Response of the Software & Information Industry Association (SIIA) to proposed rulemaking—16 CFR Parts 801-803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300 (FTC-2023-0040)

Submitted to the Federal Trade Commission

September 27, 2023

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide these comments in response to the Federal Trade Commission (FTC) Notice of Proposed Rulemaking on 16 CFR Parts 801 and 803—Premerger Notification; Reporting and Waiting Period Requirements (NPRM).

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include over 450 companies, reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software as well as platforms used by millions all over the world. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information. We believe in a competition policy that is focused on engendering innovation, protecting the competitive process, and providing consumers with superior products at competitive prices.

1. The Role of the HSR Act and the Premerger Notification Program

Section 7 of the Clayton Act provides in pertinent part that "[n]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, wherein any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[1]

Since its enactment in 1914, the Clayton Act has been amended a number of times, most recently in 1976 when Congress passed the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act).[2] The HSR Act imposed an obligation on companies to notify the enforcement agencies before consummating mergers over a certain size, and it set a timeline for most merger reviews.[3] The goal was to institute a so-called "waiting period" to afford the enforcement agencies a chance to review and, if necessary, try to block a

[1] 15 U.S.C. § 18.
[2] 15 U.S.C. § 18a.
[3] Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, Global Competition Review, October 6, 2021, https://globalcompetitionreview.com/gcr-usa/article/the-repeal-of-hart-scott-rodino

proposed merger before it was finalized.[4] Prior to the HSR Act, the only avenue available to enforcers was to get a court to order the break-up of a merger that had already happened.[5]

The pre-consummation notification requirement only applies to certain mergers. Exact deal values are adjusted for inflation every year, but, as of February 2023, transactions of up to $111.4 million are not reportable; transactions with a value of more than $445.5 million are reportable; and transactions valued at between $114.4 million and $445.5 million are reportable, provided one of the parties has assets or annual sales of at least $22.3 million, and the other party has assets or annual sales of at least $222.7 million.[6]

If a proposed merger meets the statutory requirements to be reportable, the parties must file a merger notification. Currently, the notification consists of a form, a fee, and some basic information about the proposed transaction.[7] The purpose of the notification is to give the FTC and the Department of Justice (the Agencies) enough information to conduct an initial evaluation of the potential anti-competitive impact of the merger.[8] The notification is followed by an "initial waiting period" of, typically, 30 days, where the Agencies decide which agency will handle the case, and whether it merits a more in-depth investigation. During this waiting period, the parties are prohibited from closing the deal.[9]

If, during the 30-day waiting period, the Agencies decide that the proposed merger raises no anti-competitive concerns, they can grant "early termination" of the waiting period.[10] On February 4, 2021, the Agencies announced an indefinite temporary suspension of this practice. The announcement indicated that the suspension would be "brief," but it appears to still be in effect.[11]

At the conclusion of the initial waiting period, the Agencies can decide to do nothing, which frees up the parties to close the deal, or issue a "Second Request." If issued, the Second Request requires the parties to produce a substantial volume of additional information. It also starts a new waiting period that runs until 30 days after the parties have substantially complied with the request.[12] Violations carry the risk of penalties of up to $50,120 per day, a compliance order, an extension of the waiting period, or other type of equitable relief.[13]

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[4] Daniel Francis & Christopher Jon Springman, *Antitrust – Principles, Cases, and Materials*, ABA Antitrust Law Section, 2023, at 688.
[5] Phillips, *supra.*
[6] Francis et al., *supra*.
[7] 16 C.F.R. § 803.
[8] FR, Vol. 88, No. 124, June 29, 2023, at 42178.
[9] Francis et al., *supra*.
[10] 16 C.F.R. § 803.11.
[11] https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination
[12] 15 U.S.C. § 18a(e)(1(A) and 15 U.S.C. § 18a(e)(2).
[13] 15 U.S.C. § 18a(1) and (2); https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2023

2. The FTC's Proposed Changes

On June 29, 2023, the FTC published a Notice of Proposed Rulemaking pursuant to Section 7A(d) of the Clayton Act that, if adopted, would amend the premerger notification rules that implement the HSR Act, the Premerger Notification and Report Form, as well as accompanying Instructions.[14] According to the FTC, there has not been a large-scale reorganization of the information required in the HSR Filing since the HSR Act was enacted.[15] But more importantly, the FTC no longer believes that the information collected by the Form is sufficient for the Agencies to conduct effective and efficient initial investigations of the likely competitive effects of notified transactions.[16]

The proposed changes would:

- Substantially expand the scope of documents, including early drafts, that the parties would be required to submit (*e.g.*, semi-annual, and quarterly plans and reports that discuss market shares, competition, competitors, or markets of any product or service that is provided by both the acquiror and the target)[17];
- Require narrative explanations of the parties' current business operations, as well as the rationale for the transaction, along with any horizontal overlaps and vertical relationships between the parties[18];
- Eliminate the option of filing on the basis of a preliminary agreement, without also providing a term sheet or draft agreement that reflects "sufficient detail" about the proposed merger in order to substantiate that it is more than merely "hypothetical"[19];
- Create new sections that would require the parties to include with their filing information about how the proposed transaction would affect relevant labor markets[20], report certain contracts with defense or intelligence agencies[21], and identify the filer's messaging and communications systems.[22]

The Agencies acknowledge that many of the proposed changes would increase the burden on all filers, and that some of the changes would add a significant burden on certain filers.[23] The Agencies estimate that the proposed changes would add between 12 to 222 extra hours per filing, depending on deal complexity. The average additional time-requirement as a result of the proposed changes is estimated to be 107 hours per filing.[24]

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[14] Note 8, *supra*.
[15] *Id.* at 42180.
[16] *Id*.
[17] *Id*. at 42195.
[18] *Id*. at 42186.
[19] *Id*. at 42182.
[20] *Id*. at 42197.
[21] *Id*. at 42205.
[22] *Id*.
[23] *Id*. at 42207.
[24] *Id*. at 42208.

3. Comments on the Proposed Changes

Statutory construction is more art than science, and legislative intent can sometimes be hard to discern. The legislative history of the HSR Act, however, is quite clear.[25] Three points from Congress's deliberations over this legislation, in particular, bear emphasizing. First, the goal of the Act was solely to effect a procedural change—require notification of certain mergers—not to change substantive law. Second, notification should only be required of the very largest mergers. And third, Congress was concerned about not allowing merger enforcement to become too much of a burden on commerce.[26]

In other words, what Congress, in passing the HSR Act, plainly was trying to accomplish was to strike the appropriate balance between the benefits of requiring the parties to pre-notify *some* transactions and the burdens—both on the filers and the Agencies—that this reporting requirement would impose. To wit: "The Committee believes that [the HSR Act] represents a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation *without unduly burdening business with unnecessary paperwork or delays*."[27] And until recently, the FTC seems to have been mindful of the need not to put too many unnecessary burdens on its own time and resources. Four years ago, the then-Director of the Bureau of Competition told a conference that "[a] substantial increase in filings would not only be unlikely to yield much, but would cost us a great deal."[28]

Several of the provisions in the NPRM also meet the "information collection" requirement in the Paperwork Reduction Act of 1995 (PRA).[29] The goal of the PRA is to "*minimize* the paperwork burden for individuals, small businesses … and other persons resulting from the collection of information by [] the Federal Government," and to "*maximize* the utility of information collected, maintained [and] used by [] the Federal Government…"[30]

To their credit, the Agencies concede that the proposed changes to the HSR Form would impose an additional burden on all filers, and a "substantial" extra burden on some, *supra*. But even assuming that their estimate is correct, adding an average of 107 hours, as well as the associated monetary expense, per filing is no trivial matter, especially for small- and medium-sized businesses. And there are, in fact, reasons to believe that the Agencies' own calculation grossly underestimates the true extent of the burden that they are seeking to impose, *infra*.

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[25] Andrew G. Howell, *Why Premerger Review Needed Reform – And Still Does*, 43 Wm. & Mary L. Rev. 1703, 1716 (2002).
[26] *Id*.
[27] S. Rep. No. 94-801, pt. 1, at 65-66. (Emphasis added)
[28] D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of FTC Issues*, Remarks at GCR Live Antitrust in the Digital Economy, May 22, 2019.
https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf
[29] 5 C.F.R. § 1320.3(c).
[30] 44 U.S.C. § 3501. (Emphasis added)

According to a recent survey of in-house counsels and law firm antitrust practitioners, the vast majority of whom have been involved in scores of merger transactions, the Agencies' estimation does not come close to reflecting the actual real-world impact of the proposed changes. Where, for example, the NPRM posits that the new Form will take an average of 144 hours to complete, which, by the way, is four times the current average, survey respondents think that the actual number is closer to 330 hours. A substantial majority also do not believe that, as a practical matter, it would even be feasible for the Agencies to review all the additional information that the proposed rule would require during the initial waiting period.[31] This, of course, begs the question why the Agencies would seek to impose such a massive burden on businesses when they likely will not be able to utilize the information at the time of submission anyway.

The most recent HSR Annual Report states that the Agencies received a total of 3,520 premerger notifications in FY21. Of those only 65 resulted in the issuance of a Second Request.[32] Based on those statistics, as the FTC Chair herself has confirmed, 98 percent of reported mergers raise no competitive concerns, and only a fraction of the remaining 2 percent actually merit legal challenge.[33] Curiously, the FTC, in its budget request for FY24, has asked Congress to appropriate enough funds for them to be able to hire an additional 106 full-time employees, or FTEs, in its Bureau of Competition just to be able to maintain its current level of performance.[34]

Merger review is very resource intensive, and there is no reason to believe that requiring the parties to submit, *ab initio*, copious amounts of additional and very detailed information about their deal would lead to a more efficient use of already-stretched agency resources. Take, for instance, the proposed requirement that the parties submit drafts of Item 4 documents. On any given transaction, this would force the Agencies to review a substantial volume of additional information within a limited timeframe. But draft documents, by their very nature, are preliminary, more often than not inaccurate, and, as a result, have limited or no probative value, making their relevance and utility questionable.

Add to this the chilling effect that the proposed changes are likely to have on merger activity more broadly, which would deter innovation and hamper economic growth. And those that are likely to be hit the hardest by such a development are small companies and startups, whose business models often are designed to maximize exit options. As former Commissioner Phillips has put it: "The adage that 'barriers to exit are barriers to entry' makes the general, but too often overlooked, point that the harder it is to exit, the higher the cost of entering in the first place."[35]

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[31] https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process

[32] FTC (Bureau of Competition) and Dep't of Justice (Antitrust Division), *Hart-Scott-Rodino Annual Report, Fiscal Year 2021*, at 5. https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf

[33] https://www.cnbc.com/2023/07/24/ftc-chair-lina-khan-defends-track-record-on-antitrust-challenges.html

[34] FTC, *Congressional Budget Justification for Fiscal Year 2024*, at 9. https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf

[35] Noah Joshua Phillips, *Competing for Companies: How M&A Drives Competition and Consumer Welfare*, Opening Keynote at the Global Antitrust Economics Conference, May 31, 2019.

Finally, the Agencies make no secret of the fact that they have taken some inspiration, particularly as it relates to the proposed requirement that filers submit a narrative explanation of their rationale for the transaction, from their counterparts in the European Union and the United Kingdom.[36] But as the Agencies are surely aware, these jurisdictions operate under different rules and receive significantly fewer merger notifications in a given year. In the UK, for example, there is no obligation to notify any merger, but when the parties do, it is often preceded by pre-notification discussions between them and the Competition & Markets Authority (CMA).[37] A similar practice does not currently exist in the U.S. And where the Agencies received approximately 3,500 premerger notifications in FY21, the CMA received roughly 800 merger notifications during 2021/2022[38], and the EU Commission received around 400 notifications in 2021.[39]

There have been no significant changes to the HSR Form since the HSR Act was enacted, almost to the day, 47 years ago. It is, therefore, not unreasonable to believe that an update might be in order. That said, the Agencies' proposal would amount to a complete overhaul of the current Form, greatly expand the type and scope of information required of the parties at the beginning of the process, impose an extraordinary burden on commerce, and, as a result, likely significantly chill merger activity in the U.S. It is also bears repeating that under existing rules, issuing a Second Request already provides the Agencies a way to request and receive all necessary information, once an initial determination has been made that a notified transaction raises competitive concerns.

Absent a strong justification, which has not been offered, the proposed changes would seem to be at odds with the clear legislative intent behind the HSR Act, as well as the express purpose of the PRA. For these reasons, the Agencies should rescind the NPRM and start over.

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SIIA thanks the FTC for considering our views. We look forward to continuing our engagement with the FTC on this important issue and would welcome the opportunity to answer any additional questions that the Commission may have.

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https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf

[36] Note 8, *supra*, at 42213.

[37] Competition & Markets Authority, *A Quick Guide to UK Merger Assessment*, at 4. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970333/CMA18_2021version-.pdf

[38] Competition & Markets Authority, *Annual Report and Accounts 2021 to 2022*, 21 July 2022. https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2021-to-2022/annual-report-and-accounts-2021-to-2022#year-in-highlights

[39] EU Commission Statistics on Merger Cases – September 1990 to August 2023: https://competition-policy.ec.europa.eu/system/files/2023-09/Merger_cases_statistics.pdf