TECNA
TECHNOLOGY COUNCILS OF NORTH AMERICA

INSIGHTS. CONNECTIONS. EXPERTISE.

September 26, 2023

To: The Federal Trade Commission
The Department of Justice, Antitrust Division

From: Jennifer Young
CEO
Technology Councils of North America

Submitted electronically via www.regulations.gov

Re: 16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300, Docket (FTC-2023-0040),

To Whom It May Concern:

The Technology Councils of North America (TECNA) represents more than 60 technology business-serving councils and serves as the collective voice for regional technology organizations. Our members represent 22,000 small- to medium-sized technology companies across North America. Many of our members' companies are startups and are heavily dependent on a thriving ecosystem of investment capital and acquisitions.

Mergers and acquisitions ("M&A") play a critical role in shaping the success of our small- to medium-sized innovators and is an essential part of creating a competitive U.S. economy. It provides an incentive for startup creation and produces critical financing needed for entrepreneurs and startups to successfully realize their value. Ultimately, it leads to faster and better products and services for consumers at reduced costs.

We thank the Federal Trade Commission and the Department of Justice Antitrust Division ("Agencies") for affording us an opportunity to comment on the Premerger Notification Requirement and respectfully offer for your consideration the following comments:

Congressional Intent

- Hart-Scott-Rodino Antitrust Improvement Act ("HSR Act") – In crafting the HSR Act, Congress balanced the benefits of premerger notification against the burdens of reporting transactions that were unlikely to raise competitive concerns. The intent was to detect and prevent illegal transactions without unduly burdening businesses with unnecessary paperwork or delays.

Both the legislative history and the structure of the preclearance system make clear Congress' intent to neither deter nor impede consummation of the vast majority of M&A activity. Under the system established by Congress, the premerger filing obligation is not to be a burden on general M&A activity. Rather, it is a means of identifying those transactions which might require further scrutiny and/or a "Second Request".

Current rulemaking requires well-defined, basic information about the proposed transaction and the parties (e.g. subsidiaries, revenues, shareholders, etc.). However, the Notice of Proposed Rulemaking ("Proposed Rulemaking") dramatically expands the type and amount of upfront information about a proposed deal (and past deals done by a filer), its structure, and its possible effects on competition and labor. This will significantly increase the amount of time and resources required to prepare filings, regardless of whether the transaction raises any competitive concerns. The result will be the prevention or delay of procompetitive, healthy M&A activity, contrary to the express intent of Congress in adopting the premerger notification requirement.

The legislative history of the HSR Act makes it clear that the legal authority to expand premerger notification requirements under the HSR Act lies only with Congress[1]. Subjecting all parties who are subject to premerger notification to the more intense scrutiny of transactions that have been found to be potentially anti-competitive is an expansion of authority beyond what Congress intended.

- Paperwork Reduction Act – Congress enacted the Paperwork Reduction Act (PRA) to address a concern that the federal government was requiring businesses, individuals, and other entities to spend too much time filling out paperwork at the behest of federal agencies. It outlines procedural requirements for agencies that seek information from the public. Materially broadening the HSR reporting requirements – which are subject to the PRA – will exponentially increase the volume of documents and data production from businesses without clear justification.

  As noted below, only a small fraction of Premerger Notification filings demonstrated a need for further inquiry. Notwithstanding this, under the new form and instructions, every transaction will be subject to the equivalent of a "Second Request", which would greatly increase the time and cost of filing for all transactions, 98% of which pose no threat to competition, as recently noted by the Federal Trade Commissioner Khan[2]. This

[1] During deliberations on the HSR Act, and prior to its passage, the House flatly rejected a bill introduced in the Senate that included a provision that would have allowed the FTC, after consulting with the Justice Department, to selectively "require premerger notifications from particular companies or industries or from any class or category of persons." 122 CONG. REC. 29,342 (Sept. 8, 1976) (referring to S. 1284 (May 6, 1976)).

[2] During a question and answer session at The Economics Club of New York, Commissioner Khan noted that despite increased attention on the enforcement agencies' moves to block mergers, they still decline to take action on the vast majority of deals. "Any given year, the antitrust agencies get anywhere between 1,500 to 3,000 merger filings. Of that number, 98% go through without even any second questions being asked by the agencies," Khan said. "So around 2% of all deals even get what's known as a second request, which is a set of questions so that we can do a deeper investigation. And an even smaller fraction ultimately result in a legal challenge." https://www.cnbc.com/2023/07/24/ftc-chair-lina-khan-defends-track-record-on-antitrust-challenges.html

imposes an excessive, duplicative and unjust burden on businesses and is inconsistent with the PRA, as well as the intent of the HSR Act.

Impact on U.S. Economic Growth

Current HSR rules require all transactions with a minimum value and size to file a Premerger Notification, which allows Agencies to conduct an "Initial Review" of transactions and determine whether to investigate any that may be deemed anticompetitive. For transactions that raise substantive antitrust concerns, the Agencies may request additional information by issuing a "Second Request" or, if warranted, challenge the transaction.

It is important to note that most M&A activity in the United States consists of healthy, procompetitive transactions. In fact, less than 2% of all transactions reported to the Agencies require a "Second Request" following reporting, and less than 1% result in a challenge or remedial consent order. Notwithstanding this, the Proposed Rulemaking radically overhauls the Premerger Notification process by shifting the upfront time and collection burden from the "Second Request" review period to the "Initial Review". In other words, it subsumes much of the information currently requested in the small fraction of deals and requires substantial, upfront information on all deals, even though 98% of those pose no competitive threat or substantive antitrust issues.

This newly proposed requirement is likely to discourage pro-competitive mergers, as businesses will incur significant costs and increased timelines. The result would be over-deterrence of acquisitions that have the potential to spur innovation and, consequently, a slowing effect on the United States' highly competitive and healthy free market economy.

Impact on Small- to Medium-sized Businesses (SMBs)

SMBs are the backbone of the U.S. economy and are disproportionately responsible for job creation and innovation in the United States. The Agencies themselves estimate that the Proposed Rulemaking will nearly quadruple the average HSR filing preparation time, an approximation that many in industry consider an underestimation. This is especially problematic for SMBs, who lack the time and resources necessary to comply with the increased volume and complexity of the filing process. It would make it even more difficult for SMBs to expand quickly and compete effectively to the benefit of consumers. Materially broadening the scope of HSR form requirements may make smaller acquisitions cost prohibitive and will stymie procompetitive merger activity that greatly benefits SMBs and will result in stunted growth. Policymakers should avoid unduly preventing or delaying general M&A activity, lest we create significant harmful impacts on SMBs, their customers and their employees.

Impact on U.S. Innovation

M&A activity is a crucial part of the environment necessary for a healthy innovative section of the U.S. economy, particularly in vital technology. To the extent that the Proposed Rulemaking were to unduly prevent or delay general M&A activity, it would have a significant harmful effect on U.S. innovation.

For many entrepreneurs and start-ups, their entire business model is driven by exit options. Venture capital investors, in particular, look at exit options when evaluating their potential investments, thereby driving funding and growth to those companies most likely to be attractive targets when they have reached their growth limit following the entrepreneurial phase.

With fewer exit options, more start-ups may simply go out of business or may not be able to raise the capital they need to innovate, which in turn could mean that some start-ups will never get off the ground. Alternatively, larger purchasers will require the startup or innovative firm to absorb additional costs associated with the HSR filing requirements.

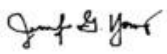
Worst of all, U.S. innovators may look to foreign technology companies for exit options, which could result in the increased acquisition of U.S. technology innovators by foreign technology companies, including foreign government-controlled entities. It would indeed be a perverse result if a U.S. government policy designed to protect U.S. markets instead resulted in the loss of U.S. companies, U.S. jobs and U.S. innovative technology to foreign interests, to the significant detriment of U.S. markets.

Conclusion

The Proposed Rulemaking will fundamentally change the breadth and depth of information required for all reportable transactions at the outset of the HSR review period. It will unduly burden businesses with increased time and costs for preparation – regardless of whether such a transaction will attract antitrust scrutiny – and will introduce greater uncertainty and risk into M&A activity. As a result, the onerous requirements will cause a chilling effect on healthy pro-competitive transactions and weaken U.S. global competitiveness.

We thank the Agencies for affording us and other stakeholders the opportunity to comment. Should you have any questions about the comments or any of the information contained herein, please contact me at 412-545-3493 or at jyoung@tecna.org.

Respectfully Submitted,



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