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

Office of Commissioner
Andrew N. Ferguson

Concurring Statement of Commissioner Andrew N. Ferguson
In the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803
Matter Number P239300

October 10, 2024

Today, the Commission updates the Hart-Scott-Rodino Act ("HSR" or "the Act")[1] notification form requirements. It concurrently announces that, after an over three-and-a-half-year wait, it will lift its categorical "temporary suspension" of early terminations once the Final Rule goes into effect.[2] Unlike the Commission's recent, doomed effort to ban noncompete agreements,[3] Congress undoubtedly gave us authority to promulgate rules governing HSR notification requirements.[4]

The Notice of Proposed Rulemaking ("NPRM") that launched today's rulemaking would have abused that authority by imposing onerous, unlawful requirements that could not have survived judicial review.[5] But the NPRM also proposed some important, lawful updates to the HSR instructions. Mergers have become increasingly complex since we first adopted an HSR rule nearly five decades ago. The current HSR instructions do not adequately address forms of business association that were rare in 1978. And long experience implementing HSR has taught the Commission which information is most important to fulfilling Congress's mandate to conduct premerger review. The current HSR instructions did not always ensure that the Commission and the Antitrust Division (together, the "Antitrust Agencies") had the information they needed to fulfill Congress's intention.

The NPRM, however, was a nonstarter. My colleagues and I engaged in intense negotiations to separate the lawful wheat from the lawless chaff. Today's Final Rule,[6] and the

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[1] 15 U.S.C. § 18a.
[2] Press Release, FTC, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.
[3] See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf; *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).
[4] See *Pharm. Rsch. & Mfrs. of Am. v. FTC*, 790 F.3d 198, 208 (D.C. Cir. 2015) (hereinafter "*PhRMA*") ("There is no doubt that the Commission's action was taken pursuant to express delegations of authority. The Act grants the FTC the authority to act by rulemaking." (citing 15 U.S.C. § 18a)).
[5] FTC, Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (hereinafter "NPRM").
[6] FTC, Premerger Notification; Reporting and Waiting Period Requirements, Final Rule (Oct. 10, 2024) (hereinafter "Final Rule"), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.

lifting of the early-termination ban, are the culmination of those negotiations. Were I the lone decision maker, the rule I would have written would be different from today's Final Rule. But it is a lawful improvement over the status quo. And although not required for the Final Rule's lawfulness, the Commission wisely accompanies the Final Rule with a lifting of the ban on early termination. I therefore concur in its promulgation.

I

Congress passed HSR in 1976, adding Section 7A to the Clayton Antitrust Act of 1914.[7] It requires merging firms to notify the Antitrust Agencies before consummating large mergers, and forbids them from consummating the merger until some period after notifying the Antitrust Agencies. The purpose of this premerger notify-and-wait requirement was to give the Antitrust Agencies the opportunity to investigate mergers and sue to block them. Premerger review dispenses with "interminable post-consummation divestiture trials … [and] advance[s] the legitimate interests of the business community in planning and predictability, by making it more likely that Clayton Act cases will be resolved in a timely and effective fashion."[8]

Obviously, the Antitrust Agencies need information about the proposed transactions to review them. Congress therefore provided that firms seeking to merge must "file notification pursuant to rules under subsection (d)(1)" of the Act.[9] Subsection (d), titled "Commission rules," in turn commands the Commission to, "by rule," "require that [a merging party's] notification … contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws."[10] The Commission may also "prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section."[11] "Taken together, these statutory provisions give the FTC … great discretion … to promulgate rules to facilitate Government identification of mergers and acquisitions likely to violate federal antitrust laws before the mergers and acquisitions are consummated."[12]

The Commission has regularly deployed the rulemaking power Congress conferred on it in the Act. The Commission published its first final HSR rule two years after Congress passed the Act.[13] In the intervening decades, the Commission has made dozens of changes to the HSR form and instructions.[14] Some changes expanded the scope of information requested.[15] Others narrowed

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[7] 15 U.S.C. § 18a(a); see also *PhRMA*, 790 F.3d at 199.
[8] H.R. Rep. No. 94-1373, at 11 (1976).
[9] 15 U.S.C. § 18a(a).
[10] 15 U.S.C. § 18a(d)(1). If the initial notification reveals a potential competitive problem, the Antitrust Agencies may seek additional information, which delays the proposed transaction until the merging parties have complied. See 15 U.S.C. § 18a(e).
[11] 15 U.S.C. § 18a(d)(2).
[12] *PhRMA*, 790 F.3d at 205.
[13] See 43 Fed. Reg. 33450 (July 31, 1978) (publishing final rules for premerger notification).
[14] See FTC, 16 CFR Parts 801 & 803, Premerger Notification; Reporting and Waiting Period Requirements, Statement of Basis and Purpose, 107, n.248 (Oct. 10, 2024) (hereinafter "SBP"), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf.
[15] E.g., 76 Fed. Reg. 42471 (July 19, 2011) (adding Items 4(d), 6(c)(ii) and 7(d) to capture additional information).

it.[16] Only one faced judicial review. In 2013, an industry association challenged a Commission rulemaking that required parties to file HSR notifications when they transferred most, but not all, of their pharmaceutical patent rights. The D.C. Circuit held that the rule was a proper exercise of the Commission's rulemaking authority and reflected reasoned decision-making.[17] The revised HSR rule survived and took effect, as have many HSR form changes beforehand and afterwards.

II

The Administrative Procedure Act ("APA")[18] governs our HSR rulemakings.[19] "The APA 'sets forth the procedures by which federal agencies are accountable to the public and their actions are reviewed by courts.'"[20] First, the Rule must be promulgated in "observance of procedure required by law."[21] For a rule like the Final Rule, Section 4 of the APA[22] is the "procedure required by law," and it "prescribes a three-step procedure."[23] "First, the agency must issue a 'general notice of proposed rulemaking,' ordinarily by publication in the Federal Register."[24] We published the notice for the Final Rule on June 29, 2023.[25] "Second, if 'notice is required,' the agency must give 'interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.'"[26] We received approximately 721 comments during the 90-day comment period.[27] "Third, when the agency promulgates the final rule, it must include in the rule's text a 'concise general statement of its basis and purpose.'"[28] With today's Final Rule the Commission includes a statement of basis and purpose that thoroughly explains its reasoning for each of the changes contained in the Final Rule. The Commission has therefore satisfied the APA's procedural requirements.[29]

APA Section 10's standard of judicial review also imposes substantive limits on the exercise of our authority under HSR. The APA requires courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[30] The APA standard

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[16] E.g., 70 Fed. Reg. 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)).
[17] *PhRMA*, 790 F.3d at, 209–12.
[18] 5 U.S.C. §§ 551 et seq.
[19] *PhRMA*, 790 F.3d at 209.
[20] *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992)).
[21] 5 U.S.C. § 706(2)(D).
[22] *Id.* § 553
[23] *Perez v. Mortgage Bankers Ass'n*, 572 U.S. 92, 96 (2015).
[24] *Ibid*. (quoting 5 U.S.C. § 553(b) (cleaned up)).
[25] NPRM, *supra* note 5.
[26] *Perez*, 572 U.S. at 96 (quoting 5 U.S.C. § 553(c) (cleaned up)).
[27] SBP, *supra* note 14, at 6, n.4; Press Release, FTC, FTC and DOJ Extend Public Comment Period by 30 Days on Proposed Changes to HSR Form (Aug. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/08/ftc-doj-extend-public-comment-period-30-days-proposed-changes-hsr-form.
[28] *Perez*, 572 U.S. at 96 (quoting 5 U.S.C. § 553(c) (cleaned up)).
[29] See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 685–86 (2020) (explaining that an agency satisfies the procedural requirements of the APA so long as it complies with the "objective criteria" of notice, opportunity to comment, and a concise general statement of basis and purpose).
[30] 5 U.S.C. § 706(2)(A), (B), (C).

generally requires an agency to show two things. First, that it has a lawful grant of authority from Congress to issue the rule[31]—that is, that Congress enacted a statute conferring on the agency power to issue the rule,[32] and that the statute is consistent with the Constitution.[33] Second, that the agency has exercised that grant of authority in a lawful way.[34]

To be sure, the Commission recently has been all too happy to issue rules without valid grants of authority from Congress.[35] But today's Final Rule is plainly authorized by a valid grant of authority from Congress. HSR commands the Commission to issue rules governing the form and contents of premerger-notification filings as it determines are "necessary and appropriate to enable [the Antitrust Agencies] to determine whether" mergers "may, if consummated, violate the antitrust laws."[36] Congress further authorized us to "prescribe such other rules as may be necessary and appropriate to carry out the purposes of" the Act.[37] The text of HSR therefore unambiguously commands the agency to issue rules of the type we today issue.[38] And I am not aware of any serious arguments that this grant of discretion to prescribe the procedures by which firms notify the Commission of a pending merger—distinct from the power to adjudicate merger challenges[39]—violates the Constitution. We therefore have statutory and constitutional authority to issue the Final Rule.[40]

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[31] *NFIB v. Dep't of Labor*, 595 U.S. 109, 117 (2022) (per curiam) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").
[32] *FEC v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency, after all, 'literally has no power to act' … unless and until Congress authorizes it to do so by statute." (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))).
[33] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a *valid* grant of authority from Congress." (cleaned up) (emphasis added)).
[34] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.").
[35] See *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Rule).
[36] 15 U.S.C. § 18a(d)(1).
[37] *Id.* § 18a(d)(2)(C).
[38] *PhRMA*, 790 F.3d at 208 ("There is no doubt that the Commission's action was taken pursuant to express delegations of authority.").
[39] See, e.g., Compl. ¶¶ 45, 55–59, 72–76, *The Kroger Co. v. FTC*, No. 1:24-cv-438 (S.D. Ohio Aug. 19, 2024), ECF No. 1 (challenging constitutionality of FTC administrative proceedings as a violation of Article III of the Constitution).
[40] When the judiciary last reviewed one of our HSR rules, it deferred to our interpretation of various undefined terms of the Act under the doctrine announced in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1983). See *PhRMA*, 790 F.3d at 204 ("[W]e apply the familiar *Chevron* framework …"). The Supreme Court has since overruled *Chevron*, correctly interpreting the APA to require the judiciary to resolve statutory ambiguities without deferring to administrative agencies' views on how to resolve those ambiguities. See *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2261 (2024) ("On the contrary, by directing courts to 'interpret constitutional and statutory provisions' without differentiating between the two, [the APA] makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus remains the responsibility of the court to decide whether the law means what the agency says." (cleaned up)). The Court in *Loper Bright* held, however, that "[i]n a case involving an agency, … the statute's meaning may well be that the agency is authorized to exercise a degree of discretion." *Id.* at 2263. The Court gave as examples statutes that delegate "to an agency the authority to give meaning to a particular statutory term," and "[o]thers" that "empower an agency to 'fill up the details' of a statutory scheme, or to regulate subject to the limits imposed by a particular term or phrase that 'leave the agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Ibid*. (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1,

The question, then, is whether the Commission has lawfully exercised the power Congress unambiguously conferred on it. As a general matter, an agency lawfully exercises power conferred on it by "engag[ing] in reasoned decisionmaking," which requires that the "agency['s] action … rest[ ] 'on a consideration of the relevant factors.'"[41] We must "examine the relevant data and articulate a satisfactory explanation for [our] action including a 'rational connection between the facts found and the choice made.'"[42] This "standard is deferential" to the agency's policy choices, so long as "the agency has acted within a zone of reasonableness and … reasonably considered the relevant issues and reasonably explained the decision."[43]

Importantly, this standard does not change because we are amending an existing rule. The APA does not require that "agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."[44] "The statute makes no distinction … between initial agency action and subsequent agency action undoing or revising that action."[45] When an agency revises an existing regulation, reasoned decisionmaking "would ordinarily demand that it display awareness that it *is* changing its position," and it must show "that there are good reasons for the new policy."[46] But the APA does not require that the agency show that "the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[47]

The Final Rule is not perfect, nor is it the rule I would have written if the decision were mine alone. But I believe that it addresses important shortcomings in the current HSR rule, and that it is "necessary and appropriate" to enable the Antitrust Agencies to determine whether proposed mergers may violate the antitrust laws.[48]

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43 (1825), and *Michigan v. EPA*, 576 U.S. 743, 752 (2015)). HSR expressly authorizes the Commission to promulgate rules "defin[ing] the terms used in" the Act, and to issue all rules that are "necessary and appropriate to carry[ing] out the purposes of" the Act. 15 U.S.C. § 18a(d)(2)(A), (C); see also *id.* § 18a(d)(1) (authorizing the Commission to issue rules that are "necessary and appropriate to enable the [Antitrust Agencies] to determine whether such acquisition may, if consummated, violate the antitrust laws"). HSR thus appears to be the sort of discretion-conferring statute that the *Loper Bright* Court suggested may require some modicum of judicial deference to agency decision making. My vote in favor of the Final Rule, however, does not depend on the Commission receiving any judicial deference. I conclude that the Final Rule properly interprets and implements HSR.

[41] *Michigan*, 576 U.S. at 750 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); see also *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020) (The APA "requires agencies to engage in reasoned decisionmaking, and directs that agency actions be set aside if they are arbitrary and capricious." (cleaned up)).

[42] *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 246 (1962)).

[43] *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021); see also *Dep't of Commerce v. New York*, 588 U.S. 752, 773 (2019) (Courts "may not substitute [their] judgment for that of the [agency], but instead must confine [them]selves to ensuring that [the agency] remained within the bounds of reasoned decisionmaking." (cleaned up)); *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021) ("[A] reviewing court must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

[44] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009) (Scalia, J.).

[45] *Id.* at 515.

[46] *Ibid*.

[47] *Ibid.*

[48] 15 U.S.C. § 18a(d)(1).

III

I turn now to the specific provisions of the Final Rule to address whether they are "necessary and appropriate" to executing the premerger-review provisions of HSR.[49]

A

The Final Rule requires the disclosure of some information not currently required by the old HSR rule. That information is "necessary and appropriate" to the execution of our premerger-review mandate under the Act, and the burdens the disclosure requirements impose on merging firms are justified by the requirements of effective premerger review.

Mergers and acquisitions have become increasingly complex since 1978. The Antitrust Agencies review a large number of deals involving corporate structures that were rare when we adopted our first HSR rule. For example, twenty years ago, only ten percent of acquiring firms were funds or limited partnerships; now, that figure is close to forty percent.[50] Such firms may be shell companies that disclose little public information about their holdings or operations, and, in many cases, have no other assets. But these deals can still present competitive problems through the acquiring person's relationships with other entities. Minority investors, including limited partners, might pull the strings for the acquiring person. And those minority investors might also control entities that compete with the transaction target, creating potential antitrust concerns.[51] The current rule does not require disclosure of investors in entities between the parent company and the acquiring person, nor does it require disclosure of any limited partners, even if they have management rights for the acquiring person. The Final Rule addresses this shortcoming. It requires disclosure of investors that own at least a five percent share in certain entities related to the acquiring person; if those entities are limited partnerships, filers must disclose limited partners that have certain management rights, such as a board seat. But unlike the NPRM, the Final Rule sensibly does not require disclosure of limited partner investors without any management rights.[52] The Final Rule's minority investor disclosures are a reasonable way to address what the Antitrust Agencies fairly determined was a shortcoming of the previous rule, and are necessary and appropriate to determining the competitive effects of a transaction involving limited partnerships or complex corporate structures.[53]

The Final Rule also requires merging firms to disclose information about their potential vertical relationships—that is, whether the two merging firms currently interact with each other at different levels of the supply chain.[54] HSR rules long required disclosure of information about

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[49] 15 U.S.C. § 18a(d)(1).
[50] See SBP, *supra* note 5, at 25.
[51] See *id*. at 225–27 ("some limited partnerships function as aggregation vehicles that allow private equity or other investor groups to direct the strategic business decisions of the portfolio companies in which they invest.").
[52] See FTC, 16 CFR Part 803 – Appendix B, Notification for Certain Mergers and Acquisitions: Acquiring Person Instructions, 4–5 (Oct. 10, 2024) (hereinafter "Acquiring Person Instructions"); SBP at 226–27.
[53] See SBP at 28–31; 15 U.S.C. § 18a(d)(1).
[54] FTC, 16 CFR Part 803 – Appendix A, Notification and Report Form for Certain Mergers and Acquisitions: Acquiring Person, 6–7 (Oct. 10, 2024) (hereinafter "Acquiring Person Form") (requesting "other agreements between the acquiring person and target" and the "supply relationship description").

vertical relationships, but a 2001 amendment to the HSR rules removed that requirement.[55] Since 2001, however, the Antitrust Agencies under the leadership of both parties have increased their scrutiny of, and rate of enforcement actions against, vertical mergers. During the Trump Administration, the Antitrust Division litigated the first vertical merger challenge in decades.[56] The Antitrust Agencies released the 2020 Vertical Merger Guidelines, the first major revision to agency guidance on vertical mergers since 1984.[57] The Commission released its 2020 Commentary on Vertical Merger Enforcement, which demonstrated the breadth of Commission investigations and consent agreements involving vertical transactions.[58] And the Commission investigated Illumina's proposed acquisition of Grail, which ultimately led to a successful 2023 Fifth Circuit opinion that effectively blocked the vertical transaction.[59] These efforts continue today. I recently joined a unanimous Commission vote authorizing a complaint to challenge a vertical merger between America's leading mattress supplier and its leading mattress retailer.[60]

Since 2001, however, the Antitrust Agencies have had to rely on limited acquisition-related documents and publicly available information to identify potential vertical-competition concerns. Not every competitive issue shows up in transaction documents or is apparent to Commission staff without experience in the industry. As a result, some anticompetitive transactions have likely slipped through the cracks. The Final Rule will also provide the Antitrust Agencies with other information that they can use to quickly identify (or rule out) potential vertical-competition problems. The new Supply Relationships Description requires filers to identify whether they supply, or are supplied by, the other merging party or its competitors.[61] The buyer must also now indicate whether it has certain types of existing contracts with the seller.[62] This information is "necessary and appropriate" to carrying out Congress's command that the Antitrust Agencies review mergers—including vertical mergers—to determine whether they violate the antitrust laws.[63]

The Final Rule requires the disclosure of additional information that will facilitate effective premerger review. Filers must now provide some regularly prepared plans and reports that analyze market shares or competition.[64] Such information, particularly market-share data, often is not available publicly, nor does it always appear in transaction documents. But market-share data are critical to antitrust enforcement. The Supreme Court many decades ago concluded that mergers of

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[55] See SBP at 327 (describing past requests for information on vendor-vendee relationships); 66 Fed. Reg. 8680 (Feb. 1, 2001) (HSR rule amendment removing that request).
[56] See *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 193–94 (D.D.C. 2018) ("the Antitrust Division apparently has not tried a vertical merger case to decision in four decades"), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).
[57] Press Release, FTC, FTC and DOJ Issue Antitrust Guidelines for Evaluating Vertical Mergers (June 30, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/06/ftc-doj-issue-antitrust-guidelines-evaluating-vertical-mergers.
[58] Press Release, FTC, FTC Issues Commentary on Vertical Merger Enforcement (Dec. 22, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-commentary-vertical-merger-enforcement.
[59] *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023).
[60] Press Release, FTC, FTC Moves to Block Tempur Sealy's Acquisition of Mattress Firm, (July 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm.
[61] See Acquiring Person Instructions at 10.
[62] See Acquiring Person Form at 6.
[63] 15 U.S.C. § 18a(d)(1).
[64] See Acquiring Person Instructions at 9.

competitors constituting thirty percent or more of the relevant market presumptively violate the Clayton Act.[65] And one of the leading metrics for assessing the competitive effects of a transaction is the Herfindahl-Hirschman Index (HHI),[66] which uses market shares to assess the level of concentration in the relevant market, and the change in concentration that the merger would create.[67] Market-share data therefore are not only "necessary and appropriate to … determin[ing] whether [an] acquisition may, if consummated, violate the antitrust laws."[68] They are vital to our enforcement mandate. Requiring the provision of these data also promotes efficiency. If the market shares of the two firms are small, the Antitrust Agencies may swiftly conclude that little further investigation is needed—and, thanks to the concurrent lifting of the unfortunate ban on early termination, may also facilitate the grant of early termination in appropriate cases once the Final Rule becomes effective. And the cost of compliance is modest; parties must collect only documents provided, within the past year, to individuals already subject to other document requests.

In addition, the Overlap Description will require filers to identify whether they compete with the other merging party.[69] Under the current form, parties identify overlaps only through Census Bureau NAICS revenue codes.[70] These codes can be painfully vague or overinclusive, particularly for new sectors. For example, NAICS code 518210 covers "companies that provide computing infrastructure, data processing, web hosting, and related services" such as "data entry services, cloud storage services and cryptocurrency mining."[71] Despite a NAICS overlap, many firms within this broad category undoubtedly do not compete. Many other NAICS codes present similar concerns, flagging overlaps where none truly exist. Misleading or overbroad NAICS code overlaps may lead to unnecessary investigations. The Overlap Description will mitigate this problem by permitting filers to explain misleading NAICS code overlaps up front.[72]

Improving the type of information the Commission receives in an HSR notification is likely to improve the merger-review process for many merging parties. If Commission staff believes that a proposed merger merits investigation beyond the initial HSR filing and publicly available information, it must formally open an investigation and obtain clearance for that investigation from the Antitrust Division. Most such investigations show that the transaction poses little risk of competitive harm and are closed without a second request for additional information.[73] Once the investigation is begun, however, the Antitrust Agencies can fall victim to bureaucratic inertia. We,

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[65] See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363–65 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.").
[66] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 568 (6th Cir. 2014) ("Agencies typically use the Herfindahl-Hirschman Index (HHI) to measure market concentration.").
[67] See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.").
[68] 15 U.S.C. § 18a(d)(1).
[69] See Acquiring Person Form at 6.
[70] See SBP at 301. Federal statistical agencies use the North American Industry Classification System to classify businesses. See *id*. at 147, n.296 (citing U.S. Census Bureau, North American Industry Classification System (rev. Sept. 10, 2024), https://www.census.gov/naics/).
[71] *Id*. at 300.
[72] See *id*. at 301.
[73] In Fiscal Year 2023, the Commission received clearance to investigate 124 transactions but only issued second requests for additional information for 26 transactions. See FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Exhibit A, Table 1, https://www.ftc.gov/policy/reports/annual-competition-reports.

like all law-enforcement agencies, have limited resources. Commencing an investigation and obtaining clearance eats up some of those resources. Commission leadership may therefore resist recommendations to close an investigation quickly even if the early stages of the investigation demonstrate that the merger presents no competitive concerns. Additionally, even investigations that do not lead to a second request can still involve significant cost and delay for merging parties.[74] The information required by the Final Rule will mitigate the risk of false positives. It can reveal that a merger presents no competitive threat at all, and the Commission can avoid crawling down rabbit holes in unnecessary investigations.

Third parties will benefit, too. Commission staff regularly requests voluntary interviews with the merging parties' customers, suppliers, and competitors following an HSR filing. These third parties often cooperate, at the cost of their senior executives' time and legal fees paid to outside lawyers. As these third parties explain the industry and competitive landscape, the lack of any competitive issues can quickly become apparent. By providing the Antitrust Agencies with greater information upfront, the Final Rule can remove the need to burden third parties with such fruitless engagement.

B

The Final Rule must be considered in light of another decision the Commission announces today: the lifting of the suspension on early termination. "Early termination" describes the Commission practice of informing merging parties that the Commission is terminating its investigation into the merger before the conclusion of the statutory waiting period, thereby freeing them to consummate the merger immediately. The benefits of early termination are obvious. It reduces financing costs associated with the delay inherent in premerger review, and it allows companies and consumers to realize the benefits of procompetitive mergers more quickly.

Until 2021, Commission staff routinely granted early termination of the initial HSR review period for acquisitions that obviously presented no competitive issues.[75] In February 2021, however, the then-Acting Chairwoman announced a "temporary suspension" of early termination due to "the confluence of an historically unprecedented volume of filings during a leadership transition amid a pandemic."[76] The Antitrust Agencies announced that they "anticipate[d] the suspension [to] be brief."[77]

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[74] See SBP at 89 ("[A]n average of 73 transactions each year … were delayed by an additional 30 days and filers were burdened by having to submit additional materials on a voluntary basis even though the investigation did not lead to the issuance of Second Requests. These delays impose costs on the parties and the Agencies, as well as third parties contacted during the extended initial review period.").

[75] See *id*. at 16, n.22, 95; see also Statement of Comm'r Noah J. Phillips and Comm'r Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations, at 2 (Feb. 4, 2021), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-commissioners-noah-joshua-phillips-christine-s-wilson-regarding-commissions-indefinite.

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

[77] *Ibid*.

The "confluence" has been over for some time. The pandemic long ago subsided. We have had a permanent Chair since June 2021. And merger filings have slowed to about half the number we saw in 2021 and 2022.[78] Nevertheless, the "temporary suspension" persisted. The Final Rule recognizes that this persistence is no longer tenable: "if the Agencies can determine from review of an HSR Filing that a transaction does not present [competitive concerns], the Agencies can more quickly and confidently determine that the transaction does not require a more in-depth review and may proceed to consummation."[79]

Indeed, maintaining the ban would have been absurd in light of the Final Rule's explicit recognition that many transactions pose no competitive risks. Specifically, the Final Rule takes a tailored approach to identify and reduce compliance costs for transactions with lower risks of harm. The Final Rule creates a new category—"select 801.30 transactions"—for acquisitions that almost never present competitive concerns, such as executive compensation agreements. For these deals, filers are excused from many new requirements, including descriptions and some document requests.[80] The Final Rule also recognizes when enough is enough. It tailors the burdens of acquiring and acquired persons, rather than requiring both sides of a transaction to provide the same information. Accordingly, it significantly pares back the requests for acquired persons.[81] Finally, the Final Rule also employs a conditional-request format—a series of if/then queries—to omit certain requirements for acquisitions that do not involve an overlap or vertical relationship.[82] Again, the burden is reduced commensurate with the lower risk of harm.

I am pleased that today the Commission announces that it will lift the categorical ban on early termination and restore this important feature of the merger-review process once the Final Rule becomes effective. It should have happened earlier. I have objected before to the majority's tendency to use our HSR authority to accomplish political objectives.[83] An indefinite ban on early termination was just more of the same. Maintaining the ban after the Final Rule's effective date would have undermined the efficiencies that justify the new information that the Final Rule requires. I am glad it is gone.

IV

The Final Rule must stand on its own feet. An arbitrary-and-capricious rule is not lawful merely because it is better than a bad NPRM. And the NPRM with which the Commission launched today's Final Rule was about as bad as it gets. It was indefensible bureaucratic overreach and could not have survived judicial review. It drew no distinctions between merger filings that presented little risk of competitive harm—such as executive compensation agreements—and those that

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[78] See FTC and DOJ, HSR Annual Report Fiscal Year 2023, at Appendix A (showing 7,002, 6,288 and 3,515 HSR filings for 2021, 2022, and 2023, respectively), https://www.ftc.gov/policy/reports/annual-competition-reports.
[79] SBP at 16.
[80] See *id*. at 150–51.
[81] See *id*. at 152.
[82] See *id*. at 152–54.
[83] See Dissenting Statement of Comm'r Andrew N. Ferguson, *In the Matter of Chevron Corp. and Hess Corp.*, FTC Matter No. 2410008, at 6 (Sept. 30, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/chevron-hess-ferguson-statement_0930.pdf; Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In re ExxonMobil Corp.*, FTC Matter No. 2410004 (May 1, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf.

raised potentially serious concerns. Instead, the NPRM applied the same blunderbuss approach to every filing. To make matters worse, the NPRM proposed a deluge of new onerous requirements the benefits of which could never have justified the burdens imposed on merging parties. In fact, several would have added little or no value to the Antitrust Agencies at all during their brief window to identify transactions that warrant further investigation. Had today's Final Rule been identical to the NPRM, I would not have voted for it.

Although today's Final Rule is a logical outgrowth of the NPRM,[84] it dramatically curtails the NPRM's wild overreach. That curtailment unsurprisingly followed the arrival of Republican Commissioners. A Final Rule identical to the NPRM would have been little more than a procedural auxiliary to the majority's general suspicion of mergers and acquisitions.[85] I would not have voted for it. The changes adopted after the arrival of Republicans to the Commission, however, rescued the Final Rule from the NPRM's lawlessness. The Final Rule, unlike the NPRM, is a reasoned decision about what is "necessary and appropriate" to carrying out Congress's premerger-review mandate. It also reasonably addresses shortcomings in the old HSR rule. It therefore satisfies the requirements of both the HSR and APA. None of this was true about the NPRM.

Although the Final Rule's lawfulness does not turn on how much better it is than the NPRM, the changes from the unlawful NPRM demonstrate that the Final Rule is in fact the product of reasoned decisionmaking, which required us to respond to valid objections about the NPRM's many problems.[86] The most important climbdown from the NPRM is the abandonment of the proposed Labor Markets section.[87] This section would have forced merging parties to classify their employees by job category codes from the U.S. Bureau of Labor Statistics,[88] even though few companies use such codes in the ordinary course of business. And it would have required filers to classify their employees by the U.S. Department of Agriculture's ERS commuting zones, even

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[84] *Mock v. Garland*, 75 F.4th 563, 583 (5th Cir. 2023) ("After the required NPRM is published in the Federal Register, with either the terms or substance of the proposed rule or a description of the subjects and issues involved, the final rule the agency adopts must be a logical outgrowth of the rule proposed." (cleaned up)); *Env't Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."); see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 160 (2007) ("The Courts of Appeals have generally interpreted this to mean that the final rule the agency adopts must be a logical outgrowth of the rule proposed." (cleaned up)).

[85] See *infra* pp. 11–14; Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–19 (Oct. 10, 2024).

[86] See, e.g., *Perez*, 575 U.S. at 96 ("An agency must consider and respond to significant comments received during the period for public comment."); *Chamber of Commerce of the U.S. v. SEC*, 85 F.4th 760, 774 (5th Cir. 2023) (An agency must "consider all relevant factors raised by the public comments and provide a response to significant points within. Comments the agency must respond to include those that can be thought to challenge a fundamental premise underlying the proposed agency decision or include points that if true and adopted would require a change in an agency's proposed rule." (cleaned up)); *Bloomberg L.P. v. SEC*, 45 F.4th 462, 476–77 (D.C. Cir. 2022) ("[A]n agency must respond to comments that can be thought to challenge a fundamental premise underlying the proposed agency decision. Indeed, the requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments. In sum, an agency's response to public comments must be sufficient to enable the courts to see what major issues of policy were ventilated and why the agency reacted to them as it did." (cleaned up)).

[87] For a fulsome accounting of the economic and legal errors that infected the Labor Markets instruction, see Statement of Comm'r Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, File No. P239300, at 7–13 (Oct. 10, 2024).

[88] NPRM, 88 Fed. Reg. at 42197.

though companies do not use them in the ordinary course of business and these zones have not been updated since 2000 and are unreliable. The new burden would have been massive, and commenters understandably objected vociferously.[89]

Beyond the major burden and methodological problems, the NPRM's Labor Markets instructions were a clear abuse of Congress's mandate that the Commission require only information "necessary and appropriate" to identify transactions that "violate the antitrust laws."[90] In the nearly half century since Congress passed HSR, the Antitrust Agencies have never successfully challenged any transactions based on labor market theories that could have been identified by the proposed requirements.[91] Until recently, the Antitrust Agencies had never even tried.[92] It is not for a lack of effort. For years, the Commission and Antitrust Division looked for viable labor market theories when investigating transactions that present other competition concerns. The lack of any success lays bare that the Commission never could have justified the immense cost of requiring every single filer to provide extensive labor-related information. Fortunately, my colleagues on the Commission agreed to jettison the Labor Markets section that likely would have doomed the Final Rule.[93]

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[89] See, e.g., Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC-2023-0040-0723 at 10–12; Comment of Wachtell, Lipton, Rosen & Katz, Doc. No. FTC-2023-0040-0670 at 6–10; Comment of Dechert LLP, FTC-2023-0040-0659 at 3–5.

[90] 15 U.S.C. § 18a(d)(1).

[91] The NPRM identified two successful merger challenges with purported labor theories. See NPRM, 88 Fed. Reg. at 42197, n.47. The first, the Antitrust Division's challenge to Penguin Random House's acquisition of Simon & Schuster, did not involve harm to employees of the merging firms. Instead, the alleged harm was in the market for "publishing rights to anticipated top-selling books." *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 12 (D.D.C. 2022). The second, the Commission's challenge to Lifespan Corporation's acquisition of Care New England, did not include a labor market count in the complaint. See Compl., *In the Matter of Lifespan Corp. and Care New England Health Sys.*, FTC Matter No. 2110031 (Feb. 17, 2022). Commissioner Bedoya identifies another purported merger challenge based on a labor theory, specifically "decrease[d] fees paid to blood plasma donors." Statement of Comm'r Alvaro M. Bedoya, In the Matter of Amendments to the Premerger Notification and Report Form and Instructions and the Hart-Scott-Rodino Rule, File No. P239300, at n.20 (Oct. 10, 2024) ("Statement of Comm'r Bedoya"). But, like the Antitrust Division's *Bertelsmann* challenge, the complaint did not allege harm to the merging parties' employees and therefore could not have been identified by the NPRM's proposed demands for employee information. See Compl., *In the Matter of Grifols S.A. and Grifols Shared Services North America, Inc.*, FTC Matter No. 1810081 (Aug. 1, 2018).

[92] Given the pendency of litigation within the Commission's administrative tribunal, I withhold comment on the strength of the Commission's labor market theory in its challenge to The Kroger Company's acquisition of Albertsons Companies, Inc.

[93] Commissioner Bedoya defends the NPRM's Labor Markets section, reasoning that because the antitrust laws apply to the labor markets, the Commission should screen every single merger subject to HSR for potential labor-competition problems. Statement of Comm'r Bedoya, *supra* n.89, at 2, 4. I do not disagree that the antitrust laws apply to labor markets. But that fact would not have made lawful a rule that was identical to the NPRM. Under ordinary principles of administrative law, the Commission would have to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made." *State Farm*, 463 U.S. at 43 (cleaned up). That means the Commission would need enough evidence of labor-competition problems in mergers to establish that the labor-markets instruction's onerous costs were reasonable. The evidence marshalled by Commissioner Bedoya—a couple papers and a book—comes nowhere near to clearing that bar. Statement of Comm'r Bedoya at 3. The majority made the same mistake in the Noncompete Rule by relying on sparse social-science research to justify massive regulatory burdens. See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 37–45 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf ("The handful of

The Final Rule also eliminates the NPRM's requirement that merging parties provide all drafts of transaction-related "document[s] that were sent to an officer, director, or supervisory deal team lead(s)."[94] Commenters rightly pointed out that this requirement would have imposed an undue burden on merging parties,[95] with the American Bar Association noting that this provision could have forced filers to use e-discovery tools to capture every draft.[96] The cost of this information demand is high. But the value to the Antitrust Agencies would have been low. Commission staff would have struggled to comb through a dozen versions of the same document. And insofar as the goal was to catch merging parties giving honest appraisals about the anticompetitive effects of mergers, I doubt demanding drafts would have succeeded. Knowing that such drafts would have to be produced, parties would just create methods to avoid exposing their honest thoughts in documents that are guaranteed to wind up in the hands of enforcers. Demanding drafts of documents in every transaction would have likely increased the expense of merging—of great benefit to antitrust lawyers—without giving the Antitrust Agencies the sort of "hot docs" for which they were hoping. The Final Rule appropriately eliminated this requirement for every transaction. The Commission can obtain drafts under the only circumstances it would ever need them—when it opens investigations into those few mergers that the HSR filings reveal present a genuine risk of anticompetitive effects.

Similarly, the Final Rule curtailed several of the NPRM's other burdensome requirements for merging parties to produce documents. It revises the definition of "supervisory deal team lead" to limit it to a single individual, eliminating the need to review multiple employees' files to fulfill this request for transaction-related documents.[97] The Final Rule also removes the NPRM's demand for ordinary course plans and reports that were shared with senior executives but not the CEO. Commenters rightfully noted that this would have forced filers to search the files of additional custodians, greatly increasing the burden on merging parties.[98] Instead, the Final Rule limits the request to certain plans and reports directly provided to the CEO or board of directors.[99] Lastly, the Final Rule no longer forces merging parties to produce all agreements between them. The NPRM's requirement to produce every single agreement between the parties would have been burdensome and expensive, but likely would have shed little light on the potential competitive effects of the merger. Some agreements between merging parties might shed light on competitive effects, but the vast majority would tell us nothing. The Final Rule acknowledges this mismatch of costs and benefits, and instead requires parties to note only whether they have particular types of agreements.[100]

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academic papers cited in the Final Rule cannot justify its incredible reach and relying on them to prohibit noncompete agreements categorically is a clear error of judgment." (cleaned up)); *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954, at *13–14 (N.D. Tex. Aug. 20, 2024) (finding the Noncompete Rule arbitrary and capricious because "[t]he record does not support the Rule."). Making that mistake here would have been a "clear error of judgment" requiring vacatur under the APA. *Huawei Technologies USA, Inc. v. FCC*, 2 F.4th 421, 434 (5th Cir. 2021) (cleaned up).

[94] NPRM, 88 Fed. Reg. at 42214.

[95] SBP at 270–71.

[96] Comment of A.B.A. Antitrust L. Sec., Doc. No. FTC-2023-0040-0723 at 15–16.

[97] See SBP at 203–05.

[98] E.g., Comment of U.S. Chamber of Com., Doc. No. FTC-2023-0040-0684 at 22, 24.

[99] See *id*. at 274–77.

[100] See *id*. at 291–93.

The Final Rule makes many additional changes to the abusive NPRM. It makes clear that filers do not need to disclose any individual's role in a "non-profit entity organized for a religious or political purpose."[101] This exception is important. Requiring a Catholic hospital, for example, to disclose its membership rolls merely because it wishes to make a reportable acquisition, without regard to the competitive effects of that acquisition, would raise serious First Amendment concerns.[102] The Final Rule also creates de minimis exclusions, which remove the need for filers to note tiny prior acquisitions, supply relationships, and defense contracts that could not plausibly move the competitive needle.[103] The Final Rule shortens lookback periods for many requests, including prior acquisitions, which limits the burdens associated with digging through dated company records.[104] It removes demands for filers to create some new documents, such as deal timelines and organization charts.[105] And the Final Rule includes other important, burden-reducing changes from the indefensible NPRM, all of which help tailor the Final Rule to only those things that are necessary and appropriate to carry out the requirements of HSR.[106]

I still would prefer a deeper cut. For example, I would not have included the transaction rationale requirement.[107] Our requests for transaction-related documents already cover the same ground, in the parties' own words. I expect most transaction rationales will be heavily lawyered essays designed to ensure that the rationale matches these transaction documents. Indeed, I cannot imagine any lawyer worth his or her salt ever permitting the rationale to depart meaningfully from other parts of the notification. I therefore doubt that the rationales will provide any valuable information that we could not glean elsewhere. Perhaps in some cases parties may use the transaction rationale to explain why a merger that appears suspect at first blush presents no competitive problems. But on the whole, I doubt the transaction rationale will benefit the Antitrust Agencies in the mine run of cases, and I would not impose the burden on every filer.

This example highlights an important consideration the Commission must bear in mind for the future. If post-promulgation experience teaches us that some parts of the rule are not working well, we can and should get rid of them in subsequent rulemakings. We have done that in the past.[108] If, for example, my prediction about the value of the transaction rationale proves correct, we can and should jettison it. The same is true of all provisions of the Final Rule. Although we have satisfied the APA's requirement that the Final Rule be the product of reasoned decision

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[101] See Acquiring Person Instructions at 5.
[102] See, e.g., *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) ("This Court has 'long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.' Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.'" (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)); *id.* at 608 (forbidding mandatory disclosure of donor rolls unless the disclosure requirement is narrowly tailored to vindicate an important government interest); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (holding that mandatory disclosure of membership rolls without a sufficient justification violates the First Amendment).
[103] See SBP at 153–54.
[104] See *id*. at 151–52.
[105] See *id*. at 6, 293–95.
[106] See *id*. at 6–8, 147–56.
[107] See SBP at 253–56.
[108] E.g., 70 Fed. Reg. 73369 (Dec. 12, 2005) (amending Form and Instructions to reduce the burden of complying with Items 4(a) and (b)); SBP at 107, n.248 (summarizing numerous changes to HSR Rule since 1978).

making about what is necessary and appropriate to carry the Act into execution, experience almost certainly will reveal that the Final Rule can be improved. The Commission should abandon whatever parts of the Final Rule do not work.

Considered as a whole, however, the additional information sought in the Final Rule is "necessary and appropriate" for the Antitrust Agencies to identify transactions that may violate the antitrust laws.[109] Its benefits are many, and, by comparison, the added burdens are reasonable.

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Because the Final Rule represents the Commission's reasoned decision about what is necessary and appropriate to carry into execution the requirements of HSR, and because I believe it lawfully addresses shortcomings in the current HSR rule, I concur in its promulgation.

[109] 15 U.S.C. § 18a(d)(1).