KnowledgeVision | Q & A Session 3- Topics in the Advanced Notice of Proposed Rulemaking

TARA KOSLOV: Good afternoon, everyone, and welcome to our third and final Q&A session for the FTC's Rulemaking Initiative related to Hart-Scott-Rodino Premerger Notification. My name is Tara Kozlov, and I am a deputy director in the FTC's Bureau of Competition. On behalf of the FTC's HSR rulemaking team, I want to welcome you to the last of three question and answer sessions. Our goal is to provide a forum to answer questions in hopes that the Commission will receive a robust set of comments on its proposed changes to the HSR rules.

By way of background, on September 21, the Commission announced that it would seek public comments on proposed changes to the rules and interpretations that implement the HSR Act. That initiative has two parts. The first is a notice of proposed rulemaking that would, if adopted, make two changes to existing rules. And last week sessions covered the proposed rule changes. Today, we will be discussing the topics addressed in the Commission's advanced notice of proposed rulemaking.

Before I introduce our panelists, I will quickly review a few administrative details. First, a video recording of today's session and our later sessions, all three of them, will be available on the FTC's website shortly after each event. Second, as with any virtual event, we may experience technical issues. If these occur, we ask for your patience as we work to address them as quickly as possible. We will also try to keep you informed of any significant delays.

Finally, we will be accepting questions during this event. So please send your questions to hsrrulereview@ftc.gov. Due to time constraints, we may not be able to address all questions. But as we've done with the previous sessions, we will review all the questions that we receive, and whether or not we get to them during the live session, we will make them part of the record for this rulemaking.

So I'm going to start by taking this opportunity to provide a brief overview of the ANPRM rulemaking initiative because it is a different project from the NPRM that we discussed last week. As antitrust practitioners know, the HSR Act gives the antitrust agencies advanced notice for some mergers and requires parties to wait before

consummating their transaction. This file and wait scheme is vital to effective and efficient merger review. Although the agencies can and do investigate non-reportable mergers that harm competition, most of our merger enforcement actions start with an HSR filing.

In many ways, the HSR statute and rules have stood the test of time. Most of the implementing rules were drafted in the late 1970s and have remained unchanged since that time. There have been tweaks to improve things along the way. Congress updated the statute in 2000, and the Commission has updated and modified the rules as needed over the years.

But over those 40-plus years, there have been significant changes not only in the investment community but also in M&A activity. Based on our experience in reviewing HSR filings over those years, it appears that some of the rules may no longer work as intended. In addition, we're aware that there are acquisitions that don't currently require a filing either because of an exemption or because of the way that the deal is structured or for some other reason. And yet we believe that those acquisitions are similar to deals in which we do receive a filing.

The Commission has a program to systematically review its rules and guides every 10 years, and the HSR rules are in the rotation for 2020. As explained in the ANPRM, although the Commission reviews the rules and revises them on a rolling basis, in light of recent evolving market and business practices, it's especially important to evaluate whether the rules are still serving their intended purpose or if they need to be amended, eliminated, or supplemented.

To that end, the ANPRM takes on seven topics to help determine the path for potential future amendments. Today, we will be discussing these seven topics and answering any questions that you might have about them, including a number of questions that were submitted over the last few days.

First, let me introduce our panelists. Once again, first is Kate Walsh, the deputy assistant director of the Bureau's premerger notification office. Kate has been with the FTC for over 13 years and in private practice for many years before that. After 20 years of focusing on HSR, she is a specialist in HSR rules. And our other panelist, again returning, is Ken Libby. Ken is an attorney in the Bureau's compliance division,

and he's been involved in enforcing the HSR rules for over 30 years.

So the first topic that we're going to discuss today is size of transaction. As those of you who are HSR practitioners know, the size of transaction test is key to determining HSR reportability. Unless an exemption applies, any acquisition of voting securities or assets and, in certain cases, non-corporate interests in excess of the size of transaction test must be notified to the antitrust agencies. This threshold is adjusted annually to changes in GNP and is currently set at $94 million. Kate Walsh will provide an overview of the topic, and then we will cover some questions about it. So, Kate, I'll turn it over to you.

KATHRYN WALSH: Thank you, Tara. Good afternoon, everyone. Thanks again for joining us. So to determine whether a filing is triggered, most people rely on an acquisition price, as laid out by the rule 801.10. What we're interested in addressing, as stated in the ANPRM, is the PNO's long-standing informal position that debt and transaction expenses can be deducted from the acquisition price in certain circumstances.

The ANPRM provides two examples of this. In the case of debt, if a buyer pays off a target's debt as part of the transaction, the buyer may deduct the amount of the retired debt from the acquisition price. In the case of transaction expenses where the purchase price in the party's transaction agreement includes funds earmarked to pay off the seller's transaction expenses, that amount may be deducted in calculating an acquisition price.

We know these informal positions can affect the calculation of the acquisition price, sometimes making an otherwise reportable transaction non-reportable. So we've asked a number of questions that will help us understand the decision-making involved when the parties agree to deduct retired debt or categories of expenses from the acquisition price.

At the heart of our questions is the reality that we have very little insight into how filing parties determine acquisition price. This is something that occurs before the PNO receives the filing. So we'd like to understand a number of things related to our acquisition price. First, we'd like to understand why paying off or retiring debt or paying off other expenses might be a part of negotiating a transaction and how the incentives involved may or may not have evolved since the HSR rules were written

in the late 1970s, early 1980s.

We'd also like to understand how parties calculate acquisition price. For instance, does this calculation include all consideration paid for the target? How does debt affect the calculation? How is an acquisition price allocated between voting and non-voting securities? And, again, we're interested in how these approaches have evolved since the early days of HSR. We welcome all comments and encourage robust responses. The more robust the comments are, the more we will be able to think through any potential updates to acquisition price.

TARA KOSLOV: Thanks for that overview, Kate. I'm going to throw you the first question that we received relating to acquisition price. So the question was, the exclusion of debt paid off at closing has been part of the program for over 30 years. Why are you rethinking it now?

KATHRYN WALSH: Great question. We're just not sure it's the right position because parties calculate acquisition price before they file, as I said above. We just don't have a lot of insight into this process. We want to better understand what goes into valuing a deal so we can adjust our approach, if warranted.

TARA KOSLOV: So the other piece that plays into size of transaction reportability is fair market value. And, Kate, I believe you're going to give us a little overview of the topic of fair market value.

KATHRYN WALSH: I'd be happy to. Thank you. And, in fact, this is another area where we need additional insights into what parties do to determine whether they need to file. Sometimes it's not possible to calculate an acquisition price, such as when there's too much fluctuation in stock prices or when it's not possible to calculate the exact amount of contingent future payments. In these cases, filing parties must rely on fair market value to determine whether they need to file. Fair market value is also covered, of course, in 801.01 of the rules.

We've asked a number of questions to get a better understanding of how parties make the fair market value determination. We're interested in what kinds of methodologies parties use and whether those methodologies change in certain contexts. We're also interested in whether the fair market value calculation required by 801.10 differs from the acquiring person's determination of the target's value in

the ordinary course.

We'd like to know what factors play into the calculation and how parties rely on third party fair market value calculations. We'd like to understand the way future or uncertain payments on commercialized assets and liabilities are taken into account when conducting a fair market value. Finally, we'd like to understand whether the approach to fair market value may have changed since the early days of HSR. As I mentioned with acquisition price, we're hopeful-- again, a recurring theme-- that robust comments will help us understand whether we need to address any part of what goes into fair market value.

TARA KOSLOV: Great. So my understanding is we did not yet receive any questions specifically relating to fair market value. But as Kate mentioned, we are happy to receive additional questions in this format today, and we'll add those to the record. And we certainly hope to see robust comments as well on that topic.

So I'm going to move on to our next subject, which is real estate investment trusts. So Kate is going to give an overview on those. And then we will have some questions on that topic.

KATHRYN WALSH: Thank you, Tara. So starting just with a bit of background, Congress created REITs and gave them special tax treatment based on their use as a means of passive investment in real estate. For a long time, the PNO has taken the informal position that when a REIT acquires real property and, of course, assets incidental to the real property, the acquisition is exempt from HSR reporting under Section 7A(c)(1) of the Clayton Act, the statutory ordinary course of business exemption.

This position is based on the presumption that REITs are solely buying, owning, leasing, and selling real property. And therefore, any acquisition of real property is exempt because it's done in the ordinary course of the REIT's business and is unlikely to violate the antitrust laws. Yet it's pretty clear that REITs have evolved.

The Commission is aware of numerous REITs that are engaged in the active operation of businesses. For instance, REITs operate assisted living and other health care businesses as well as companies that own cell towers and billboards. As a result, we believe it's possible that the blanket exemption for REITs under Section 7A(c)(1) may no longer be appropriate.

It's rare for a REIT to file an HSR from. We do see it, but it's unusual. As a result, we really have very little insight into how REITs are structured. We also need to learn more about how REITs have evolved. We would also like to know the impact of having to rely on the real property exemptions, 802.2 and 802.5, instead of being able to rely on the statutory ordinary course of business exemption. So once again, we welcome comments here on REITs and ask that you make your comments as robust as possible so that we can determine whether we need to rethink our approach to REITs.

TARA KOSLOV: So here's a question that we received in the mailbox over the weekend relating to REITs. And the question is, are there examples where the exemption for REITs has resulted in acquisitions that were not filed but were anti-competitive?

KATHRYN WALSH: So I think the point to make in response to that is that if REITs are no longer merely passively holding real estate, the Commission may determine that they should be treated like any other acquirer that seeks to operate the business that it proposed to acquire.

TARA KOSLOV: OK, thanks for that clarification. OK, we're going to move on to our next topic, which is non-corporate entities. So the rise of limited partnerships and limited liability companies, which we collectively refer to as non-corporate entities, has presented challenges for the Commission. And Kate's going to give an overview of that issue, and then we'll have some questions.

KATHRYN WALSH: Thank you. So of course, the statute applies to voting securities and assets, and the PNO has long taken the position that interest in unincorporated entities are neither voting securities nor assets. So for many years, only the acquisition of 100% of a non-corporate entity was reportable as the acquisition of 100% of the underlying assets of the non-corporate entity.

At first, this approach didn't raise significant issues. When non-corporate entities were first used in transactions, they were typically created to be acquisition vehicles and were used to effectuate transactions. At that time, non-corporate entities did not separately hold operating companies. But the role of non-corporate entities began to evolve.

As they evolved, non-corporate entities began to acquire interests in other corporate and non-corporate entities. The Commission addressed this evolution in 2005 when it changed the HSR rules so that the acquisition of control, or 50% or more of the non-corporate interests in a non-corporate entity, is reportable.

But non-corporate entities have continued to evolve even since 2005. Now the acquisition of non-corporate interests are often captured in securities purchase agreements, and this implies that non-corporate interests are deemed to be more like voting securities.

We would like to understand whether and how non-corporate entities and non-corporate interests have evolved since 2005. It would help us to know whether non-corporate entities have become more like corporate entities and whether non-corporate interests have become more like voting securities. We are also interested in whether the benefits and drawbacks to becoming a non-corporate entity have evolved since 2005 and whether anything has changed any applicable incentives since that time.

TARA KOSLOV: Thanks, Kate. So we did receive a few questions on non-corporate entities. Here's the first one that we received. Since HSR is limited to the acquisition of voting securities, what is the basis for looking at non-corporate interests?

KATHRYN WALSH: Sure. So we've observed over time that non-corporate interests are more often treated in the same manner as voting securities. It's just that simple. That's a trend we're seeing. We want to know if there are still important distinctions that would justify treating non-corporate interests differently than voting securities and gain better insight into both non-corporate interests and non-corporate entities to understand if we need to change our approach.

TARA KOSLOV: So here's another question we received relating to non-corporate entities. Since non-corporate entities don't have boards of directors, in what way can non-corporate interests be considered the same as voting securities within the HSR rules?

KATHRYN WALSH: Great question. That's exactly what we're looking to understand. Are there important distinctions that justify different treatment? That's at the heart of what we're interested in.

TARA KOSLOV: And then we were asked, are you considering changing the definition of voting securities to deal with the fact that non-corporate entities don't have boards of directors?

KATHRYN WALSH: So we are considering whatever changes make sense in terms of the way non-corporate entities function, and we would love input. Thank you. More comments, please.

TARA KOSLOV: Our enduring theme. More comments. Lots of comments. All the comments. OK, we're going to move on to our fourth topic, which covers a range of issues that involve the acquisition of small amounts of voting securities. So over the decades since the implementation of the HSR program, there's been a significant expansion of the holdings of investment entities, including investment funds and institutional investors.

For instance, index funds barely existed when the HSR rules were drafted back in the late 1970s. And there's also been expanded interest and ability of shareholders to participate in corporate governance since that time. In addition, changes in investment behavior have resulted in some investment entities holding small stakes in a large number of firms, including competitors. This has caused some to raise concerns about the competitive effects of common ownership, that is, a single investor holding small minority positions in issuers that operate competing lines of business.

In light of these developments, the Commission wants to take a fresh look at the rules that apply to acquisitions of voting securities by investment entities to determine whether updates may be necessary. Kate's going to give us an overview of the specific issues, and then we'll go back to some questions.

KATHRYN WALSH: Thanks, Tara. Appreciate the preview. The first aspect of the HSR rules that I want to discuss as part of this piece of the ANPRM is the treatment of passive investors and investments. The concept of acquisitions of stock made solely for the purpose of investment is in the HSR statute and further defined by the rules. We often use the shorthand of 802.9 to refer to this concept.

802.9 exempts acquisition of 10% or less of an issuer's voting securities if made

solely for the purpose of investment. But 801.1 contains the definition of solely for the purpose of investment. Can't forget that. And given changing investor engagement with issuers, the Commission would like to know whether it needs to update either the definition in 801.1 or the exemption contained in 802.9 for these types of acquisitions.

To that end, we've asked questions about an investor's intention to participate in the basic business decisions of the issuer. We've also asked about the differing activities of investors, as well as how to distinguish between the activities of investment firms and those of operating companies. We're interested in learning more about how our approach differs from that of the SEC and whether specific investor conduct should play into the use of the exemption. We welcome your comments on the definition of solely for the purpose of investment in 801.1 and, of course, on the exemption itself, 802.9.

TARA KOSLOV: So we did receive a number of questions relating to the solely for the purpose of investment aspect. So the first was, why does the FTC interpret the solely for the purpose of investment exemption so narrowly?

KATHRYN WALSH: So the general rule is that exemptions from the antitrust laws are construed narrowly. So interpreting this exemption narrowly is consistent with that position. This has been the position of the antitrust agencies for nearly three decades and has been enforced in a number of cases brought by both the FTC and the DOJ.

I just want to note in addition that the agencies take a holistic view of investment intent, and a determination that an investment is made solely for the purpose of investment may not turn on any particular conduct. Clear evidence of a non-passive intent, even if not accompanied by conduct to that end, can make the exemption unavailable. Similarly, no particular conduct is likely dispositive. And we will assess a variety of factors to determine if an investor has properly invoked the investment only exemption.

TARA KOSLOV: So here's a follow-up question about the exemption. Have you considered allowing people to rely on the exemption regardless of intent, except if they are a horizontal competitor of the issuer?

KATHRYN So Congress established the exemption in the HSR Act. And as written, it depends

WALSH: on the intent of the acquirer. So we need to interpret the exemption consistent with that congressional intent.

TARA KOSLOV: And here's a question about an alternative, a potential alternative approach. So the question reads, given that the agencies have never challenged a standalone acquisition of 10% or less of the issuer by an active investor, why not create a blanket 10% exemption regardless of investment intent?

KATHRYN WALSH: We don't want to exempt acquisitions that might have anti-competitive implications. In that regard, of course, proposed 802.15 would create such an exemption except when an acquirer has a competitively significant relationship with the issuer.

TARA KOSLOV: So, Kate, I believe you're now going to talk to us a little bit about the definition of institutional investors.

KATHRYN WALSH: Yes. And fear not. Ken will get his turn to talk here shortly. [LAUGHS] Yes, so turning to the part of the ANPRM that focuses on institutional investors, we're looking at 802.64 here. And under 802.64, institutional investors are exempt from HSR reporting when making acquisitions of 15% or less of the voting securities of an issuer in the ordinary course of business and solely for the purpose of investment.

In the initial HSR rulemaking in 1978, entities were identified as institutional investors because they were viewed as constrained by law like non-profits or fiduciary duty like pension trusts, insurance companies, entities like that, or generally uninterested in affecting management of the companies whose stock they buy like a broker dealer. As a result of this definition, a wide range of investment firms are generally exempt from filing HSR forms for their purchase of voting securities.

The reality is that this definition hasn't been updated since 1978, and we think it might be time to look closely at the entities on our list. The questions we've asked are designed to determine whether these entities remain uninterested in affecting the management of the companies whose stock they buy. In addition, we've asked for input on the SEC's approach and for more information generally about the activities of institutional investors.

TARA KOSLOV: So here are some questions that we received about the definition of institutional investors. So the first question is, in light of the aggregation proposal, is there any thought to increasing the 802.64 exemption above 15%? With aggregation, a lot of entities may already be above 10%, which would create problems if they need to file and observe the waiting period.

KATHRYN WALSH: We will be happy to consider every proposed approach that we receive in the comments. So if this is something you'd like for us to consider, anyone would like for us to consider, please provide us with comments to that effect.

TARA KOSLOV: So here's the next question on that topic. If the proposed aggregation rules in the NPRM are adopted, questions in the ANPRM regarding the investment only and institutional investor exemptions become even more critical. If the FTC intends to make any changes to the HSR rules following the comments received to the ANPRM, will the timeline for finalizing rules or guidance that will result from the ANPRM align with the timeline for finalizing the proposed rules in the NPRM? And I should note we've all gotten really good at these acronyms because we've been living with this for months. But it's a little confusing-- NPRM, ANPRM. So, Kate, enlighten us, please.

KATHRYN WALSH: Well, I'll just note that it's a great question, and we're aware that the changes proposed in the NPRM may impact the issues raised by the ANPRM. Of course, it's our first goal to minimize the disruption that may occur from finalizing rule changes at different times, and we intend to keep that in mind.

TARA KOSLOV: So here's a question about the absence of comments. If the FTC does not receive comments on a particular exemption or interpretation, is the FTC more likely to eliminate the exemption or the interpretation?

KATHRYN WALSH: We're really looking at the topics in the ANPRM as an opportunity to gain additional information on the listed topics. If no comments are received on a given topic, we'll consult with the Commission to determine the best path forward. Any proposed changes to the rules would still, of course, be subject to another public comment before they're enacted.

TARA KOSLOV: All right. So always another bite at the apple. Here's another question. Both the ANPRM and the NPRM acknowledge that discussions regarding any potential competitive impact of common ownership remain ongoing. Has the FTC considered

waiting until there has been further analysis of common ownership before implementing rule changes aimed to address common ownership? In considering the potential benefits and burdens of any rule changes, should the common ownership analysis be allowed to develop further before investors that have been relying on the investment only and institutional investor exemptions are potentially forced to submit an extensive number of additional filings?

KATHRYN WALSH: So as discussed in the NPRM and at our session last week on proposed rule 802.15, the Commission does not intend to take a position on the common ownership concerns but believes that the proposed rule could be finalized prior to the resolution of that debate. That is, at this time, there may not be a basis on which to determine that there is little or no antitrust risk associated with common ownership. And until there is such a basis, these acquisitions should be treated like any other. Of course, there is still an exemption available for acquisitions made solely for the purpose of investment, and proposed 802.15 contemplates another exemption for the acquisition of small amounts of voting securities.

The questions in the ANPRM similarly look to find proposals that could be enacted without regard to the common ownership analysis. Should future developments or research indicate that additional changes are appropriate, as always, we would consider them at that time.

TARA KOSLOV: All right, let's see. Here's our next question. Investors are allowed to file SEC form 13D and 13G after the acquisitions have closed, which permits efficient securities markets. Given that minority acquisitions do not involve integration of assets and there is no need to unscramble the eggs in consummated transactions, is the FTC considering whether non-suspensory filings would be appropriate for acquisitions of small minority interests?

KATHRYN WALSH: Well, in enacting HSR, Congress made the determination that the filing should be made and a waiting period observed before the acquisition occurs, even with regard to small minority interests where no exemption applies. Even though the acquisition of stock may not involve a scrambling of assets, it does give the holder rights as a shareholder to certain information as well as voting power, which may, of course, have competitive implications.

Although the antitrust agencies have not challenged the standalone acquisition of stakes below 10%, it has challenged the acquisition of partial interests short of control over concerns that it gave the investor the ability to influence decision-making or access to competitively relevant information.

TARA KOSLOV: All right, we are going to turn to our fifth topic. And guess what, everybody? We get Ken now. All right, so our fifth topic relates to that point that Kate just raised actually, the ability to influence the decision-making at the issuer through some means other than voting. So we're going to talk about influence outside of the scope of voting securities.

So starting with first principles, the HSR Act, by its terms, applies to acquisitions of assets and voting securities. The rules currently exempt acquisitions of convertible voting securities. A filing is not required until those shares are converted to voting securities. Yet the Commission is aware that there are ways to gain influence over a company without having the present right to vote for the election of directors. In light of this, the Commission wants to take a fresh look at these issues. So I'm going to turn to Ken, who will give an overview of some of these specific issues. And then we'll turn to some additional questions. Take it away, Ken.

KENNETH LIBBY: Thank you, and good afternoon, everyone. So with regard to convertible voting securities, the PNO has long taken the view that the acquisition of convertible voting securities can be reportable if, at the same time, the acquirer gets the right to appoint board members in proportion to the acquirer's holdings in the issuer.

But that might miss some circumstances in which a proportional share of board members can wield significant influence in the operation of the business. For example, if the issuer has a 10-person board, an acquirer will obtain the right to designate one board member at the same time it acquires convertible voting securities that, upon conversion, would represent 10% of the total voting securities of the issuer. PNO's position has been that that is nonetheless reportable.

TARA KOSLOV: So, Ken, how is obtaining a right to appoint board members the equivalent of acquiring voting securities?

KENNETH LIBBY: Well, one of the main functions of a shareholder vote is to elect members of the board of directors. So having the right to appoint a director is doing directly what

the voting rights do indirectly.

TARA KOSLOV: So here's a question we received. The ANPRM asks questions about cumulative voting. Why is cumulative voting relevant to our consideration?

KENNETH LIBBY: In order to answer that, I want to take a minute to explain how cumulative voting works. Let's say for simplicity's sake that the issuer has 100 shares outstanding, and the acquirer owns 10 shares, representing a 10% stake. Also assume that the board has 10 members.

Now under straight voting, the acquirer can cast 10 votes for 10 different candidates. However, under cumulative voting, the acquirer can cast 100 votes divided up over as many or as few candidates as it chooses. So it can cast 100 votes for a single candidate. This would guarantee that its candidate would win because there would be 900 other votes cast, and there could not be 10 other candidates with more than 100 votes.

So if the acquirer has the right to appoint one member to the board, this would be the same as its voting rights. But of more significance is what happens when there is not cumulative voting. Let's assume that the issuer still has 100 shares outstanding and 10 members on its board. Well, now let's change it so that the acquirer has 15 shares, representing 15% of the outstanding shares.

Under straight voting, it can cast 15 votes for each of 10 candidates. But that is not enough to guarantee that any of its candidates will win. If the acquirer had the contractual right to appoint one member to the board, this would give it more clout than its voting power would, even though it is appointing a lower percentage of the board than represented by its holdings.

TARA KOSLOV: And, Ken, I believe you were going to turn to a related topic about board observers.

KENNETH LIBBY: Yes, that's right. So there have been circumstances that instead of getting the right to appoint a board member, an acquirer might obtain the right to designate a representative to be observer at the board meetings. Although not having the right to vote on issues raised at the board meeting, the observer gains information about the issuer and may have the ability to raise questions and interact with the board members or otherwise influence the actions of the issuer even without the right to

appoint a board member.

TARA KOSLOV: That leads to a very good and perhaps obvious question. Have there been competitive concerns raised by board observers?

KENNETH LIBBY: Well, the Commission would like to better understand the role of board observers since their role is not public, even though they are present during board meetings. I note that the Commission's complained in Altria/JUUL matter discussed Altria's rights to appoint one of its executives to a non-voting observer position on JUUL's board at a time when the Commission alleges the companies were direct competitors. There may be benefits to having board observer rights, and the Commission would like to better understand those benefits, as well as any risks these relationships might pose to competition.

TARA KOSLOV: Ken, here's another question we received on this point or related point. Why is a right to have a board observer together with convertible voting securities considered the equivalent of presently having voting rights?

KENNETH LIBBY: Well, one concern might be that board observer rights can be used to influence the issuer in ways that mere voting of the shares could not. And when coupled with the ownership of convertible voting shares, board observer rights could give the issuer at least as much power-- excuse me-- could give the acquirer at least as much power over the issuer before conversion, as would be the case after the conversion. But this is something we really need more information on and would welcome robust comments on.

TARA KOSLOV: We will certainly be on the lookout for those. Let's see. We have not received any new questions on that topic. So I'm going to turn to topic six, which is devices used for the purpose of avoiding filing HSR premerger notification. So under rule 801.90, the Commission must disregard the structure of transactions or devices used by parties for the purpose of avoiding the HSR Act requirements and review the substance of the transaction to determine whether an HSR filing is required. The Commission has concerns about this in connection with extraordinary dividends declared by an issuer. Ken, can you explain our specific concerns about this?

KENNETH LIBBY: Yes. So when an extraordinary dividend is declared by the issuer shortly before the acquisition is consummated, it can reduce the amount of assets on the balance

sheet of the issuer. In some cases, this can cause the issuer to fall below the size of person test. And as a result, the acquisition is no longer subject to the reporting and waiting period requirements. Accordingly, we've asked a number of questions about when and how these dividends are issued and the reasons behind issuing them.

TARA KOSLOV: So we received a question about special dividends that relates to our recent blog post on this topic. So the question reads, recently the Bureau of Competition published a blog post withdrawing its informal advice that special dividends can never raise 801.90 concerns. Given that, is this issue still relevant?

KENNETH LIBBY: Yes, it's still relevant because the Commission still wants to better understand when and why special dividends are issued to determine whether adjustments to the rule are necessary to prevent evasion through the use of special dividends. Also, the Commission is very interested in understanding any non-avoidance reasons for declaring a special or extraordinary dividend.

And I'd just like to note that the blog post merely said that we are no longer of the view that a special dividend can never raise 801.90 concerns. That doesn't mean that there are 801.90 concerns in every instance or that any time that a special dividend is declared, that there is a violation of HSR. We need more information on this and are looking for more information to try and understand when it would be an issue and when it would not be.

TARA KOSLOV: That's an important clarification of what our blog post says and does not say. All right, we have no additional questions on that topic. So I'm going to move on to our seventh set of issues. So this is a variety of related filing issues that are covered by the ANPRM, including questions about the length that the filing is effective and what prior acquisitions have to be included in the filing. So Ken is going to give us an overview of each of those issues.

KENNETH LIBBY: Sure. With regard to the length the filing is effective, as many of you know, 802.21 exempts additional acquisitions in an issuer that do not exceed the next threshold for five years after the expiration of the waiting period. Since this exemption only relates to minority interests in the issuer, the Commission is concerned that changes in the markets or the business of the issuer and the acquirer may cause changes to the competitive analysis of the acquisition during that time period.

Accordingly, , the Commission is wondering whether the five-year period for the exemption should be shortened.

TARA KOSLOV: So here's a question we received on that point. Are there examples where the five-year period led to a competitive problem as a result of changes in the business of either the acquirer or the issuer?

KENNETH LIBBY: Well, we're not aware of any specific examples, but it is certainly a possibility. And because any change would only be effective on a going forward basis, we would be interested in hearing from people about this.

TARA KOSLOV: Another question on this point. If the five-year period were altered, is there any thought to lengthening it instead of shortening it?

KENNETH LIBBY: Given the possibility that changes to the business of the companies could create new competitive concerns, we don't think it's likely that the Commission would decide to lengthen it but would welcome comments as to why that might be appropriate.

TARA KOSLOV: And then, Ken, I believe you're going to also give us a little overview of the item eight issue.

KENNETH LIBBY: Yes. So item eight of the form, as many of you all are aware, requires listing acquisitions that were made by the acquirer in the prior five years that report income in the same NAICS code as the acquire person. However, as we all know, NAICS codes are imperfect, and companies can compete even though they do not report in the same NAICS code.

As a result, we're considering changing item eight to require reporting all acquisitions in the prior five years without regard to NAICS code overlaps. We realize this might be burdensome and welcome suggestions that might give the agencies the information they need in a different way.

TARA KOSLOV: So here's a follow-up question that we had gotten about the item eight issues. What is the basis for the concern that item eight is too narrow?

KENNETH LIBBY: Well, we often see filing parties disclose that they compete with each other even though they do not report in the same NAICS code. However, there is no

requirement that the parties disclose this information when there's no overlap in the NAICS codes, and some parties do not disclose anything in these circumstances. Accordingly, we may not be aware of prior acquisitions that compete with the acquire person, which could affect our analysis of the transaction.

TARA KOSLOV: And, Ken, are there examples where the lack of information on prior acquisitions led to missing a competitive concern?

KENNETH LIBBY: Well, we can't disclose information about specific filings. But some commissioners have expressed a continuing interest in toehold or serial acquisitions in the same sector of the economy. And obtaining more complete information in item eight may enable the agencies to see patterns that otherwise would not be apparent to them.

TARA KOSLOV: So another example where we would really benefit from your comments and your feedback on this point. So it looks like we have reached the end of the questions that we've received. Kate, let me just turn it back to you for a second to review where we are procedurally in terms of the start of the comment period and what people should do to keep an eye out on that.

KATHRYN WALSH: Sure. Well, as I believe I mentioned in one of our discussions last week, when drafts are finalized and forwarded to the Office of the Federal Register, there's a very robust dialogue that goes on back and forth to make sure everything is clear. And then after that, the Office of the Federal Register finalizes and puts things out. We are very close to the point where we are finished with the dialogue with the Office of Federal Register. So we're very hopeful that the comments will be published within the next couple of weeks.

TARA KOSLOV: And then remind us how long is the public comment period once it's published.

KATHRYN WALSH: Yes, thank you. Good point. When they are finally in the Federal Register, it will be a 60-day comment period.

TARA KOSLOV: OK, so we encourage everybody to keep an eye out. And as soon as that public comment period gets running, then we will be able to calculate, and we'll know exactly what the due date is for all of these comments.

KATHRYN WALSH: Yes, and we'll make that very clear on premergers' website. It will be very obvious when you log on when those comments are going to be due.

TARA KOSLOV: Great. I think that is-- I'm just confirming we have not had any additional questions. So I think we'll be wrapping up. I'd really like to thank Kate and Ken for all of their hard work preparing and responding to all of these questions. We'd be also interested in hearing feedback from all of you out there what you thought about this format and if this was useful to you. Obviously, during these challenging times, we're experimenting with delivering content to all of you in as many ways as possible. And so we hope that you've enjoyed this. It's been fun for us as well. And we'd love to hear your feedback on that.

Again, we encourage you all to submit your very thoughtful comments. We know we have a dedicated HSR bar out there who really love getting in the weeds on all of these issues. And we are relying on all of you to pick apart everything we're doing here and contribute your expertise to ours so that we can make sure we get to the right answers here. On behalf of my colleagues, thanks for joining us today, and we will look forward to your comments. Thank you.