Comments for the Record

Comments for the Record: Premerger Notification; Reporting and Waiting Period Requirements

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I. Introduction and Summary

The Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), among other duties, enforce the nation's antitrust laws. Section 7 of the Clayton Act prohibits mergers whose effect may be substantially to lessen competition or tend to create a monopoly.[3] Blocking such mergers protects consumers from increased prices, reduced output, and hampered innovation.

Because of the difficulty of unraveling consummated mergers,[4] Congress passed in 1976 the Hart-Scott-Rodino Antitrust Improvements Act (HSR). HSR established a premerger notification program and mandatory waiting period before certain mergers could be consummated.[5] The law requires firms involved in deals valued at more than $111.4 million (current threshold) to complete the *Notification and Report Form for Certain Mergers and Acquisitions* (HSR Form) and submit it to the FTC and DOJ.[6] The form requires the submission of information pertaining to the merger or acquisition and is used by the agencies to make an initial determination of whether the proposed transaction violates antitrust law. The HSR mandatory waiting period, typically 30 days, affords the agencies time to review the collected information.

The FTC, in concurrence with the DOJ, published a notice of proposed rulemaking (NPRM) to amend the rules governing HSR.[7] If adopted, it would be the first overhaul of the rules in 45 years.[8] As proposed, the rules would dramatically increase the regulatory burden on firms intending to engage in mergers and acquisitions by significantly broadening the information required to be submitted. This would substantially increase the cost and preparation time needed to comply with the requirements of the new HSR Form. Furthermore, this increased burden will have the effect of depressing overall merger activity despite the fact that the overwhelming share of transactions pose no threat to competition.

The most significant proposed changes, the legality of the rule, and the cost of implementing these changes are addressed below.

II. The Proposed Changes Will Add Significant Costs to Businesses

The HSR Act requires parties to submit the HSR Form to the agencies when the proposed transaction exceeds $111.4 million. This process already casts a wide net, yet most mergers raise few antitrust concerns. Only 1 percent of HSR filings result in a challenge by the FTC or DOJ. [9] Given the low likelihood that a proposed merger will raise antitrust concerns, the premerger notification program must best balance the information necessary to identify potentially illegal mergers without imposing an undue burden of compliance on firms. Even by the FTC's own estimates, the proposed changes fail this balancing act and, consequently, will likely

chill merger activity.

In the NPRM, the FTC provides a detailed cost estimate. The agency projects that the proposed changes will require 107 additional hours of labor to complete the preparation of documents. The agency expects 7,096 filings will be affected in fiscal year 2023.[10] This equates to 759,272 additional hours required to complete the HSR Form. Using the FTC's assumed hourly wage of $460 for executive and attorney compensation, firms seeking to merge will need to spend an additional $350 million in labor costs.[11]

The FTC estimates a quadrupling of the time required to prepare the information under the proposed amendments. Such an increase will undoubtedly cause delays in merger transactions and introduce additional risk to the merging parties. Mergers are already subject to risks associated with changes in valuation, new market opportunities, new buyers, or deal abandonment. This increased regulatory burden, coupled with the draft Merger Guidelines proposed by the agencies in July 2023, introduces an increased likelihood of litigation. Heightened litigation risk will likely be associated with larger termination fees, a fee paid to compensate the purchaser for costs associated with the deal if abandoned, and commitments by the acquired firm to litigate if the merger is challenged. Termination fees typically ranges from 1–3 percent of the deal's value.[12] An abandoned deal valued at $1 billion could have an associated termination fee of $30 million.[13]

The expanded scope of the proposed HSR Form fails to consider changes to internal practices businesses must make to gather and maintain the records required under the NPRM. Introducing workplace safety violations and labor overlaps as part of the HSR screening process is one such example.[14] Companies may not have a current process for gathering and maintaining such records for the purpose of merger investigations. Furthermore, the NPRM calls for expanding the time frame subject to the initial screening process.[15] Both examples add to the cost of labor and record retention in addition to the FTC's estimate. Moreover, antitrust attorneys have used the current HSR framework for decades. Simply understanding the new rules and requirements is another cost that is omitted from the FTC's estimate. Taken together, the proposed changes would add hundreds of millions of dollars in additional labor costs, delay merger deals, and likely chill merger activity.

All these direct costs on the firms have indirect costs on the economy. When firms merge and pose no risk to competition, they often create economies of scale that enable lower prices, better quality, increased supply, and more choice. In turn, rival firms must respond, and the process of competition continues. While there are mergers likely to substantially lessen competition and warrant enforcement, adopting rules such as those proposed in the NPRM threatens the proposal and consummation of procompetitive mergers, and therefore limit the benefits of competitive markets.

III. The Proposed Changes Will Provide Minimal, If Any, Benefits To Identifying Transactions That Would Violate the Antitrust Laws If Consummated

To justify these costs, the proposed rule changes must provide significant benefits to the agencies' ability to identify and block transactions that harm competition. Unfortunately, these changes lack meaningful benefits that would allow the FTC and DOJ to identify additional transactions that violate antitrust laws that current rules would miss.

a. Most Transactions Do Not Raise Antitrust Scrutiny

First and foremost, HSR filings are simply a first step in transaction review, and the enforcement agencies can request additional information from problematic transactions.[16] The HSR review process balances the

additional costs of businesses by only requiring basic information into the transaction as this information can allow the agency to identify those transactions that may require additional scrutiny.

Most transactions that require HSR filings raise no such scrutiny, however, and adding further costs to these transactions provides no meaningful benefits. Over the past 10 years, less than 3 percent of transactions warranted a Second Request from the agencies for additional information outside of that currently provided under the HSR filing rules.[17] In fact, from FY 2012–FY 2020, of the 15,940 transactions reported, the agencies granted 9,265 early terminations, meaning the transactions raised few if any concerns and could be completed prior to the end of the 30-day waiting period.[18]

Yet the Biden Administration's current approach has been to add unnecessary delays. While previous enforcement under both a Democratic and Republican FTC saw almost 80 percent of requests for early termination granted, the Biden Administration suspended this process and in FY2021 less than 20 percent of these requests were granted.[19] The agencies have not changed whether the transactions raise additional concerns, but instead see this process as a means of limiting merger activity generally and are using it as such.

While it is one thing for the agency to more closely scrutinize mergers, it cannot arbitrarily rewrite rules without a reasonable basis for that change. The Hart-Scott-Rodino Antitrust Improvements Act requires that rules passed by the FTC may only require information "necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such an acquisition may, if consummated, **violate the antitrust laws** (emphasis added)."[20] As the Supreme Court has explained, the purpose of the antitrust laws is to "protect competition, not competitors," and increasing concentration alone does not invalidate a transaction without a further consideration of the market and the competitive effects.[21] The historical data above suggest that most transactions do not require further examination by the agencies because they raise few, if any, competitive concerns. Consequently, the FTC should abandon its attempt to use this proceeding to broadly chill mergers across the economy.

b. The Proposed Changes Are Unnecessary To Stop Violations of the Antitrust Laws

The Act requires information provided in the HSR filing be "necessary and appropriate" to determine if an acquisition if consummated would violate the antitrust law.[22] This section explains that for many of the proposed rule changes, the new requirements are neither necessary nor appropriate for such a goal, and as such should not be implemented.

i. Labor Markets Information

The proposed rule changes require labor information about the merging firms and the markets in which the firms participate.[23] While cases of labor restrictions give rise to antitrust liability do exist, there is little justification for requesting such information at the initial filing stage. If in reviewing the initial filings the FTC has concerns about labor market practices that could give rise to antitrust concerns, the agency can request such information. Making every merging firm provide such information is unnecessary, however, and could add significant costs to the transaction.[24] HSR filing requirements should allow the agencies to identify transactions that may raise competitive concerns as established by current law, and labor market information does not have significant relevance for such analysis and should not be included in the final rules.

ii. Requiring Draft Agreements or Term Sheets

Current rules provide that letters of intent or term sheets are acceptable as long as the provided documents reflect sufficient detail about the deal and confirm the transaction is more than hypothetical.[25] Again, at the initial filing stage, the agencies need information to determine if a merger merits further scrutiny, and more complete terms can be acquired later in the process. Requiring full draft agreements and term sheets inherently means the transaction will take additional time to begin review, and therefore longer to close. As time is often of the essence in mergers, requiring more substantial documents at the outset for all mergers that meet the threshold will cause a significant chill on mergers that may benefit consumers and competition more broadly, not just those that substantially limit competition.[26]

Further, the agencies' primary justification for this proposed change is that the merging parties have often not yet conducted a robust analysis of the transaction. But again, the point of the HSR filings is not to be an exhaustive examination of every transaction, but rather to identify those transactions that could substantially lessen competition.[27] Documents such as letters of intent and preliminary agreements give the agencies enough information to identify those transactions that require further scrutiny, and thus a full list of terms or a final agreement can be provided in those cases that raise antitrust concerns. Requiring such information at the outset is neither necessary nor appropriate considering the delays waiting for a final agreement would cause.

iii. Transaction-related Documents

The NPRM proposes to expand the collection of transaction-related documents to include all draft versions of transaction documents and ordinary course documents such as Board documents and strategic plans.[28] The FTC and DOJ can currently request these documents, but only in connection with reviews of transactions that raise competition concerns.[29] By requiring these documents at the outset, the FTC would place a large burden on all firms and transactions as firms must now engage in careful consideration of potential antitrust implications in the creation and tracking of potentially responsive materials.[30] Further, many early drafts and early documents contain "preliminary and inaccurate information that may distort the agencies' view of important facts related to their competitive assessment."[31] With such a significant burden and a lack of benefits to antitrust enforcement, the FTC should not adopt these changes.

iv. Transaction Rationale (Narrative Response)

The agencies should carefully scrutinize the transaction rationale when evaluating whether a merger could substantially lessen competition or otherwise violate the antitrust law. The agencies have traditionally allowed firms to defend transactions by citing efficiencies and procompetitive justifications stemming from the transaction.[32] When firms create efficiencies or integrate products that improve their services, consumers benefit and rivals must likewise explore new avenues to remain competitive.

That said, the transaction rationale is unnecessary at the initial filing stage unless the merging firms wish to provide such information. The procompetitive justifications of a merger are largely a defense to a showing that given conduct is anticompetitive, and plaintiffs must first show the conduct is anticompetitive. Here, the information *required* by the agencies should focus on first establishing a prima facie case that the transaction would substantially lessen competition. If the information supports such a finding, the merging firms may provide such information if further requests for information or may voluntarily provide such information in specific cases to alleviate agency concerns. If the information is not necessary to show a merger would violate the law, the agencies should not place the undue burden on firms to provide this information at the outset.

v. Prior Acquisitions

The FTC proposes firms provide information about prior acquisitions, extending the previous five-year window to 10 years prior to the transaction.[33] If a firm has assets that would likely lead to monopoly power upon consummating the merger, regulators should carefully scrutinize the deal. Yet at the initial stage in determining whether a transaction would violate the antitrust laws, the agencies should primarily examine the competitive effects rather than how it acquired those assets. If the agencies are concerned about issues such as roll-ups in a given transaction, they can request additional information about previous transactions over a wider timeframe. [34]

c. The Proposed Changes Will Stifle All Mergers, Even Those That Promote Consumer Welfare

Even if the proposed changes would provide benefits for identifying transactions that violate the antitrust laws, the changes would also have the effect of deterring all merger activity in the United States, not just those that are anticompetitive. By adding costs, delays, and uncertainty to the merger approval process, firms will gain less value from entering into merger agreements. While the Biden Administration may view mergers as problematic, stifling all activity in the market will ultimately harm consumers.

First, mergers create efficiencies that can lead to lower prices and better-quality products. A search engine, for example, could acquire a popular online review service and build reviews into their search results. A cable broadband provider could acquire a mobile broadband network, offering consumers ubiquitous connectivity at a lower rate than what rivals could offer. Even fully horizontal mergers can provide significant efficiencies, such as T-Mobile and Sprint combining spectrum assets to better compete with industry leaders AT&T and Verizon. [35]

Second, stifling merger activity will likely limit the development of new firms that can act as mavericks for current incumbents. Many startups plan for eventual acquisition, and this strategy drives investment that allows the firm to grow. Without a future offramp, new competitors that constrain monopolistic behavior would never form. The proposed changes necessarily limit the value proposition for this early-stage investment because firms that have success will know that future acquisition comes with additional risk.

The agencies should consider carefully how each proposed rule change would benefit the mission of blocking illegal mergers, and not simply attempt to stifle all merger activity.

IV. The Proposed Changes Violate the Paperwork Reduction Act

Under the Office of Management and Budget, the Office of Information and Regulatory Affairs enforces the Paperwork Reduction Act (PRA). The PRA requires agencies to “minimize the paperwork burden…resulting from the collection of information by or for the Federal Government.” Any paperwork requirement should “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.” [36]

The NPRM fails these and other stated purposes of the Paperwork Reduction Act. As discussed throughout these comments, the glut of unnecessary information sought by the agencies will yield little marginal benefit in exchange for the quadrupling of time necessary to prepare documents and associated costs.

V. Conclusion

The proposed rules governing the Hart-Scott-Rodino Act will create an undue obligation designed to stifle merger activity. The NPRM fails to strike the correct balance between obtaining the necessary information at the initial stages of a merger investigation with the financial and time burden imposed on businesses seeking to engage in merger activity.

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[3] 15 U.S.C. § 18

[4] Statement of Chair Lina M. Khan et al. Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300, Federal Trade Commission (June 27, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commrs_slaughter_and_bedoya_on_ _final_130p_1.pdf.

[5] 15 U.S.C. § 18a

[6] *Premerger Notification; Reporting and Waiting Period Requirements*, RIN 3084-AB46, Notice of Proposed Rulemaking, 88 Fed. Reg. 42178, 42208 (June 29, 2023) ("NPRN"), https://docs.fcc.gov/public/attachments/DA-23-741A1.pdf.

[7] NPRM.

[8] 16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements, Matter Number P239300, Federal Trade Commission (June 29, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements.

[9] *FTC Proposes Sweeping Changes to HSR Reporting Requirements*, BakerHostetler (June 29, 2023), https://www.bakerlaw.com/insights/ftc-proposes-sweeping-changes-to-hsr-reporting-requirements/.

[10] *Premerger Notification; Reporting and Waiting Period Requirements*, RIN 3084-AB46, Notice of Proposed Rulemaking, 88 Fed. Reg. 42178, 42208 (June 29, 2023), https://docs.fcc.gov/public/attachments/DA-23-741A1.pdf.

[11] *Id*.

[12] *Market Standards: Average Termination Fee as Percentage of Deal Size*, LexisNexis (Dec. 13, 2022).

[13] *Id*.

[14] NPRM at pp. 42186, 42197.

[15] NPRM at p. 42183

[16] 15 U.S.C. §18a(e)(1)(A)

[17] Hart-Scott-Rodino Annual Report: Fiscal Year 2021, Federal Trade Commission & U.S. Department of Justice (Feb. 10, 2023), https://www.ftc.gov/reports/hart-scott-rodino-annual-report-fiscal-year-2021.

[18] *Id*.

[19] *Id*; *see also* Joseph J. Bial et al., *FTC and DOJ Temporarily Suspend Early Terminations of HSR Waiting Period*, Paul Weiss (Feb. 4, 2021), https://www.paulweiss.com/practices/litigation/antitrust/publications/ftc-and-doj-temporarily-suspend-early-terminations-of-hsr-waiting-period?id=39355.

[20] 15 U.S.C. §18a(d)(1).

[21] Explaining that market share and concentration alone are not conclusive indicators of anticompetitive effects/*US v. General Dynamics Corp.*, 415 US 486, 504-05 (1962).

[22] 15 U.S.C. § 57a(d)(1).

[23] NPRM at p. 42197.

[24] Specifically, the filing parties would need to categorize employees, provide geographic market information for overlapping employee classifications, and provide information on penalties or findings by the Department of Labor, National Labor Relations Board, or Occupation Safety and Health Administration in the five-year period prior to filing. This new requirement will undoubtedly add hours in labor costs, especially in cases where such information may not be readily available or otherwise need to be compiled and presented to the FTC. *See U.S. antitrust agencies propose extensive overhaul of HSR filing requirements*, Davis Polk (June 28, 2023), https://www.davispolk.com/insights/client-update/us-antitrust-agencies-propose-extensive-overhaul-hsr-filing-requirements.

[25] *Hart-Scott-Rodino and Foreign Merger Notification Requirements*, Perkins Coie (last visited Sept. 20, 2023), https://www.perkinscoie.com/images/content/1/5/v2/158084/Hart-Scott-Rodino-and-Foreign-Merger-Notification-Requirements.pdf.

[26] Delays kill deals because the longer a deal takes to close, the risk of stock swings increases. As stocks prices move, valuations change and can make a deal impossible to reach a signing. If the transaction closes quickly, this risk is diminished. While speed isn't a goal in and of itself, the FTC should ensure that the required information does not impose unnecessary delays. *See* Spencer D. Klein & Joseph Sulzbach, *Speed is a Key Component of Successfully Executing a Stock-for-Stock Merger*, Morrison & Foerster (March 17, 2023), https://www.lexology.com/library/detail.aspx?g=25fce0dc-f6c8-4992-8f0f-9be5cf1057da.

[27] Carrie G. Amezcua & Abigail L. Cessna, *A New Era: FTC and DOJ Propose Overhaul of Premerger Notification Filing Process*, Buchanan (July 3, 2023), https://www.bipc.com/a-new-era-ftc-and-doj-propose-overhaul-of-premerger-notification-filing-process.

[28] NPRM at pp. 42193-95

[29] William Blumenthal et al., *The Impact of the FTC's Proposed Changes to Hart-Scott-Rodino Filing Requirements*, Sidley (July 10, 2023), https://www.sidley.com/en/insights/newsupdates/2023/07/the-impact-of-the-ftcs-proposed-changes-to-hsr-filing-requirements#:~:text=Current%20HSR%20submissions%20must%20include,transmitted%20to%20the%20full%20Boa
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[30] *Id*.

[31] *Id*.

[32] E. John Steren, *Using Efficiencies as a Procompetitive Defense for a Merger*, Epstein Becker Green (Sept. 20, 2018), https://www.ebglaw.com/insights/using-efficiencies-as-a-procompetitive-defense-for-a-merger/.

[33] NPRM at p. 42203.

[34] Colin P. Ahler & Eric L. Kitner, *FTC Challenges Private Equity Roll-Up Acquisition Strategy*, Snell & Wilmer (Sept. 22, 2023), https://www.swlaw.com/publications/legal-alerts/ftc-challenges-private-equity-roll-up-acquisition-strategy#:~:text=Chair%20Khan%20also%20described%20how,reporting%20to%20federal%20antitrust%20agencies.%
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[35] Mike Dano, *The quiet brilliance of T-Mobile's 5G spectrum strategy*, LightReading (Aug. 10, 2022), https://www.lightreading.com/5g/the-quiet-brilliance-of-t-mobile-s-5g-spectrum-strategy.

[36] 44 U.S.C. § 3501(1)(2).