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THE REGULATORY MINEFIELD: HOW APPROVAL CONDITIONS SHAPE M&A

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Regulatory approvals have always been among the most consequential and least predictable elements of M&A execution. Although regulatory agencies operate within statutory frameworks, the application of those mandates varies across both regulators and administrations, particularly where review standards incorporate broad public interest considerations. Deal teams regularly assess antitrust, national security, and sector-specific approval risk, but the precise contours of regulatory response often cannot be determined in advance of engagement with the relevant agency.

Regulatory approval has also always carried the possibility of conditions. Traditionally, those conditions have taken the form of structural divestitures or behavioral commitments tied directly to competitive effects or consumer impact. From time to time, however, agencies have exercised their discretion more broadly. Recent approvals from the Federal Communications Commission ("FCC" or "Commission") reflect a more visible use of that discretion in the corporate governance context. In December 2025, for example, the FCC approved AT&T's acquisition of wireless spectrum licenses from UScellular subject to a condition unrelated to spectrum concentration or service quality. As part of the approval, AT&T committed to end its diversity, equity, and inclusion ("DEI") initiatives, and the Commission expressly relied on those commitments in concluding that the transaction served the public interest.

That approval followed a series of similar actions from earlier last year. In May 2025, Verizon obtained FCC approval for its $20 billion acquisition of Frontier Communications just one day after it agreed to substantially roll back its DEI programs, including removing DEI references from training materials, modifying supplier diversity practices, and eliminating certain hiring goals. In July 2025, T-Mobile made comparable commitments in connection with approvals for its $4 billion acquisition of UScellular's wireless operations and spectrum, as well as a joint venture to acquire fiber provider Metronet. Later that same month, Skydance secured approval for its merger with Paramount after resolving litigation with President Trump and agreeing to impose internal content oversight measures intended to "root out" political bias.

These approvals reflect a shift in how transaction review functions in practice. Boards and deal teams have traditionally evaluated regulatory risk on the premise that approval conditions bear a rational and direct relationship to the transaction,

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typically tied to competitive effects or consumer impact. Conditioning approval on company-wide governance commitments alters that premise and brings internal governance decisions into the regulatory approval calculus. Where approval authority is exercised on a discretionary, case-by-case basis, similar dynamics are likely to recur as regulatory priorities evolve across administrations. For boards, executives, financial advisors, and counsel, the intersection of governance and regulatory approval therefore warrants sustained attention in transaction planning.

How Regulatory Approvals Became a Governance Lever

The recent use of regulatory approvals to influence internal corporate policy arises from a convergence of legal authority, institutional incentives, and political scrutiny that has rendered regulatory review in the M&A context an especially effective tool for advancing regulatory priorities. Many agencies operate under statutory mandates that require consideration of broad public interest factors, affording them significant discretion in evaluating whether a transaction should proceed. At the same time, formal rulemaking has become increasingly burdensome and vulnerable to legal challenge, limiting regulators' ability to advance contested policy priorities through more traditional means.

That pressure has been reinforced by a materially changed legal and policy landscape surrounding certain internal governance practices, including DEI initiatives. Recent judicial decisions, executive actions, and federal guidance have applied heightened scrutiny to programs that take race, gender, or other protected characteristics into account, contributing to increased enforcement attention and perceived litigation risk for regulated companies. In the telecommunications sector, Commission leadership has also signaled through public statements and direct communications with regulated entities that such practices may be considered in public interest determinations, making the transaction approval process a particularly relevant point of regulatory engagement.

Against this backdrop, tying governance conditions to M&A transactions offers regulators a distinct set of advantages. Transactional review allows agencies to act on a company-specific basis, in real time, and at a moment when regulated entities face substantial pressure to reach resolution. For the parties to the transaction, delay can carry meaningful economic and strategic costs, particularly where financing, integration planning, and market expectations are tied to closing. Approval authority thus provides regulators with a degree of practical leverage that is difficult to replicate through rulemaking or enforcement alone. That leverage is most pronounced in sectors subject to ongoing regulatory oversight, where transaction approvals are frequent and central to business strategy.

The Impact of Governance-Conditioned Approvals on Corporate Governance

Importantly, the use of transaction approvals to address governance issues does not depend on regulators articulat-

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ing a comprehensive governance agenda or asserting expanded jurisdiction over corporate affairs. Instead, it reflects how transaction review functions in practice. Regulatory approvals in the M&A context occur on a transaction-by-transaction basis, allowing governance-related conditions to be raised and resolved without the formality or visibility associated with rulemaking or broad policy statements.

In turn, internal corporate initiatives that were previously managed as part of ordinary governance oversight may increasingly be revisited in connection with specific transactions, particularly in industries where regulatory approvals are frequent or strategically significant. Governance choices may therefore be considered not only in terms of long-term objectives, but also in light of how they affect approval for a given deal.

Repeated reassessment of internal initiatives in transaction settings carries consequences for how those policies are perceived. When governance commitments are modified in response to deal-specific considerations or regulatory posture, stakeholders may begin to view them as negotiable rather than fixed commitments. Governance oversight consequently becomes more closely intertwined with transaction strategy—not by formal mandate, but through the practical realities of securing regulatory approval.

Implications for Board Judgment and Oversight

The use of regulatory approvals to influence internal corporate governance has direct and practical implications for boards. These implications touch core aspects of board oversight, including how governance decisions are made under the pressure of a deal, how those decisions persist beyond closing, and how fiduciary judgment is exercised amid competing regulatory, stakeholder, and strategic considerations. These dynamics also create incentives for boards to adjust how internal policies are adopted, documented, and communicated well before a transaction is announced, in order to reduce regulatory friction and preserve deal certainty.

Governance Challenges Created by Regulatory Conditions

One of the most immediate challenges for boards is that internal governance matters may be addressed under deal constraints rather than through ordinary board processes. These types of governance matters have traditionally been considered through deliberative board processes, informed by sustained engagement, public commitments, and stakeholder expectations. When such policies surface as conditions of regulatory approval, boards may be required to reassess long-standing initiatives in the context of a specific transaction, often with far less time and flexibility than would ordinarily accompany governance decisions of that magnitude.

Complicating this assessment is the unsettled nature of the current regulatory environment. Boards are increasingly required to make governance decisions without clear or stable guidance about how internal policies will be viewed in future transaction reviews, as legal standards and enforcement priorities continue to evolve across administrations and agencies. Under these circumstances, approval conditions may reflect the views of current regulatory leadership as much as established precedent. As a result, boards may find it more difficult to assess, at the outset of a transaction, how internal governance choices will be evaluated during regulatory review.

Prior transactions illustrate how this uncertainty can materialize in practice. During President Trump's first administration, the U.S. Department of Justice ("DOJ") challenged AT&T's acquisition of Time Warner by pursuing litigation rather than seeking behavioral remedies, despite the absence of traditional horizontal overlap. The challenge coincided with President Trump's repeated public criticism of CNN, a Time Warner subsidiary, and was widely regarded by market participants as an unusually aggressive approach to a vertical media transaction. Although the DOJ ultimately lost at trial, the lawsuit underscored for boards that regulatory discretion, when combined with public political commentary, can materially affect deal timing and certainty.

Recent reporting around the proposed sale of Warner Bros. Discovery ("WBD") illustrates how boards must be able to respond to these lessons in real time. During the bidding contest between Netflix and Paramount, press coverage focused not only on price and strategic fit, but also on how different bidders would handle ownership of CNN. Under Netflix's proposal, WBD would have first spun off certain cable assets, including CNN, and Netflix would have subsequently acquired WBD's film and television studios,

HBO and HBO Max. In contrast, Paramount's competing bid was for the entire company. That divergence in structure assumed added significance in light of President Trump's repeated public criticism of CNN and his statements that the network's ownership should change, adding a political dimension to the transaction and prompting commentary that regulatory review could extend beyond traditional competition analysis. In this politically charged environment, boards may therefore be required to factor those considerations into decisions about asset composition, deal structure, and governance posture well before a transaction undergoes formal review.

Long-Term Governance Consequences

These dynamics are compounded by the fact that corporate governance policies are not designed to be temporary concessions tied to a single transaction. Changes made in the transactional context are likely to become part of the company's ongoing governance framework, shaping expectations well beyond the closing of a particular deal. Boards must therefore manage the impact of these decisions across multiple stakeholder constituencies simultaneously. Decisions to modify or abandon internal initiatives in response to regulatory conditions may affect employee morale, invite investor scrutiny, or carry reputational consequences. Managing those competing pressures falls squarely within the board's oversight role, requiring directors to balance stakeholder impact against fiduciary obligations to pursue transactions that advance the company's strategic objectives.

In addition to regulatory considerations, boards must account for how governance concessions are perceived by external constituencies that may draw very different conclusions about the company's motivations and priorities. Boards also play a central role in shaping the narrative surrounding governance-related decisions, including how those decisions are explained to employees, investors, and the market. Public reactions to recent transaction approvals suggest that stakeholders often interpret such decisions through the lenses of market power, customer dependence, and perceived insulation from competitive pressure. In industries viewed as essential or highly concentrated, governance changes made to secure regulatory approval may be seen as reflecting strategic calculation rather than principled judgment, heightening reputational risk even where the underlying decision is legally sound.

The recent focus on DEI-related conditions does not imply any limit on the scope of this approach. DEI has emerged as an early example largely because it is a highly visible corporate initiative that has been the subject of sustained legal and political challenge. Internal programs around environmental and sustainability commitments, data governance frameworks, and artificial intelligence oversight all share similar characteristics and could likewise become the subject of regulatory conditions in future M&A transactions.

For boards, governance conditions accepted in one transaction can carry forward into future approvals, particularly for companies that engage in repeated acquisitions or operate in heavily regulated industries. Conditions agreed to in one transaction often inform regulators' expectations in later approvals, even where the transactions involve different assets or strategic objectives. A pattern of concessions may influence how regulators, investors, and other stakeholders view the company's governance posture, affecting not only the current deal but the board's flexibility across a broader transaction pipeline. As a result, boards may need to evaluate governance concessions not only in terms of their immediate impact on a particular transaction, but also in light of how they position the company for future strategic activity.

Deal Execution and Closing Risk

From a deal execution perspective, governance-related conditions in transaction approvals expose a mismatch between emerging regulatory practice and the way approval risk is typically allocated in M&A agreements. Customary regulatory covenants have developed with the expectation that approval conditions would take the form of structural remedies or behavioral remedies tied to competitive effects. Those covenants generally contemplate procedural cooperation with regulators and acceptance of transaction-related remedies designed to address market structure or consumer harm. Where agreements limit the scope of required remedies, those limitations are typically framed in terms that courts and practitioners evaluate by reference to economic burden, business impact, or proportionality, rather than by reference to the subject matter of the remedy itself.

Governance-related approval conditions challenge those assumptions. Although regulatory efforts covenants often extend to behavioral remedies that regulate post-closing

conduct, governance commitments differ in important respects. They may regulate internal corporate policies rather than market-facing conduct, apply to across the company as a whole rather than to the acquired business, and persist indefinitely rather than for a defined compliance period. They may also bear little or no relationship to the competitive effects of the transaction itself, yet become decisive to the approval outcome. As a result, determining whether accepting such commitments falls within the scope of an efforts covenant is no longer straightforward.

These uncertainties are most likely to surface when approval is delayed or contested. A seller may argue that refusal to modify internal policies reflects a failure to use the contractually required level of efforts to secure approval. In contrast, a buyer may contend that while efforts covenants can require acceptance of economically burdensome remedies affecting the acquired business or post-closing conduct, they do not extend to open-ended, company-wide governance concessions unrelated to the transaction's economics or competitive impact. When governance conditions function in this way, they operate less like traditional regulatory remedies and more like negotiated deal terms, introducing a new dimension to closing risk allocation that traditional regulatory covenants were not drafted to address.

Fiduciary Judgment Under Competing Pressures

The convergence of governance considerations and deal execution risk during the regulatory approval process affects how boards apply their fiduciary judgment. Boards continue to owe the same fiduciary duties, but must make decisions in circumstances where questions about deal timing, regulatory approval, and longer-term governance commitments are presented at the same time. The approval process often compresses those considerations into a single decision point, requiring boards to weigh whether a proposed concession advances the transaction while remaining consistent with the company's broader interests.

In practice, this requires boards to navigate tradeoffs that do not fit neatly into traditional deal analysis. Decisions that support closing may carry consequences for internal governance priorities, while decisions aimed at preserving governance commitments may introduce approval risk or delay. Applying fiduciary judgment in this context involves assessing those tradeoffs directly and determining how best to proceed in light of the company's overall objectives, rather than treating governance issues and deal execution as standalone or sequential considerations.

Preparing for Effective Board Oversight

As regulatory approvals intersect with internal corporate policies, boards should not assume that governance considerations will remain separate from the approval process. Effective oversight requires incorporation of regulatory foresight into governance discussions before a transaction is on the table. To prepare, boards should work closely with management and advisors to identify which internal initiatives are most likely to attract regulatory scrutiny in the context of a transaction. Programs that are highly visible and subject to active legal or political debate are more likely to become the focus of regulatory conditions. Understanding that landscape in advance allows boards to assess how those initiatives align with the company's long-term strategy and values outside the pressure of a deal.

Boards should also seek clarity about which policies are foundational and which may be adaptable if transaction approval depends on it. That clarity does not eliminate time pressure during regulatory review, but it helps ensure that governance decisions made under constraint are anchored in prior board judgment rather than improvised in response to deal-specific demands. Where such distinctions have not been established in advance, governance choices are more likely to be shaped by the immediate circumstances of a transaction rather than by the company's longer-term governance framework.

As part of that preparation, boards may also consider how governance objectives are embedded and implemented. Some initiatives may be set forth in formal policies or public commitments that the board expects to rely on over time, while others may be advanced through oversight practices or internal controls that allow for adjustment as circumstances change. Making these determinations in advance can help boards respond to regulatory conditions without having to revisit core governance commitments under deal-specific pressure, reinforcing governance discipline.

Coordination across functions is equally important. Boards should ensure that legal, regulatory, compliance, and communications teams are aligned early in the transaction

planning process. Where governance concessions become a possibility, companies will need a cohesive narrative not only to regulators, but also to employees, investors, and other stakeholders. Looking beyond immediate alignment, boards must also evaluate governance concessions in a longer-term context. Effective oversight therefore requires boards to consider how individual transaction-related governance decisions fit within the company's broader approach to regulatory and governance issues.

Looking Ahead

The Commission's recent approval orders have drawn attention to the telecommunications sector because internal governance commitments were not only raised as regulatory conditions, but became dispositive to deal outcomes on an unusually compressed timeline. In several instances, approvals followed within days of governance-related commitments, underscoring the extent to which those commitments had become central to the approval decision.

The significance of those decisions, however, lies less in the identity of the regulator or the sector involved than in the discretionary nature of the approval authority being exercised. Wherever regulators exercise discretionary, case-by-case approval authority, transaction review may extend beyond competition and market structure to encompass internal governance decisions. As discussed above, the media and communications sector provides a concrete example of how this dynamic can arise outside telecommunications. Other heavily regulated sectors share similar regulatory features and may therefore encounter comparable scrutiny, including financial services, energy and utilities, transportation, and certain technology sectors subject to licensing, security or content review.

For boards and their advisors, regulatory approval is a point at which governance considerations and deal execution intersect. Treating those matters as separate inquiries can obscure how one affects the other. Advance preparation helps ensure that governance decisions reflect informed judgment rather than transactional constraint.

STATE AGs AS INDEPENDENT ENFORCERS: WHAT TO GLEAN FROM THE CHALLENGE TO THE NEXSTAR/TEGNA ACQUISITION

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March brought a one-two punch for Nexstar's proposed $6.2 billion acquisition of Tegna. On March 18, eight state attorneys general—spanning California to Virginia—filed a sweeping Clayton Act challenge seeking to permanently enjoin the deal. That same day, DIRECTV filed its own action for injunctive relief—a rare private challenge—alleging that the merger would turbocharge retransmission fees and trigger newsroom closures nationwide. The FCC and the Department of Justice Antitrust Division ("DOJ") declined to block the transaction, which closed on March 19, and both the states and DirecTV followed up by filing separate motions for a temporary restraining order to enjoin further integration. A week later, on March 27, a federal judge in the Eastern District of California granted DirecTV's motion and ordered the parties to cease integration efforts for 14 days pending a preliminary injunction hearing scheduled for April 7. Parallel to these actions brought under federal antitrust law, a coalition of cable and broadband associations has also filed an emergency application with the D.C. Circuit to challenge the FCC approval.

Although the theories in the state AG and DirecTV complaints differ in some respects, they share a central claim: the merger would create unprecedented concentration in the licensing of Big Four retransmission consent and give Nexstar enhanced leverage to raise prices and reduce the quality and diversity of local news. Together, these ac-

tions offer important insights for companies contemplating strategic transactions.

In particular, four takeaways stand out:

(1) the escalating risk of state attorney general enforcement;

(2) the staying power of the 2023 Merger Guidelines;

(3) the renewed potency of private merger challenges; and

(4) the loss of distinct viewpoints as a vector for assessing reduction in quality.

Background on Complaints

In the complaint filed by California, Colorado, Connecticut, Illinois, New York, North Carolina, Oregon, and Virginia, the states define the relevant product market as the licensing agreements to retransmit television programs from the Big Four—ABC, CBS, NBC, and Fox—alleging that the affiliate stations have unique offerings to viewers. The states note that both the DOJ and the Federal Communications Commission adopted the same product market in prior investigations.[1]

The geographic market in the states' complaint is calculated in units of designated market areas ("DMAs"), of which the proposed transaction would implicate 31 across the country. Each DMA represents a market area in which Tegna and Nexstar each own at least one Big Four-affiliate station, and 11 of the 31 DMAs directly affect residents of the plaintiffs-states.

In detailing the presumptive illegality of Nexstar/Tegna deal, the states allege that the post-merger HHI in each affected DMA would far exceed 1,800, with the highest being 6,556 in the Norfolk-Portsmouth-Newport News region in Virginia. The lowest market share of the merged entity in a DMA would be 48.6%, which is greater than the 30% standard in the Merger Guidelines.

The states advance three theories of harm. First, the acquisition would raise retransmission fees for the 11 DMAs where Tegna and Nexstar directly compete, which would result in higher subscription prices and fewer viable alternatives. Second, given the industry practice of negotiating retransmission agreements on a "station-group, multimarket 'footprint' basis," the anticompetitive effects of higher prices would spill over into the remaining DMAs where Tegna and Nexstar do not own competing stations. Third, Nexstar's modus operandi of consolidating newsrooms would lead to job cuts and a reduction in the number of independent news outlets, which, according to the states, is a decrease in news quality.

DIRECTV's theories of harm track those brought by the states—including the same product and geographic markets—alleging potential price hikes for retransmission licenses and a reduction in the quality of local broadcast news offerings.

Embracing the 2023 Merger Guidelines

Both complaints adopt the lower market share threshold for presumptive illegality (Guideline 1), discuss Nexstar's serial acquisitions (Guideline 8), and industry trends toward consolidation (Guideline 7) as outlined in the 2023 Merger Guidelines. All three of these guidelines represent an evolution from the 2010 Horizontal Merger Guidelines, which used a higher market share threshold for scrutiny and did not consider serial acquisitions or trends towards consolidation to independently warrant investigation. This explicit endorsement of the 2023 Merger Guidelines by both state enforcers and a private claimant increases the likelihood that these principles will continue to shape merger review processes and be adopted by courts.

Station Consolidation as Quality Degradation

In addition to the traditional theories of harm in which the proposed transaction allegedly reduces competition and raises prices for consumers, both complaints allege that Nexstar's longstanding strategy to consolidate newsrooms would sacrifice local news reporting and give Nexstar editorial power to "suppress viewpoints and exclude voices that are essential to a robust political and social discourse." The states' complaint claims that "[e]liminating independent sources of local news is a quality degradation resulting from the aggregation of market power and, as such, fits neatly within traditional antitrust concerns over the ability of firms with significant market power to lower the quality of products (even as they boost prices)." DIRECTV describes the "reduced variety and quality" of content as "precisely what the antitrust laws are designed to prevent." In couching this impact on consumers in traditional antitrust parlance, both complaints contend this loss of independent reporting constitutes a reduction in quality.

Rise of Independent State AG Challenges

While many state AGs have historically acted in concert with federal enforcers to challenge mergers, the present case shows that state AGs will sue to block deals even without the support of their federal counterparts. The last time state and federal enforcers diverged on merger enforcement was in 2019 during the first Trump administration when over 10 state AGs sued to enjoin the T-Mobile/Sprint merger after DOJ cleared it. Their challenge was ultimately unsuccessful, but it demonstrated that state antitrust enforcers were willing to litigate on their own.

The states' challenge to the Nexstar/Tegna acquisition comes on the heels of ongoing litigation in the Live Nation monopolization case, in which a bipartisan coalition of state AGs have forged ahead after the DOJ settled its claims mid-trial. In that case, the states are also pursuing theories of harm under their own state antitrust and consumer protection statutes, whereas in the present case they sued only under federal law.

State AGs have varying degrees of resources to bring these cases, but they can leverage their resources by working together. Some are significantly increasing their antitrust litigation capacity as they see new opportunities to make their mark in the competition and consumer protection space.

Increased Risk of Private Merger Challenges

DIRECTV, a customer of the merging parties, filed its own private action on the same day in the same district court, seeking to block the proposed acquisition on substantially similar grounds. The private right to challenge a merger has existed since the enactment of the Clayton Act in 1914, but it is uncommon due to the cost and difficulty in showing antitrust injury—a requirement for standing to sue. This rare instance of a private party suing to stop a transaction highlights the potential hurdles to clearing a deal even when federal enforcers give it the green light.

Looking Ahead

It remains to be seen how the states and DIRECTV will fare in their challenges of Nexstar's acquisition of Tegna, but the lessons are clear: 1) Merging parties should continue to expect scrutiny by state AGs (even if federal enforcers decline to act); 2) The 2023 Merger Guidelines continue to gain traction; 3) Private parties pose more of a risk than just providing evidence to bolster an enforcer's claims; because as customers, suppliers, and competitors, they may seek to stop or unwind mergers themselves; and 4) Claims regarding non-price competitive effects from transactions such as reduction in quality remain popular.

ENDNOTES:

[1]The relevant product market was used by DOJ in its challenges to Nexstar's acquisition of Tribune Media in 2019 as well as to Gray Television's acquisition of Quincy Media in 2021. Both transactions were cleared after the DOJ secured divestitures.

DELAWARE COURT OF CHANCERY DECLINES TO DISMISS AIDING-AND-ABETTING CLAIMS AGAINST FINANCIAL ADVISOR IN DE-SPAC TRANSACTION

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Overview

In a recent decision that financial advisors should take note of, the Delaware Court of Chancery declined to dismiss a claim that a financial advisor aided and abetted breaches of fiduciary duty by the board of directors of a special purpose acquisition company ("SPAC") in connection with an allegedly misleading merger proxy statement. Although the case (*Electric Last Mile Solutions, Inc. Stockholder Litigation*)[1] arises out of the somewhat unusual facts of a "de-SPAC" transaction, where the subject company faced bankruptcy less than a year following its going-public merger, the Court's analysis and the scope of its ruling may have

broader implications for financial advisors in M&A transactions.

The ruling shows that notwithstanding recent Delaware Supreme Court decisions instructing lower courts to apply a more critical approach to assessing claims of aiding-and-abetting liability, risk in this area remains.[2] In this case, the Court declined to dismiss claims that the financial advisor had knowingly failed to correct projections contained in board materials, which were eventually summarized in the proxy statement. The Court imputed knowledge of allegedly conflicting information from a different transaction without considering whether it was obtained by a different deal team and whether information firewalls were put in place. The decision creates potential litigation risks for financial advisors who advise their clients while in possession of information related to the transaction gleaned from a previous or concurrent engagement. It also expands the potential for financial advisors to be attributed liability for statements by their clients in SEC filings, despite the absence of any formal underwriter liability and despite the weight of both recent and longstanding contrary Delaware precedent. We note a few key takeaways and ways of mitigating such risks below.

Case Background, Procedural Posture and the Underlying Claims

The case arose out of a de-SPAC transaction, in which Forum III Merger Corporation ("Forum III"), a SPAC, merged with Legacy Electric Last Mile Solutions, Inc. ("Legacy ELMS") in June 2021.[3] Forum III went public in August 2020, raising $250 million with a two-year deadline to complete a merger.[4] Shortly before going public, Forum III entered into discussions with one of the two founders of Legacy ELMS.[5] Forum III and Legacy ELMS entered into a merger agreement in December 2020, which was approved by Forum III's stockholders on June 24, 2021.[6]

Forum III retained Jefferies LLC ("Jefferies") as its financial advisor in connection with the transaction in October 2020.[7] As part of its engagement, Jefferies prepared investor materials and engaged in diligence with Forum III's board but did not deliver a formal fairness opinion.[8] Upon the closing of the merger, Jefferies earned a transaction-contingent fee of $19.3 million.[9]

Pertinent to the claims against Jefferies, in parallel with the merger, Legacy ELMS also entered into separate transactions to acquire assets, including an Indiana manufacturing plant, from SF Motors, an electric car manufacturer.[10] Prior to Forum III's IPO, Jefferies had represented SF Motors to evaluate the Indiana plant acquisition, and allegedly received certain diligence information regarding Legacy ELMS in that role.[11]

Shortly after the de-SPAC merger, the two founders resigned following an internal investigation.[12] The company filed for Chapter 7 bankruptcy liquidation in June 2022.[13] Stockholder plaintiffs brought claims against Forum III directors for breaches of fiduciary duties.[14] The plaintiffs also brought claims against other defendants for aiding and abetting the breaches of fiduciary duty and other claims.[15]

In a prior ruling, the Court addressed plaintiffs' aiding-and-abetting claims against the two Legacy ELMS founders, who were not Forum III fiduciaries, in connection with alleged disclosure deficiencies in the de-SPAC proxy statement.[16] The Court held that it was reasonably conceivable, at the pleadings stage, that Taylor and Luo knowingly participated in the alleged disclosure-related breaches associated with the transaction.[17]

The latest ruling, discussed here, addresses claims that Jefferies aided and abetted the Forum III board's breach of fiduciary duties by reviewing and approving an allegedly misleading proxy statement.[18]

Plaintiffs alleged that the proxy statement had three types of misleading statements.[19] *First*, plaintiffs alleged that the proxy stated that Forum III "did not contact any prospective target companies before the IPO" whereas, in fact, management had met with Legacy ELMS before Forum III's IPO.[20] *Second*, plaintiffs alleged that the proxy statement "failed to disclose Jefferies' conflict arising from its prior work for SF Motors."[21] *Third*, plaintiffs alleged that the proxy statement contained financial projections for Legacy ELMS that were significantly higher than the financial projections that Jefferies had received as part of its diligence of Legacy ELMS as part of its engagement for SF Motors.[22]

In its motion to dismiss, Jefferies asserted that, even assuming the directors breached their fiduciary duties, the complaint failed to state an aiding and abetting claim against Jefferies.[23]

Governing Legal Framework for Aiding and Abetting

The Court's analysis proceeds against the backdrop of two recent Delaware Supreme Court decisions, which clarified the requirements of the "knowing participation" standard that plaintiffs must satisfy to establish aiding and abetting liability.

In *Mindbody*, the Supreme Court reversed a post-trial finding of liability against a third-party buyer, emphasizing that establishing the scienter element of "knowing participation" requires the plaintiff to show that the secondary actor had actual knowledge both of the primary actor's fiduciary duty breach and of the fact that its own conduct was wrongful.[24] Participation in turn requires "substantial assistance to the primary violator," meaning "active participation rather than passive awareness."[25] After trial, the Court of Chancery found that a third-party buyer aided and abetted a CEO's breach of fiduciary by failing to correct proxy disclosures after having the opportunity to review them.[26] The Supreme Court reversed, holding that a failure to correct disclosures upon review, even in the presence of a contractual obligation to do so, does not on its own constitute substantial assistance sufficient to establish knowing participation.[27]

In *Columbia Pipeline*, issued after the *Mindbody* reversal, the Supreme Court also reversed a post-trial finding of aiding-and-abetting liability against a third-party buyer, reiterating that constructive knowledge or routine transactional conduct is insufficient to establish knowing participation.[28] The Court again stressed that the breach by the buyer of a contractual duty in the merger agreement to notify the seller of any material misstatements in the proxy statement does not alone satisfy the "substantial assistance" requirement—the secondary actor must take affirmative steps in furtherance of the primary actor's breach.[29] As the Court later summarized when describing the import of *Mindbody* and *Columbia Pipeline* in the *Electric Last Mile* letter decision, those decisions "settled that a party's failure to correct an incorrect proxy statement, even in the face of a contractual duty to do so, is not enough for a defendant's conduct to amount to substantial assistance."[30]

To assess whether a defendant engaged in "knowing participation" in the primary actor's breaches of fiduciary duty, the court must engage in a fact-intensive analysis of four so-called *Dole* factors derived from the Restatement (Second) of Torts:

1. The nature of the underlying tortious conduct, including its severity and clarity.
2. The amount, kind, and duration of the assistance provided.
3. The nature of the relationship between the primary and secondary actors.
4. The secondary actor's state of mind.[31]

In prescribing this framework, the Delaware Supreme Court stressed that the "knowing participation" inquiry is a demanding one.[32] Both cases, however, applied the framework upon a developed trial record, leaving open how such framework should apply at the pleadings stage.

The Court's Analysis

Applying the *Dole* test, Chancellor Kathaleen St. J. McCormick held that three of the factors supported an inference that Jefferies "knowingly participated" in the directors' breaches of fiduciary duties.

With respect to the first factor, the Court held that it was reasonably conceivable that Jefferies had "first-hand knowledge that Forum III's disclosures misled stockholders and the Forum III board" because it had "advised Forum III throughout the transaction" and had obtained "conflicting information about the Indiana Plant's capacity, workforce and financial performance" as a result of its previous engagement with SF Motors.[33] In reaching that conclusion, however, the Court inferred that the information obtained by Jefferies in connection with its SF Motors engagement was available to, and attributable to, the team advising Forum III. The opinion did not consider, at least at the motion to dismiss stage, whether the allegedly conflicting information was received by a different deal team or whether internal confidentiality protocols limited the flow of that information between deal teams, effectively treating Jefferies as a unitary actor. On that same basis, the Court concluded with respect to the fourth factor that it was "reasonably conceivable that Jefferies knew its own conduct was improper."[34]

In assessing the second factor, the Court treated the

authorship and dissemination of presentations to the board and stockholders as affirmative assistance, distinct from mere silence or passive awareness.[35] The Court's analysis focused on Jefferies' authorship of two separate presentations which were delivered to Forum III's board and shareholders respectively, which contained "allegedly misleading representations" regarding the Indiana Plant's capacity and workforce.[36]

The Court's analysis of the second and fourth factors turned on Jefferies' role in preparing board materials while suffering from what the Court perceived to be a conflict.[37] Though the Court seemed to acknowledge that mere review of the proxy statement with knowledge of its inaccuracies does not count as active participation, the decision indicates that, in the Court's view, the preparation of board materials that contain at least some of the same alleged misrepresentations as the proxy statement crosses the line.

In support of that conclusion, the Chancellor invoked the seminal *Rural/Metro* case, in which the Court of Chancery held (and the Delaware Supreme Court affirmed) that a financial advisor may be liable for aiding and abetting where it creates an "information vacuum" to induce the board to take action benefiting the advisor.[38] In that case, however, the financial advisor actively manipulated the sales process to guide the board to accept an offer that provided the advisor's financing team with a substantial fee.[39] It failed to inform the board and a special committee about its interest in providing buy-side financing to the winning bidder and actively attempted to "secure that role while simultaneously leading the negotiations in price."[40] The information vacuum in *Rural/Metro* thus involved intentional, conflict-driven manipulation of the sales process.[41] Here, though, the alleged information vacuum involved the creation of board materials that included management projections prepared by another party, which were alleged to be overly optimistic.

To buttress the "information vacuum" theory, the Court cited Jefferies' incentives to close the deal, and adopted the plaintiffs' position that "Jefferies was closely involved in the Merger on both sides, and therefore participated in a conflicted transaction."[42] However, nothing else in the opinion suggests that the interests of Forum III and SF Motors were adverse to each other in any manner that would have rendered Jefferies conflicted. Although the prior engagement involved a transaction related to Legacy ELMS and allegedly generated information that would have been relevant to Forum III's disclosures in the de-SPAC transaction, Jefferies did not represent Legacy ELMS itself but rather a third party, whose interests were distinct from—and in many respects—adverse to those of Legacy ELMS in the prior deal.

The Court also gave short shrift to the fact that in Jefferies' engagement letter the client expressly "disclaimed reliance on the accuracy underlying Jefferies' analyses."[43] While acknowledging that such disclaimer may have some weight, the Court declined to treat the disclaimer as dispositive for purposes of the motion to dismiss.[44] At most, the Court held, the third *Dole* factor was "neutral."[45]

Analysis and Key Takeaways for Financial Advisors

- While this decision was delivered at a motion to dismiss stage, without the benefit of a developed factual record (and thus accepted plaintiffs' factual pleadings as true for purposes of the analysis), the legal analysis itself would, if upheld, represent a potential expansion of financial advisor liability. In particular, the *Electric Last Mile* decision might be read as imposing liability on financial advisors for a company's disclosures in M&A transactions, at least where the financial advisor prepares board materials while it is in possession of information that contradicts those disclosures from parallel or past engagements.

- For purposes of analyzing whether Jefferies had information about the target company that contradicted the board materials it prepared, the Court seemingly treated Jefferies as a single unitary actor. The decision does not grapple with the possibility that two separate deal teams worked on these two transactions, thus imputing the knowledge of one deal team to another, even if such deal teams may have been bound by confidentiality restrictions and subject to internal wall-crossing procedures. This aspect of the Court's decision may be due to the fact that the Court is obligated to draw all reasonable inferences in favor of the plaintiff at the motion to dismiss stage, but nonetheless it appears to be somewhat in tension with the *Columbia Pipeline* decision, where the Delaware Su-

preme Court found that aiding and abetting liability cannot rest on constructive knowledge alone.[46] As this decision does not resolve factual disputes, the advisor retains such exculpatory arguments on a more developed factual record should the case proceed to trial.

- The Court's analysis turns in significant part on the allegation that Jefferies was "conflicted" based on its undisclosed engagement with SF Motors. The Court referenced Jefferies' undisclosed engagement in its analysis for three of the four *Dole* factors, and repeatedly stressed that Jefferies had a "conflict."[47] The upshot is that the failure to disclose the advisor's involvement in transactions involving a contractual counterparty to one of the merger parties—even where interests are not adverse with respect to the transaction on which the financial advisor is engaged—can metastasize into a "conflict" and raises the question of whether, in such situations, the advisor has a duty to disclose any information that may be relevant to the client's assessment of the transaction. To mitigate litigation exposure, financial advisors should consider whether their existing conflicts-checking process adequately captures prior or concurrent engagements involving the counterparty, even where the advisor did not represent the counterparty.

ENDNOTES:

[1]*Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195 (Del. Ch. 2026).

[2]*In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. 2024); *In re Columbia Pipeline Group, Inc. Merger Litigation*, 342 A.3d 324 (Del. 2025). The Court requested supplemental briefing on the impact of *Mindbody* and *Columbia Pipeline* on the aiding and abetting claims in the present case, which formed the basis in part for its letter decision. *See Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *3 (Del. Ch. 2026).

[3]*Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *1 (Del. Ch. 2026).

[4]*Id.*

[5]*Id.*

[6]*Id.* at *1, *2.

[7]*Id.* at *1.

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]*Id.* at *7.

[12]*Id.* at *2.

[13]*Id.*

[14]*Id.*

[15]*Id.* The Plaintiffs also asserted an unjust enrichment claim tied to Jeffries receiving transaction-contingent fees. *Id.* at *10.

[16]*Id.*

[17]*Id.*

[18]*Id.* at *7.

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]*Id.* at *4.

[24]*Mindbody*, 332 A.3d, at 391.

[25]*Id.* at *392-3.

[26]*Id.* at *399.

[27]*Id.* at *401.

[28]*Columbia Pipeline*, 342 A.3d, at 356-7.

[29]*Id.* at 368, 371.

[30]*Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *6 (Del. Ch. 2026).

[31]*Id.* at *4.

[32]*Mindbody*, 332 A.3d, at 391.

[33]*Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *7, *9 (Del. Ch. 2026).

[34]*Id.* at *9.

[35]*Id.* at *8.

[36]*Id.*

[37]*Id.* at *8, *9.

[38]*Id.* at *8.

[39]*See In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014), decision clarified on denial of reargument, 2014 WL 1094173 (Del. Ch. 2014) and subsequent determination, 102 A.3d 205 (Del. Ch. 2014).

[40]*Jervis*, 129 A.3d at 862-63 (noting that "RBC's knowing participation included its failure to disclose its interest in obtaining a financing role in the EMS transaction and how it planned to use its engagement as Rural's advisor to capture buy-side financing work from bidders for EMS; its knowledge that the Board and Special Committee were uninformed about Rural's value; and its failure to disclose

to the Board its interest in providing the winning bidder in the Rural process with buy-side financing and its eleventh-hour attempts to secure that role while simultaneously leading the negotiations on price").

[41] *Id.*

[42] *Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *8 (Del. Ch. 2026).

[43] *Id.* at *9.

[44] *Id.*

[45] *Id.*

[46] *Columbia Pipeline*, 342 A.3d, at 356-7.

[47] *See Re: Electric Last Mile Solutions, Inc. Stockholder Litigation*, 2026 WL 207195, at *7-9 (Del. Ch. 2026).

FEDERAL DISTRICT COURT IN TEXAS TOSSES FTC'S 2025 HSR FILING RULES

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- **What's new:** The Eastern District of Texas vacated the FTC's 2025 rule changes that expanded the premerger notification filing requirements under the HSR Act and took effect just over one year ago.
- **Why it matters:** The ruling alters a company's filing requirements until the Fifth Circuit decides the FTC's appeal of the decision. Since taking effect on February 10, 2025, the expanded form has added time, cost and complexity to the HSR filing process.
- **What to do next:** Parties planning to submit HSR filings may now use the prior, less burdensome form.

On February 12, 2026, the U.S. District Court for the Eastern District of Texas vacated the Federal Trade Commission's ("FTC's") new rule changes ("New Rules") that a year ago expanded the premerger notification filing requirements under the Hart-Scott-Rodino ("HSR") Act.

The court stayed its order until February 20, 2026. On February 19, 2026, the Fifth Circuit granted the FTC's request for an administrative stay of a lower court's decision vacating the 2025 rules that expanded the premerger notification filing requirements under the HSR Act.[1] However, on March 19, 2026, the Fifth Circuit denied the FTC's motion for a formal stay pending appeal, allowing the district court's ruling to become effective.[2]

Background

On October 10, 2024, the FTC adopted a set of New Rules[3] relating to the filing requirements for parties that submit prenotification forms under the HSR Act. The New Rules dramatically overhauled the types of data and documents to be submitted, requiring approximately 20 new categories of information and documents, including information about parties' ownership structures, prior transactions, transaction-related drafts and internal competitive analyses.

Since taking effect on February 10, 2025, the expanded form has added time, cost and complexity to the HSR filing process. For example, the FTC estimated that transacting parties would need 105 hours on average to complete the new form—nearly triple that of the prior form's 37-hour average.

One month before the New Rules had been scheduled to take effect, the Longview Chamber of Commerce, U.S. Chamber of Commerce, American Investment Council and Business Roundtable filed a lawsuit challenging the New Rules in the Eastern District of Texas.

Over one year later, on February 12, 2026, Judge Jeremy D. Kernodle granted summary judgment for the plaintiffs and vacated the New Rules. The FTC has appealed the decision to the Fifth Circuit, but the Fifth Circuit denied the FTC's motion for a stay pending appeal, so parties may now use the HSR Form that was in place prior to the New Rules taking effect. There is no specific deadline for the Fifth Circuit to rule on the FTC's appeal, but based on recent Fifth Circuit timelines, a decision is unlikely to come before 2027.

Legal Analysis

The FTC Exceeded Its Statutory Authority Under the HSR Act

The HSR Act authorizes the FTC to require information

from transacting parties that is "necessary and appropriate" for the agency to determine if a potential merger violates the antitrust laws.

In its decision, the court agreed with the plaintiffs that the "necessary and appropriate" language serves as a significant constraint on the FTC's authority rather than a grant of broad discretion, as the FTC argued.

The court held that the statute requires the FTC to establish that the New Rules' benefits "reasonably outweigh its costs," a standard the agency failed to meet. Specifically, it found that the FTC failed to provide sufficient evidence that the New Rules' claimed benefits—detection of additional harmful mergers and savings to agency resources—outweighed the nearly triple increase in compliance costs for the filing parties.

The FTC's Rulemaking Was Arbitrary and Capricious Under the APA

The Administrative Procedure Act ("APA") mandates that rules promulgated by federal agencies are not "arbitrary and capricious," which courts have interpreted to mean that a rule's benefits must bear a "rational relationship" to its costs. The court found that because the FTC essentially "deemed cost irrelevant" during its rulemaking process, the New Rules were arbitrary and capricious.

Specifically, the court found that the FTC "failed to consider" the over-inclusiveness of the New Rules to reportable transactions that do not present significant competitive risks and thus established a presumption that all M&A activity is "inherently dubious," which conflicts with the HSR Act's mandates.

Additionally, the court noted that the FTC did not adequately explain why it rejected less burdensome and costly alternatives to the expanded form, highlighting that the existing HSR form had been "highly effective" for decades.

Implications

Although the FTC adopted the New Rules in 2024 with unanimous, bipartisan support, this support was not without reservation. In his statement concurring with their adoption, then-Commissioner (now-Chairman) Andrew Ferguson concluded that the New Rules, though "not perfect," were "plainly authorized by a valid grant of authority from Congress" and a "lawful improvement over the status quo."

Ferguson posited that the New Rules addressed "important shortcomings" in the old form, reasoning that they better reflected modern corporate structures and would help reduce "bureaucratic inertia" in agency investigations.

However, Ferguson also signaled that he would have preferred to have further narrowed the New Rules. For example, he flagged the transaction rationale requirement as redundant, expressing doubt that it would "provide any valuable information" the FTC could not glean elsewhere in the form.

This qualified support suggests that, if the district court's decision is not reversed, the FTC under Chairman Ferguson's leadership may push for new rulemaking on a more limited scale rather than abandon the HSR modernization effort and accept reversion to the prior Form entirely.

As noted above, the Fifth Circuit has yet to rule on the merits of the appeal, so it is possible that it could reinstate the New Rules once it does so. However, recent Fifth Circuit timelines suggest that any such decision would likely not come until 2027 at the earliest.

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ENDNOTES:

[1] *See* https://www.skadden.com/-/media/files/publications/2026/02/federal-district-court-in-texas-tosses-ftcs-2025-hsr-filing-rules/2640094_documents-united-states-court-of-appeals.pdf.

[2] *See* https://www.skadden.com/insights/publications/2026/03/fifth-circuit-denies-ftcs-motion.

[3] *See* https://www.skadden.com/insights/publications/2024/10/final-hsr-rules-major-changes-ahead-for-premerger-filings.

FDIC RESCINDS POLICY STATEMENT LIMITING THE PARTICIPATION OF PRIVATE INVESTORS IN THE ACQUISITION OF FAILED BANKS

By H. Rodgin Cohen, Mitchell Eitel, Jared Fishman, Charles Gray and Ryan Lessing

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To encourage the participation of private investors such as private equity firms in the acquisition of failed banks, the Federal Deposit Insurance Corporation ("FDIC") on March 19 approved the rescission of its 2009 Statement of Policy on the Qualifications for Failed Bank Acquisitions.[1] The rescission of the Policy Statement follows other recent actions by the FDIC to expand nonbank participation in failed bank auctions, and was previewed in a March 11 speech from FDIC Chairman Travis Hill. In the same speech, Chairman Hill also suggested that the FDIC and the other banking agencies are exploring the possibility of a streamlined emergency process for the approval of "shelf charters" that could create a more realistic pathway for nonbank investors to acquire a failed bank's deposit franchise on short notice.

Policy Statement

The Policy Statement was adopted following the May 2009 failure of the Florida-based thrift BankUnited, FSB, and its sale by the FDIC as receiver to a newly chartered federal savings bank owned by a group of private equity investors. The Policy Statement prospectively imposed terms and conditions on covered "private investors" in a company seeking to acquire any part of the deposit franchise of a failed bank.[2] These terms and conditions included a prohibition on private investors utilizing "complex and functionally opaque ownership structures," a requirement to disclose to the FDIC information relating to the private investor's chain of ownership and affiliates, a requirement that private investors maintain their investment for a three-year minimum term, and a requirement that the investors undertake in certain circumstances to pledge the stock acquired in one depository institution to the FDIC as a form of "cross-support" in the event of the failure of any other depository institution under common ownership by the investors. The Policy Statement also imposed conditions on the acquiring institution in which a private investor invested, most notably a requirement to maintain a ratio of Tier 1 common equity to total assets of at least 10% throughout the first three years from the time of acquisition and an outright prohibition on extensions of credit to affiliates of the private investor.[3]

In rescinding the Policy Statement, the FDIC emphasized that the restrictions made applicable to private investors were more onerous than those that would be imposed under generally prevailing law in any other failed bank acquisition and could discourage the participation of nonbank investors such as private equity firms in the bank resolution process. In announcing the rescission, the FDIC noted that private investment entities "can play a significant role in the resolution process, given their ability to access and deploy significant pools of capital," and that given the increased speed with which a bank failure may occur, deterring their participation could considerably increase the costs of resolution.[4]

The rescission of the Policy Statement follows other recent actions by the FDIC to expand nonbank participation in the sale of loans or other assets of failed banks, including its adoption of a pilot program to prequalify nonbanks to bid for the assets of failed banks and announcement of a "seller financing" program targeted at nonbank bidders on failed bank assets.[5]

Shelf Charters

In a speech on March 11 (in which he previewed the March 19 action), Chairman Hill noted that even in cases in which nonbank investors have "an interest in buying the entire failed bank from the FDIC," there is currently "no path for nonbank entities to buy such a bank outright in a short period of time" if the bank fails suddenly. Chairman Hill indicated that, in addition to easing restrictions on nonbank investors through rescission of the Policy State-

ment, the FDIC is "exploring with the other banking agencies the possibility of establishing an emergency exception that would enable a nonbank to rapidly set up a shelf charter to bid on a failed institution following a sudden failure."[6]

Shelf charters allow investors to receive preliminary approval from the OCC for an inactive national bank charter that remains "on the shelf," activated only if and when a troubled institution acquisition opportunity arises. Shelf charters were first established by the OCC during the 2008 financial crisis, and were intended to expand the pool of potential buyers of troubled banks. Since their introduction, however, they have seen extremely limited adoption: the first shelf charter was granted in November 2008, and shelf charters were used to facilitate failed bank acquisitions twice, in January and July 2010.[7] The mechanism then fell into disuse for over a decade before another institution received a shelf charter in December 2023.[8] Shelf charters have in the past required an extended application process (Chairman Hill noted that the most recent application took 22 months) and have generally only been valid for 18 months following approval, significantly limiting their appeal. The now-rescinded Policy Statement was also a significant obstacle to capital raising by prospective shelf charter applicants. In addition to the granting of a shelf charter by the OCC or another chartering authority, the FDIC must issue an approval of deposit insurance for the newly chartered entity, and the Federal Reserve must approve its ownership if any company is to have control of the shelf charter entity. In light of this multi-agency involvement, Chairman Hill observed that any effort to adopt an expedited process for making shelf charters available will need to be coordinated on an inter-agency basis.

Implications

A more streamlined emergency process for approval of shelf charters could create a more realistic pathway for nonbank investors to secure a bank charter and be in a position to submit "whole bank" bids, or bids that otherwise cover the deposit franchise of the failed institution, even where a bank failure has occurred suddenly. Private investors that are potentially interested in participating in future acquisitions of failed banks, free from the restrictions formerly imposed by the Policy Statement, should consider undertaking a fresh review of the structures and potential deal terms that may now be feasible as a result of these shifts in FDIC policy, and continue to monitor any further agency policy or guidance on shelf charters. Private investors must of course take into account the implications of the Bank Holding Company Act and other statutes in cases where that investor would be deemed to control a bank through use of a shelf charter or a failed bank acquisition.

ENDNOTES:

[1]Press Release, FDIC, *FDIC Board of Directors Rescinds Statement of Policy on the Qualifications for Failed Bank Acquisitions* (Mar. 19, 2026), https://www.fdic.gov/news/press-releases/2026/fdic-board-directors-rescinds-statement-policy-qualifications-failed-bank; FDIC, *Rescission of Statement of Policy on the Qualifications for Failed Bank Acquisitions* (Mar. 19, 2026) [hereinafter *Rescission Notice*], https://www.fdic.gov/board/federal-register-notice-rescission-statement-policy-qualifications-failed-bank-acquisitions. The rescission will be effective upon publication in the Federal Register.

[2]Private investors with less than 5% of the total voting power in an investee institution were excluded, as were investors who partnered with an established bank holding company that had a "strong majority interest" post-acquisition (*i.e.*, the private investors had no more than one-third of total equity and voting power).

[3]FDIC, *Final Statement of Policy on Qualifications for Failed Bank Acquisitions*, 74 Fed. Reg. 45440 (Sept. 2, 2009); *Statement of Policy on Qualifications for Failed Bank Acquisitions*, FDIC (Mar. 15, 2024), https://www.fdic.gov/laws-and-regulations/statement-policy-qualifications-failed-bank-acquisitions. For more on the 2009 adoption of the Policy Statement, *see* our related client memoranda, S&C Memo, *FDIC Releases Draft Policy Statement on "Private Capital Investors" in Banks and Thrifts* (July 2, 2009), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Failed-Bank-Acquisitions-Draft-Policy-Statement.pdf; S&C Memo, *FDIC Releases Final Policy Statement on Private Investments in Failed Insured Depository Institutions* (Aug. 28, 2009), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Failed-Bank-Acquisitions-Final-Policy-Statement.pdf, *FDIC Releases Frequently Asked Questions on the Statement of Policy on Qualifications for Failed Bank Acquisitions* (Dec. 14, 2009), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Failed-Bank-Acquisitions-FAQs.pdf.

[4]FDIC *Rescission* at 3.

[5]See S&C Memo, *FDIC Provides Update on Resolution Planning for Large Banks and New Transparency on Failed Bank Sale Process* (Jan. 12, 2026) https://www.sullcrom.com/insights/memo/2026/January/FDIC-Issues-Updates-Resolution-Planning-Sale-Process; S&C Memo, *Acting*

FDIC Chairman Previews Changes to Resolution Planning and Execution: Acting FDIC Chairman Hill Offers Lessons Learned from 2023 Bank Failures and Discusses Potential Streamlining of Resolution Plan Requirements and Improvements to Failed Bank Receivership Process (Oct. 27, 2025), https://www.sullcrom.com/insights/memo/2025/October/Acting-FDIC-Chairman-Previews-Changes-Resolution-Planning-Execution.

[6]Travis Hill, Chairman, FDIC, Speech at the American Bankers Association Washington Summit: *An Update on Reforms to the Regulatory Toolkit* (Mar. 11, 2026), https://www.fdic.gov/news/speeches/2026/update-reforms-regulatory-toolkit.

[7]Press Release, OCC, *OCC Conditionally Approves First National Bank Shelf Charter to Expand Pool of Qualified Bidders for Troubled Institutions* (Nov. 21, 2008), https://www.occ.gov/news-issuances/news-releases/2008/nr-occ-2008-137.html; Press Release, OCC, OCC Approves First Use of "Shelf Charter" to Acquire Failed Bank (Jan. 22, 2010), https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-8.html; Press Release, OCC, *OCC Approves Use of Second Shelf Charter to Acquire Three Failed Banks* (July 16, 2010), https://www.occ.treas.gov/news-issuances/news-releases/2010/nr-occ-2010-82.html.

[8]OCC, Conditional Approval #1315 (Dec. 21, 2023), https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2024/ca1315.pdf.

ANTITRUST FOR DIGITAL MARKETS

By Mark R. Meador

Mark Meador is a Commissioner in the U.S. Federal Trade Commission. The following is edited from remarks he gave at the Antitrust for Digital Markets Forum on March 23, 2026.

When it comes to digital markets, we face a moment that is both familiar and new. Familiar, because many of the challenges confronting us echo debates that have existed since the earliest days of the Sherman Act. New, because the scale and speed of technological change are transforming markets in ways that test how the law should be applied.

Yet there is a temptation in some of these discussions to declare that antitrust enforcement is obsolete. That our existing tools cannot keep up with the pace of technological change, and that the antitrust laws are an impediment to economic progress. That narrative is not new, but it is commonplace in many antitrust circles.

My goal today is to push back on that narrative. But doing so requires stepping back from individual cases and focusing on broader questions: What legal principles should guide our approach to digital markets? What do those principles imply for merger enforcement and remedies? And how should we approach emerging technologies?

The central point I want to leave you with is simple: while markets evolve, the core principles of competition law—and the obligations of those charged with enforcing it—do not.

Antitrust as a Law Enforcement Framework

When we discuss antitrust enforcement in digital markets, it is useful to remember that many of the questions we face today have clear historical precedents.

Technological revolutions are not new. Railroads, electricity, automobiles, telecommunications, and the internet each transformed markets in profound ways. Each wave of innovation raised concerns about concentration, the accumulation of economic power, and restraints on competition.

Antitrust law developed in response to the challenges of industrialization. The language of the antitrust statutes was derived and informed by the American common law tradition,[1] which allowed courts to address unfair and restrictive business practices through case-by-case adjudication.[2] As the Supreme Court has explained, the antitrust laws establish "a charter of freedom" with a "generality and adaptability comparable to that found to be desirable in constitutional provisions" and requires "vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce."[3]

Despite this tradition, some argue that the antitrust laws area purely technocratic exercise that tasks courts with calculating with precision whether commercial practices "maximize" economic efficiency or output.[4] But even setting aside the fact that this approach goes well beyond the institutional capacities of courts and has operated to drive up the costs of antitrust compliance and litigation over the last several decades, this view has no foundation in the structure, history, language, or statutory scheme animating the antitrust laws.[5]

The goal of antitrust enforcement is not to engineer the

economy or micromanage market outcomes. Instead, the antitrust laws establish a law-enforcement framework that is aimed at identifying and curbing accumulations and abuses of economic power, which harm the process through which firms compete to create value and innovate to win over trading partners.[6] It is the focus on the welfare of real people—consumers—that is and should remain the focus of antitrust enforcement.[7]

Artificial intelligence, digital platforms, and data-driven markets may present new factual settings. But the governing principles are long-standing and can be readily applied across different markets.

What the Speed of Market Change Means for Enforcement

With this background, let's address a common claim made about digital markets: that the pace of innovation makes antitrust enforcement not just difficult, but counterproductive.

The argument is familiar. Markets move quickly. By the time an investigation or litigation concludes, the market has changed. Enforcement, the argument goes, risks addressing problems that no longer exist, and ultimately the market will correct itself.

This critique has some force as an argument for equipping agencies with more funding and considering proposals that would address evidentiary challenges that impede more efficient enforcement. What it does not support is abdicating the obligation to enforce the law.

The speed of technological change can amplify competitive harm. Conduct that entrenches platform advantages, forecloses entry, or creates durable data advantages can compound rapidly. Network effects, path dependence, and feedback loops can act to further entrench dominance. The longer such conduct persists, the harder it becomes to restore competition and the greater the need may be for relief, including structural remedies. Urgency in markets should translate into urgency in enforcement, particularly during periods of technological transition.

The argument about "self-correction" also obfuscates the problem that antitrust law seeks to correct. If a firm gains a dominant position through better products or lower prices, that is not an antitrust concern. In this situation, entry or the absence of entry are lawful and ordinary market responses. Neither can be said to be addressing a problem requiring correction in the legal sense, as it is not the role of courts to ensure that the marketplace conforms to an economist's model of perfect competition.

Rather, the relevant antitrust question is whether that position is acquired or maintained through collusive or exclusionary conduct. In that setting, the issue to be addressed is the unlawful conduct itself, which is a problem that can only be corrected through law enforcement.[8]

Innovation is often invoked in these debates, but too frequently as a vague, all-purpose defense rather than a concrete economic consideration.[9] The fact that firms can point to breakthroughs they made in one area of their business does not excuse practices that foreclose access to alternatives in another part of their business. Innovation matters, but only insofar as evidence can be put forward that the challenged conduct itself is the driving force behind that innovation.

These challenges identified here remain constant even as the technological environment evolves. Artificial intelligence provides a clear example.

AI has the potential to transform industries—from healthcare and logistics to finance and scientific research. Innovation is occurring at extraordinary speed. At the same time, the development of AI raises familiar competition concerns: new technologies being used to facilitate unlawful agreements, efforts to unduly restrict access to critical data inputs and compute resources, and the leveraging of a dominant position to limit entry opportunities.

There is also an opportunity here for enforcement agencies. Advances in artificial intelligence and data analytics can significantly improve investigative speed and accuracy. Tools that accelerate document review, economic analysis, and market mapping can reduce the time required to build cases. Rather than requiring changes in substantive legal standards, technological advancements can improve the efficiency with which those standards are applied.

Accordingly, the appropriate response is neither heavy-handed regulation nor reflexive deference to scale. It is the

application of established antitrust principles to distinguish between conduct that creates value through competition and conduct that appropriates value by restricting it.

Merger Enforcement in Digital Markets

Mergers play a central role in the modern economy. They can create efficiencies, combine complementary capabilities, and enable firms to bring new products to market. But mergers in some cases present competitive concerns. Transactions that eliminate direct competition or raise barriers to entry can harm consumers and limit the benefits of innovation. These concerns are particularly pronounced in digital markets, where acquisition activity has been both frequent and strategically significant over the past few decades.

One pressing area relates to the treatment of acquisitions by dominant technology platforms of nascent competitors. Rather than deploying acquired new technologies at scale, transactions may operate as a pretext for shelving or foreclosing access to emerging alternatives. Higher post-transaction switching costs or limits on interoperability can further heighten concerns, particularly where market or monopoly power in legacy markets operates to shape the quantity and quality of innovation incentives in emerging ones.

A common rejoinder to stricter scrutiny of such acquisitions is that entrepreneurs need viable exit options, and that acquisition by a large platform is often the intended outcome from the moment a startup is conceived. While these claims should be taken seriously and are scrutinized during the premerger review process, it is not dispositive. Acquisition by a dominant incumbent is not the only exit available to entrepreneurs; IPOs and acquisitions by adjacent firms or non-market leaders can present fewer competitive concerns. Moreover, a permissive approach carries its own distortionary effects on innovation. Where entrepreneurs and investors know that the most likely and lucrative outcome is acquisition by a dominant firm, capital flows toward innovations that appeal to those existing incumbents. The result, in turn, may be fewer paradigm-shifting innovations that tend to promote competition and a greater number of incremental developments that have the tendency to entrench already dominant firms.

Another emerging concern arises in the context of "acqui-hires."[10] In these arrangements, dominant firms acquire key talent from startups without formally acquiring the company. The competitive harm is functionally similar to cases involving nascent acquisitions: a potential rival disappears, its capabilities are folded into an incumbent, and the market may see fewer break-through innovations.

What makes acqui-hires particularly challenging from an enforcement standpoint is their structure; arrangements can be designed to fall below premerger notification thresholds, limiting the opportunity for advance review. That makes it even more important to look past formal transaction labels and assess whether a deal, however packaged, forecloses competition and constrains access to the specialized talent on which dynamic markets depend. It also highlights the importance of providing avenues for third parties to bring these issues to the agency's attention and the confidentiality protections afforded to complainants when they do come forward during investigations.

Another longstanding challenge arises from the cumulative effects of acquisitions over time. Individual transactions may appear modest when viewed in isolation, each one defensible on its own. But antitrust law takes a holistic approach that elevates substance over form.[11] In this regard, it is necessary to analyze acquisitions as part of an overall course of conduct, which may also implicate other contractual arrangements, such as exclusive dealing or non-compete provisions, that the parties have already secured or are better positioned to pursue as a result of the acquisition. These arrangements, in turn, may raise yet additional competitive concerns.

Questions That Arise in the Context of Remedies in Merger Review

Remedies remain an essential part of the merger-enforcement toolkit. They allow the agencies to address legal concerns quickly, efficiently, and effectively while preserving the benefits of lawful transactions. When properly designed and implemented, remedies enable enforcers to resolve competitive issues without resorting to prolonged litigation, ensuring that markets remain competitive and yield benefits for consumers while businesses can still pursue growth opportunities.

This approach stands in contrast to the prior administra-

tion's reflexive skepticism toward remedies. That posture, while often framed as being willing to fight for consumers, ultimately proved counterproductive. By resisting workable solutions, the prior administration prolonged the merger review process and lengthened the timeline for bringing enforcement actions, thereby slowing agencies' ability to respond. In dynamic sectors, where time is of the essence, this kind of rigidity makes it harder to prioritize scarce agency resources and take effective action in policing misconduct that arises in technology markets.

Several of the FTC's recent matters, including Synopsys/Ansys, ACT/Giant Eagle, Valvoline/Greenbrier, and Sevita/BrightSpring, illustrate the continued importance of remedies in practice.[12] In each case, the central question was whether divestitures could fully restore competition in affected markets.

When this standard is met, remedies can serve multiple critical functions. They preserve competition, ensuring that consumers continue to benefit from improvements in price, quality, and innovation. They facilitate efficient enforcement, allowing agencies to resolve concerns without expending unnecessary time and resources. And they provide certainty to the business community by assuring that transactions can proceed where parties work with the agencies in a transparent manner to ensure competition is adequately protected.

At the same time, remedies must work in practice. Where meaningful uncertainty remains about whether competition will be restored, that uncertainty should be resolved in favor of competition and consumers. The antitrust laws reflect a clear congressional preference to avoid underenforcement, and that directive must continue to guide both enforcement and settlement decisions.[13]

The FTC's Dual Competition-Consumer Protection Mandate

The Federal Trade Commission brings unparalleled expertise in addressing issues presented by digital markets, as its law enforcement program spans both competition and consumer protection. This dual mandate reflects an important reality: competitive harm and consumer harm are often closely linked in these settings.

Consumer protection investigations often reveal practices that affect how consumers receive information, evaluate choices, and interact with powerful firms. Competition investigations often focus on market structure, entry barriers, and adverse price, output, and innovation effects. Fundamentally, both sets of laws are concerned with the same constituency: American consumers.

The functioning of markets depends critically on a respect for legal rules that ensure parties transact on a good faith and voluntary basis. When firms violate those rules or engage in abuses of process that target rivals, the conduct does not simply produce suboptimal outcomes: it distorts the process through which such outcomes emerge and undermines the ability of consumers to make free and informed choices. Whether firms act through deception or economically coercive practices, they are unfair methods that are subject to challenge under Section 5 of the FTC Act.

The overlap between these two domains is particularly evident in digital and platform markets, where conduct that excludes rivals often also harms the users and businesses that depend on the platform. Data practices that undermine privacy can raise barriers to entry or distort competition within and across platforms. Deceptive practices may impair users' ability to make informed choices among alternatives, or create a "race to the bottom" in which firms degrade quality, protections, or transparency in order to remain competitive. Conflicts of interest further exacerbate these dynamics, as platforms that operate both as intermediaries and market participants may have the incentive and ability to disfavor rival offerings in ways that upset contractual commitments or settled expectations, thereby distorting competition and disadvantaging rivals and users alike.

The FTC is therefore uniquely positioned to address these overlapping concerns. Cases and investigations that sit at the intersection of competition and consumer protection should be treated as opportunities to deploy complementary tools that protect competition and advance consumer welfare.

Conclusion

Let me conclude with a final observation. Competition policy can be complex and technical. Lawyers argue doctrine. Economists model markets. Agencies and practitioners publish guidance that get debated even further. Academics publish articles that no one reads.

All that work is important. But competition enforcement ultimately serves a broader purpose: it preserves economic conditions that allow markets to function and individuals to innovate in the first place. Maintaining those conditions requires sustained commitment to rigorous law enforcement.

ENDNOTES:

[1]*See Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 49-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

[2]*Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 467, 112 S. Ct. 2072, 119 L. Ed. 2d 265, 1992-1 Trade Cas. (CCH) ¶ 69839 (1992) ("This Court has preferred to resolve antitrust claims on a case-by-case basis.").

[3]*Appalachian Coals v. U.S.*, 288 U.S. 344, 359-60, 53 S. Ct. 471, 77 L. Ed. 825 (1933) (overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628, 1984-2 Trade Cas. (CCH) ¶ 66065 (1984)).

[4]*See, e.g.*, Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* 91 (1st ed. 1993) (1978) ("The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."); Herbert Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, NETWORK L. REV. (Jan. 17, 2020), https://www.networklawreview.org/herbert-hovenkamp-meaning-consumer-welfare/ ("the consumer welfare principle in antitrust should seek out that state of affairs in which output is maximized, consistent with sustainable competition.").

[5]*See* Mark Meador, *Antitrust Policy for the Conservative* 13-18 (FED. TRADE COMM'N May 1, 2025) [hereinafter *Antitrust Policy for the Conservative*], https://www.ftc.gov/system/files/ftc_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf.

[6]Mark Meador, *Antitrust Myth Busting 1* (FED. TRADE COMM'N May 5, 2025) [hereinafter *Antitrust Myth Busting*], https://www.ftc.gov/system/files/ftc_gov/pdf/meador-antitrust-myth-busting-remarks-5.5.25.pdf ("Not only is the enforcement of the antitrust laws not regulation, when properly undertaken antitrust enforcement can prevent the need for regulation in the first place."); *Ohio v. American Express Co.*, 585 U.S. 529, 541, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 2018-1 Trade Cas. (CCH) ¶ 80427 (2018) (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623, 2007-1 Trade Cas. (CCH) ¶ 75753, 35 A.L.R. Fed. 2d 631 (2007)) ("The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' ").

[7]*Antitrust Policy for the Conservative*, supra note 5, at 22 ("[W]hat we mean by 'consumer' is that class of persons whose business is courted by the alleged monopolist, their trading partners. The conduct at issue in an antitrust case should be evaluated through the lens of how it affects their welfare.").

[8]*See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 448, 113 S. Ct. 884, 122 L. Ed. 2d 247, 1993-1 Trade Cas. (CCH) ¶ 70096 (1993) ("[The Sherman Act] directs itself only against conduct that unfairly tends to destroy competition").

[9]*See Antitrust Myth Busting*, supra note 6, at 2-3.

[10]*See* Mark Meador, Keynote Address at the Tech Antitrust Conference 3-4 (FED. TRADE COMM'N Jan. 15, 2026), https://www.ftc.gov/system/files/ftc_gov/pdf/meador-concurrences-keynote.pdf.

[11]*See, e.g., Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2024) ("[T]he correct legal standard" requires the court to "take account of all the conduct holistically and determine its effect on potential competition in the relevant market."); *FTC v. Deere & Co.*, No. 25-cv-50017, 2025 LX 172398, at *17-18 (N.D. Ill. June 9, 2025) ("[T]hough courts may start by assessing how conduct fits within a recognized category, they 'should stay focused on the effect' the conduct has on competition." (emphasis added) (quoting *Viamedia, Inc. v. Comcast Corporation*, 951 F.3d 429, 453, 2020-1 Trade Cas. (CCH) ¶ 81098, 111 Fed. R. Evid. Serv. 811 (7th Cir. 2020))).

[12]Press Release, Fed. Trade Comm'n, FTC to Require Synopsys and Ansys to Divest Assets to Proceed with Merger (May 28, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/05/ftc-require-synopsys-ansys-divest-assets-proceed-merger; Press Release, Fed. Trade Comm'n, FTC Approves Final Consent Order in ACT-Giant Eagle Deal (Nov. 19, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/11/ftc-approves-final-consent-order-act-giant-eagle-deal; Press Release, Fed. Trade Comm'n, FTC Requires Divestiture of Oil Change Shops in Valvoline-Greenbriar Deal (Nov. 14, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/11/ftc-requires-divestiture-oil-change-shops-valvoline-greenbriar-deal; Press Release, Fed. Trade Comm'n, FTC Takes Action to Prevent Anticompetitive Healthcare Services Merger (Jan. 30, 2026), https://www.ftc.gov/news-events/news/press-releases/2026/01/ftc-takes-action-prevent-anticompetitive-healthcare-services-merger.

[13]*Antitrust Policy for the Conservative*, supra note 5, at 25 ("[A] conservative approach to antitrust law that seeks to follow congressional guidance will be more concerned with avoiding Type II errors than Type I errors.").

FROM THE EDITOR

The HSR Merry-Go-Round

A recent court decision that stymied, as of now, the expansion of premerger notification filing requirements under the Hart-Scott-Rodino Act appears to be far from the last word on the matter.

It began in mid-February, when the U.S. District Court for the Eastern District of Texas vacated the FTC's recent rule changes to the HSR Act. These rule changes, which had expanded premerger notification filing requirements under the Act, had taken effect just over a year ago. The Eastern District of Texas court vacated the changes, essentially resetting the M&A market back to where things were in 2024, with filing parties now allowed to use the less comprehensive HSR Rules. Two weeks later, the Fifth Circuit granted the FTC's request for an administrative stay of the lower court's decision. Then, on March 19, the Fifth Circuit denied the FTC's motion for a formal stay pending appeal, allowing the district court's ruling to become effective.

As Skadden, Arps, Slate, Meagher & Flom's Joseph Ciani-Dausch, Ken Schwartz and Rita Sinkfield Belin write in this issue, "the [Texas] court held that the statute requires the FTC to establish that the New Rules' benefits 'reasonably outweigh its costs,' a standard the agency failed to meet. Specifically, it found that the FTC failed to provide sufficient evidence that the New Rules' claimed benefits—detection of additional harmful mergers and savings to agency resources—outweighed the nearly triple increase in compliance costs for the filing parties."

There's strong potential that, if the district court's decision does not get reversed on appeal, the FTC "may push for new rulemaking on a more limited scale rather than abandon the HSR modernization effort and accept reversion to the prior Form entirely," the authors write.

Indeed, on March 25, the FTC and DOJ announced a joint request for public comment regarding the HSR Premerger Notification and Report Form, a sign that the agencies seek to address and amend rules changes to HSR premerger review. As per their request, "the Agencies seek to understand whether the requirements of the Updated Form effectively fulfill their intended purpose, *i.e.*, to enable the Agencies to identify potentially anticompetitive mergers more efficiently and to determine more swiftly whether a Request for Additional Information and Documentary Material would be necessary. The Agencies also want to ensure that the requirements of the Updated Form do not impose burdens on filers that outweigh the usefulness of the information provided to the Agencies."

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