September 26, 2023

Comments on Hart-Scott-Rodino Pre-Merger Rulemaking
6 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules,
Project No. P239300

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, appreciates the opportunity to provide comments on the proposed changes to the Hart-Scott-Rodino coverage, exemption, and transmittal rules. NTU has long held an interest in monitoring competition policy and evaluating mergers, acquisitions and other transactions on behalf of taxpayers. It is imperative that the well-being of consumers and taxpayers are paramount in the consideration of these processes.

Mergers and acquisitions represent a vital tool in the private sector's strategic arsenal. These transactions can unlock tremendous value for both parties and are a top motivator for business startups and the innovation economy. Furthermore, acquisitions help fuel the startup economy by providing a liquidity event for founders. Unfortunately, agencies involved in merger reviews such as the Federal Trade Commission (FTC) and Department of Justice (DOJ) have been overly aggressive recently, slowing economic activity and contributing to the current slump in mergers and acquisitions activity across the nation.[1]

While reviewing acquisitions is important, both from a national security and competition standpoint, the current administration's posture has been far too rigid. Adding additional costs and complexity to this process will unduly burden companies and damage startup growth at a time of economic uncertainty.

The FTC's requirements add up to a total overhaul of the pre-merger process - in fact the agency itself estimates that the time to complete the process will surge from 37 hours to 144.[2] Their estimate of net effects of the rule total an additional $350 million in compliance costs. However, this tally fails to account for additional employees that companies will need to hire for the vast array of new requirements and work required to comply.

[1] "2022 M&A Review and Outlook." Wilmer Hale LLP, 2023.
[2] https://www.federalregister.gov/d/2023-13511/p-376

While the sum cost of the rule is worrisome, several overreaching sections of the proposed rulemaking are even more concerning for free enterprise and taxpayers. First, the FTC proposes adding a new requirement that companies submit the drafts of their 4(c) filings with further expansions of documents submitted, including strategic plans and deal team documents. This stands in contrast with the longstanding guidance that these materials are not required. Beyond the obvious increase in compliance costs, this would potentially lead to unneeded, time-consuming scrutiny. For instance, if all drafts are required, this could cause early and/or inaccurate internal information or analysis to unfairly prejudice the agency to assign further investigation or position the merger for denial.

Second, with a totally new inclusion of labor market conditions as a new requirement, the FTC continues its undue and potentially unconstitutional expansion of its statutory authority by supplanting the Department of Labor as a employment law enforcement agency. The controversial non-compete rulemaking represents the first foray, while the FTC's investigation of franchising represents another plank, and this new requirement continues this pattern. As NTU has commented numerous times in the past, the FTC stands unique as an agency that could potentially regulate all aspects of the economy if its authority is read expansively. As justification, the rulemaking cites extremely recent DOJ/FTC cases as its own precedent for this topic.[3] These cases, all within the past two years, do not reflect precedent with any sufficient backing. The agency states that it is seeking information from parties on the Standard Occupational Classification (SOC) of their workers and the top five SOC codes that the merger would impact. This approach lacks precision and would likely predispose the agency to deny any merger that would result in cost savings or synergy from the labor market. The rule also fails to include any information on what the FTC will consider as a test for what might constitute an inappropriate concentration of labor market power. Without any real precedent on the matter, companies also cannot look to any judicial decisions for clarity either.[4]

It seems unlikely that Congress intended the FTC to prevent mergers based solely on labor market justifications. Such a process would be problematic since widely determining individuals' assessment of their own labor market prospects is inherently unpredictable. Should the FTC be able to block a merger and define a labor market when any individual can, at-will, seek new training or new employment? Product market definitions and subsequent regulatory actions are generally firmly grounded in fact and precedent largely due to the consumer welfare standard. Since labor is an input to a product, then it becomes difficult to determine the consumer impacts of a potential new labor market concentration standard. The FTC also proposes requiring information about the post-merger labor market plans. Companies are unable to fully view the future of the impacts of a merger. Requiring a plan to be submitted on the potential outcomes on labor of a merger is again unduly burdensome. Taken as a whole, none of these requirements should be included as they are not in line with the intent of the overall mission or statutory authority of the FTC. Employment law should be left to agencies that Congress has charged with that specific mission.

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[3] Press Release, U.S. Dep't of Just.(Nov. 2, 2021) "Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster.", Concurring Statement of Commissioner Slaughter and Chair Khan regarding *FTC and State of Rhode Island* v. *Lifespan Corporation and Care New England,* at 1–2 (Feb. 17, 2022).

[4] "Antitrust Issues in Labor Markets", Congressional Research Service, 2022.

Further, the FTC is proposing to double the window for including other transactions from five years to ten years and to significantly reduce the reportable threshold of acquisitions. This set of changes will also further add to the compliance burden. However, the more insidious impact will be the reduction of investment in startups. If a larger company is contemplating a more substantial acquisition above the HSR threshold or sees that as a possibility in the ten-year window, then the risk-weighted value of small investments over a longer period of time will be significantly reduced due to the potential for jeopardizing the larger transaction.

The FTC makes it clear within this rulemaking that they will be scrutinizing for patterns of "serial acquisitions." Entities like private equity firms or large tech companies often make a series of investments or acquisitions in order to unlock value from smaller companies. Oftentimes, these investments generate negative returns for these companies, but it can also propel a startup with excellent product-market fit into success, given the additional resources and technical/management expertise.[5] Furthermore, this pathway is the "overwhelming majority" of startup exits, one upon which founders plan for and depend on.[6] Disincentivizing this crucial liquidity for startups will damage the innovation economy and impede more startups from progressing while discouraging new ventures from ever forming.

Finally, the FTC is proposing creating a Transactions Subject to International Antitrust Notification, that would collate areas where the proposed merger or acquisition would potentially generate antitrust concerns. In a vacuum, this seems relatively innocuous, but with the current FTC's trend of sending employees abroad to the European Union to collaborate with antitrust officials to stall American companies' transactions, it becomes much more worrisome. This is also coupled with a potential new "voluntary waivers" checkbox to allow filers to authorize the FTC to share their confidential information with other jurisdictions. Given the issues that this FTC has dealt with in terms of leaks, this again raises major red flags for American companies sharing some of their most vital and confidential business information with regulators. This new "voluntary" requirement also could become a mandatory one in the future, similar to how the international transactions notification was once voluntary and now the FTC is seeking to make it mandatory. U.S. companies have a right to know that their own government is not seeking to make an end-run around U.S. antitrust laws and precedent through the use of other jurisdictions' competition authorities. Given the many questions around the FTC's use of travel and employee time to collude with other regulators, this seems particularly problematic and should be stricken from the final rulemaking.

To conclude, many of these proposed changes will have a detrimental impact on numerous aspects of the economy. Mergers and acquisitions are not inherently anticompetitive - and this rule, as proposed, will certainly lead to further chilling of normal market activity. In particular, small startups will indeed suffer if the serial acquisitions portion is finalized. Creating a major disincentive for larger companies to take the risk of acquiring smaller companies will lead to capital lock ups for entrepreneurs and a less robust ecosystem for innovation. We hope that the

[5] Crawford, G. Christopher, et al."Power law distributions in entrepreneurship: Implications for theory and research." Journal of Business Venturing, Volume 30, Issue 5, 2015.
[6] "Exits, Investments and the Start Up Experience: the Startup Voice on Acquisitions", Engine, 2022.

FTC will turn away from many of its detrimental ideas in the rulemaking and proceed along a more incremental path forward.

Thank you for the opportunity to provide comments on this timely and urgent matter. Please let me know if you have any questions or concerns about the material laid out above.

Sincerely,

Nick Johns
Senior Policy and Government Affairs Manager