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September 27, 2023

Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, D.C. 20580

Re: FTC-2023-0040-0001—Notice of Proposed Rulemaking on Premerger Notification; Reporting and Waiting Period Requirements

Dear Chair Khan and Commissioners Bedoya and Slaughter,

On behalf of the R Street Institute's Technology and Innovation Policy team, I appreciate the opportunity to comment on the Federal Trade Commission's (FTC) proposed rule regarding changes to the premerger filing process. We harbor concerns about the breadth of the new reporting requirements and the negative impact they may have on merger activity, particularly in the technology sector.

1. Overview

The 1976 Hart-Scott-Rodino (HSR) Act established the FTC's merger pre-filing process as an aid to antitrust enforcers by requiring firms proposing an acquisition over a certain size threshold to notify the antitrust agencies and provide them with information about the transaction in advance.[1] At the same time, the HSR Act was designed to expedite the large majority of mergers that posed no obvious anticompetitive concerns by placing a 30-day limit on the review period unless the agencies found a need to request further information.[2]

Initially, the size of mergers which needed to pre-file under the HSR process meant that a relative handful—about 150—of the largest transactions received this scrutiny each year, but inflation and economic growth quickly caused that number to balloon. By 2000, the majority of U.S. merger activity was subject to the HSR Act's static thresholds, and an amendment was passed to increase the threshold annually according to gross domestic product growth.[3] Nevertheless, as FTC commissioners have

[1] Kelly Signs, "Milestones in FTC history: HSR Act launches effective premerger review," Federal Trade Commission, March 16, 2015. https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review.
[2] Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, Cornell Law School Legal Information Institute, last accessed Sept. 18, 2023. https://www.law.cornell.edu/uscode/text/15/18a.
[3] Andrew G. Howell, "Why Premerger Review Needed Reform – And Still Does," *William & Mary Law Review* 43:4 (March 2002).
https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1483&context=wmlr.

complained, even with this higher threshold the antitrust agencies frequently receive more than 150 merger filings *per month*.[4]

Instead of taking measures to narrow down which merger filings are most likely to be problematic, however, the enforcement agencies—particularly the FTC—have recently taken the opposite approach by broadening the number of transactions which may be subject to antitrust scrutiny. The steps that the FTC has taken to hinder the smooth operation of the HSR merger process have already, prior to the issuance of this proposed rule, served as a de facto tax on mergers by delaying and discouraging them wherever possible.[5] The present rulemaking appears to continue this worrisome trend, and unlike the prior actions on mergers, it will have the force of law.

1. Information Overload

This proposed FTC rule would dramatically expand the amount of information that merging firms must submit for pre-merger review. These new requirements include producing materials "relevant to a proposed transaction," including a draft of the final merger agreement between the parties, organizational charts, "certain strategic plans," a list of prior acquisitions by the acquiring firm and a "narrative that would identify and explain each strategic rationale for the transaction."[6]

Ironically, these expanded filings will likely exacerbate one of the frequent complaints of the antitrust enforcement agencies, which is that they are inundated with merger filings and lack the time and personnel to review them adequately.[7] The proposed changes will flood agency staff with thousands of pages of more information to sort through during the limited time windows they have to determine which transactions necessitate further investigation.

Practically speaking, these requirements may require companies to essentially testify against their future selves by narrating the ways that a transaction might help them versus their competition. As one antitrust scholar has written, "this is effectively a requirement that the parties prepare a reply brief to a potential future challenge without the benefit of knowing the specific arguments that the agencies might make against the transaction. The prejudicial value that this narrative would have is breathtaking."[8]

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[4] Office of the Chair, "Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya 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_the_hsr_form_and_rules_-_final_130p_1.pdf.

[5] Noah Joshua Phillips, "Disparate Impact: Winners and Losers from the New M&A Policy," Federal Trade Commission, April 27, 2022. https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf.

[6] "Premerger Notification; Reporting and Waiting Period Requirements," Federal Trade Commission, June 29, 2023. https://www.regulations.gov/document/FTC-2023-0040-0001.

[7] Maribeth Petrizzi and Heather M. Johnson, "HSR Early Termination After a Second Request Issues," Federal Trade Commission, March 12, 2021. https://www.ftc.gov/enforcement/competition-matters/2021/03/hsr-early-termination-after-second-request-issues.

[8] Justin (Gus) Hurwitz, "A Bad Merger of Process and Substance: Changing the Merger Guidelines and Premerger Review Form," *Network Law Review,* Sept. 11, 2023. https://www.networklawreview.org/hurwitz-merger-guidelines.

The merging firms are left to figure out what the enforcement agencies are likely to deem "relevant to a proposed acquisition," which is likely to encourage overproduction of documents lest any omission be deemed as noncompliance. This is likely to force firms to produce sensitive internal strategic information that will be available for rival firms to parse.

2. Compliance Costs

The most tangible potential drawback of the proposed rule is the raw cost of putting together the required extensive report. By the FTC's own estimate, the total approximate time required for firms to file for a merger review would nearly quadruple—from 37 hours to 144 hours per filing. They assume this will burden merging firms with an additional $350 million in new labor costs to create these extended filing reports.[9] This essentially makes the upfront cost of merely filing a merger for review more analogous to what companies would normally have had to outlay for a review that was flagged for a second review—the median cost of which was estimated at $4.3 million each.[10]

While this cost estimate would be staggering on its own, the FTC approximation is likely to be a significant underestimate. For example, the U.S. Chamber of Commerce conducted a poll of 70 seasoned antitrust practitioners who predicted the actual cost of a single merger filing would be five times higher than the FTC's estimates. This, they estimated, would result in over $2.3 billion in new filing expenses.[11]

These compliance costs will have to be spread out in several ways. Acquiring companies may simply factor the additional costs into the offers they are willing to extend, which effectively reduces the payout to an acquired firm for succeeding in attracting a buyer. Another likely result is that some of the increased costs of mergers will be passed on to consumers in the form of higher prices. Perhaps the worst result is that mergers that might have accrued a benefit to consumers will never be consummated due to the cost of filing and the risk of further scrutiny and legal entanglements.

Especially when paired with the new proposed FTC and Department of Justice merger guidelines, which tilt the burden of proof heavily upon acquiring firms to establish that their proposed mergers are not anticompetitive, the incentives offered by antitrust enforcers appear geared toward discouraging acquisitions by large firms altogether.[12]

The cost of this enhanced review process will be felt not only in money, but in time. According to a Bloomberg analyst, the new rules are likely to extend filing preparation times "from a 10-day process to

[9] "Premerger Notification; Reporting and Waiting Period Requirements." https://www.regulations.gov/document/FTC-2023-0040-0001.

[10] Peter Boberg and Andrew Dick, "Findings from the Second Request Compliance Burden Survey," *The Threshold* 14:3 (Summer 2014). https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf.

[11] Sean Heather, "Antitrust Experts Reject FTC/DOJ Changes to Merger Process," U.S. Chamber of Commerce, Sept. 19, 2023. https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.

[12] Josh Withrow, "R Street Institute Comments on the Proposed Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ) Merger Guidelines," Federal Trade Commission, Sept. 18, 2023. https://www.rstreet.org/outreach/r-street-institute-comments-on-the-proposed-federal-trade-commission-ftc-and-u-s-department-of-justice-doj-merger-guidelines.

a two-to-three month process."[13] Competitors in dynamic markets like the digital economy rely on the ability to move quickly in response to innovation, and a multi-month delay in acquisitions is likely to disadvantage both incumbent firms and the smaller firms they are trying to acquire.

3. Lack of Cost/Benefit Analysis

Like many of the antitrust policies pursued by the Biden administration, this proposed rule appears to take into consideration only the potential costs of mergers and few of the benefits. In particular, the rule does not acknowledge the benefits of vertical mergers, which economists and enforcers alike have long agreed generally create pro-consumer efficiencies and rarely threaten competition.[14] Instead, the rule includes a new demand for information about vertical relationships between the filing firms as well. Considerations of economic efficiencies that a merger might create are conspicuously absent from the rule.[15]

For example, acquisitions by large, established firms play a crucial role as an exit strategy for startups when securing venture capital, a key to promoting innovation in many sectors, including tech.[16] Discouraging the acquisitions that facilitate entrepreneurial exit not only harms the startups themselves, but also consumers, by limiting new innovations that are able to scale on their own.[17]

The tremendous new burdens the proposed rule will impose has caused some scholars to question whether this rule will survive court scrutiny, as the HSR Act itself specifies that the FTC limit production of information to that which is "necessary and appropriate" to make a determination about whether a merger deserves further review.[18] Whether it does pass legal muster in the long run, this rule will exact a heavy cost on merger activity while it is in effect.

4. Conclusion

The staggering cost of implementing this rule ought to be enough to cause the Commission to consider scaling back to just the new reporting requirements required by statute under the Merger Filing Fee

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[13] Leah Nylen, "US Merger Review Revamp Set to Delay Deals by Months (2)," *Bloomberg Law*, June 27, 2023. https://news.bloomberglaw.com/antitrust/merger-review-revamp-by-us-agencies-set-to-delay-deals-by-months.

[14] Geoffrey A. Manne et al., "The Fatal Economic Flaws of the Contemporary Campaign Against Vertical Integration," *Kansas Law Review* 68:5 (2020), pp. 923-973. https://laweconcenter.org/wp-content/uploads/2020/06/The-Fatal-Economic-Flaws-of-the-Contemporary-Campaign-Against-Vertical-Integration.pdf.

[15] "Premerger Notification; Reporting and Waiting Period Requirements." https://www.regulations.gov/document/FTC-2023-0040-0001.

[16] "Engine Releases Report on the Role of Acquisitions in the Startup Ecosystem," Engine, Oct. 24, 2022. https://www.engine.is/news/category/engine-releases-report-on-the-role-of-acquisitions-in-the-startup-ecosystem.

[17] Gary Dushnitsky and D. Daniel Sokol, "Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments that Fund It," *Vanderbilt Journal of Entertainment & Technology Law* 24:2 (May 17, 2022). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863580.

[18] See, e.g. Justin (Gus) Hurwitz, "Premerger Notification Approval Faces a Rocky Path," *The Regulatory Review*, Aug. 28, 2023. https://www.theregreview.org/2023/08/28/hurwitz-premerger-notification-proposal-faces-a-rocky-path; 15 U.S.C. § 18a. https://www.law.cornell.edu/uscode/text/15/18a.

Modernization Act of 2022.[19] The deadweight burden this rulemaking will impose in terms of time, legal fees, and the unseen cost of deals that are never consummated or proposed surely outweighs any possible marginal benefit it will provide in terms of enforcement.

Respectfully submitted,

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[19] H.R. 2617, Consolidated Appropriations Act, 2023, 117th Congress. https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf .