "officer" might simply be the junior lawyer who drew up the paperwork

forming the entity. This is extremely common for the many limited-use subsidiary entities that comprise a large business's corporate family—and an individual in this type of role is clearly not relevant to the Agencies' competition analysis. As such, there is minimal benefit to counterbalance the tremendous cost and effort necessary to identify them.

There is simply no need to for filers to report every officer, director, and board observer of every entity within either of the merging parties, and the NAM respectfully encourages the Agencies to rescind this proposed requirement.

**VII. The proposed requirement that merging parties provide a narrative description of a transaction's strategic rationale is duplicative, unnecessary, and unlikely to benefit the Agencies' review.**

The proposed rule would require filing entities to “identify and explain each strategic rationale” for a transaction. Companies would also be required to identify specific responsive documents that support each rationale.

For large, complex deals, there may be many strategic rationales that support pursuing and consummating a transaction. Requiring businesses to isolate and identify them individually, and then to write up a detailed summary of their motivations, will present significant cost and time hurdles for parties seeking to make their HSR filings and consummate a transaction. The rule offers little guidance as to which and how many individual rationales are required to be reported under the proposal, further increasing uncertainty and thus cost.

More broadly, the transaction rationale requirement is duplicative of other sections of the HSR Form. The purpose of providing responsive documents under Item 4—a requirement the Agencies are proposing to expand—is to provide the Agencies with the information necessary to understand the purpose and goals of the transaction. And other requirements, such as overlapping NAICS code reporting, are designed to show the deal's impact. Given the availability of concrete information about the rationale and effect of a transaction elsewhere in the Form, the proposed requirement that companies draft a separate rationale statement will create nothing but added cost and confusion.

**VIII. The breadth and depth of the proposed amendments raise serious concerns about the proposal's alignment with the text and intent of the HSR Act.**

The Agencies generally have the authority to amend the HSR Rules and to manage the pre-merger notification program. But the Agencies' authority is limited by Congress's directive that the Rules be “necessary and appropriate” to enable the Agencies to determine whether a transaction may “violate the antitrust laws.”<sup>6</sup> The NAM is concerned that the breadth and depth of the proposed amendments may exceed this statutory authority.

First, Congress intended the HSR Rules to enable the FTC and the Antitrust Division of the DOJ to identify deals that might prove anticompetitive. The goal of the HSR Act was not to chill all merger activity, or to establish a presumption that all potential transactions are likely anticompetitive. The current Rules, which subject all reportable deals to an initial filing requirement and then provide the Agencies with the option to make a Second Request for potentially concerning transactions, enable the Agencies to effectively screen transactions for anticompetitive risks without unnecessarily impeding other deals beyond the 30-day waiting period. The proposed amendments, on the other hand, would subject 100% of reportable transactions to a level of scrutiny that approaches what is currently only applied to the most concerning 2% of deals. This change would undermine antitrust law and the HSR Act by setting a presumption that all reportable transactions are likely

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<sup>6</sup> 15 U.S.C. Sec. 18a(d)(1).

anticompetitive and by delaying and disincentivizing mergers and acquisitions that pose no risk to American consumers.

What is more, the additional information required by the proposal is unlikely to grant the Agencies new insights into potentially anticompetitive transactions and would only serve to delay closing for all reportable deals. Under the current HSR Rules, the Agencies already have access to the vast majority of information necessary to make the threshold decision of whether or not to further investigate a transaction. Where HSR filings lack information necessary for such a determination, the Agencies can and do request additional voluntary filings and/or issue a Second Request. It is unlikely that the new information required by the proposed amendments would enable the Agencies to identify an anticompetitive impact that would not have been otherwise apparent based on the information currently available or accessible to them.

Second, and relatedly, the Agencies are charged under the HSR Act only with enforcing antitrust law in order to prevent parties from consummating anticompetitive transactions. The Agencies are not authorized to pursue other policy goals outside of this scope. However, the proposed amendments would delay and disincentivize *all* reportable transactions, not just ones that could potentially violate antitrust law and harm consumers. Seeking to reduce business combinations writ large is neither appropriate nor authorized by the statute. Similarly, the Agencies are not authorized to pursue an agenda divorced from competition policy. While the Agencies have general authority to promulgate and amend the HSR Rules, they cannot do so in contravention of the goals of the underlying statute.

To this point, it is notable that the Agencies have not attempted to connect the proposed requirements to governing antitrust law. The proffered explanation for the amendments does not reference litigation victories by the FTC or the DOJ or cite applicable case law. Neither does the proposal provide specific examples of problems the Agencies have found with HSR filings made under the current Rules or identify transactions the Agencies would have blocked had the now-proposed information been included as part of the parties' HSR filings at the time. Absent any such ties to the underlying law or reasons to change the existing regulations, the proposed rule is a burdensome solution in search of a problem.

Finally, even if the Agencies maintain that the proposed amendments are truly designed to root out anticompetitive transactions, they are not narrowly tailored to that purpose. Federal agencies have an obligation under the Administrative Procedure Act to avoid arbitrary and capricious rulemaking, which means, among other things, that the requirements of a rule must be rationally related to its stated purpose. But in this case, it stretches credulity to assume that 100% of transactions are deserving of the level of suspicion and scrutiny associated with the proposed rule. And, putting aside the broad scope of the proposal writ large, many of its individual provisions are not rationally related to merger review—including, for example, the labor and employment disclosures and the requirement to identify officers, directors, and board observers of every entity within the merging parties.

Courts and antitrust lawyers (from the Agencies and merging parties alike) recognize the importance of reasonableness at all procedural stages of antitrust matters. From the Supreme Court's admonishment in *Twombly* that courts and parties should not "forget that proceeding to antitrust discovery can be expensive"<sup>7</sup> to the proportionality guidelines in the Federal Rules of Civil Procedure and the Sedona Conference Principles, practitioners recognize that no party (not even the Agencies) is entitled to receive all information that could possibly be related to a potential competition problem. The Agencies, like a party issuing overbroad requests for production at the start of discovery, have issued an unworkable set of requests. The NAM appreciates this chance to "meet and confer" on

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<sup>7</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

these requests through the notice-and-comment process, and manufacturers hope that the Agencies will modify and limit the proposal accordingly.

The NAM supports robust enforcement of antitrust law in order to protect consumers from anticompetitive transactions, but manufacturers are concerned that the proposed amendments to the HSR Rules undermine the goals of the HSR Act itself and could exceed the Agencies' statutory authority. The NAM respectfully encourages the Agencies to more appropriately tailor the proposal to focus any filing requirements on information directly related to pre-merger review of anticompetitive deals—and to avoid unnecessarily and extra-statutorily impeding transactions that support growth, innovation, and efficiency in the manufacturing industry.

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Mergers and acquisitions are critical growth tools for businesses of all sizes in the manufacturing industry. Larger businesses utilize M&A to unlock efficiencies, enhance innovation, and expand operations, while smaller companies, entrepreneurs, and early-stage investors benefit from opportunities for capital formation, liquidity, and growth. This ecosystem benefits not only the transacting parties, but society as a whole: for instance, more efficient and scaled companies make more products available to more consumers at lower costs. The NAM is disappointed that the Agencies have taken an adversarial stance toward business combinations, and manufacturers are concerned that the proposed amendments to the HSR Rules will stifle pro-competitive transactions in the manufacturing industry.

The NAM respectfully encourages the Agencies to withdraw the proposed amendments. At a minimum, the Agencies should re-propose more narrowly tailored reforms that focus solely on enhancing their ability to detect and investigate potentially anticompetitive transactions—while remaining safely within the Agencies' statutory authority under the HSR Act. If the Agencies do move forward with amendments to the HSR Rules, they should conduct a comprehensive assessment of the increased time and cost burdens any proposed changes will impose on merging parties so as to better understand the potentially detrimental impact the proposal could have.

Manufacturers look forward to working with the Agencies to ensure that the HSR Rules support pro-competitive mergers in the manufacturing industry and the associated job creation, economic growth, and U.S. competitiveness such transactions enable.

Sincerely,

A handwritten signature in black ink that reads "Charles P. Crain". The signature is written in a cursive, slightly slanted style.

Charles Crain  
Vice President, Domestic Policy