

# International Center for Law & Economics

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Federal Trade Commission  
600 Pennsylvania Ave. NW  
Washington, DC 20580

Commissioner Alvaro M. Bedoya  
Federal Trade Commission  
600 Pennsylvania Ave. NW  
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Commissioner Rebecca Kelly Slaughter  
Federal Trade Commission  
600 Pennsylvania Ave. NW  
Washington, DC 20580

Anisha Dasgupta, General Counsel  
Federal Trade Commission  
600 Pennsylvania Ave. NW  
Washington, DC 20580

## **RE: Proposed Amendments to 16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300**

Dear Chair Khan, Commissioners Slaughter and Bedoya, and General Counsel Dasgupta,

The International Center for Law & Economics (ICLE) respectfully submits this letter in response to your June 29, 2023, NPRM regarding amendments to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) and to the Premerger Notification and Report Form and Instructions.

ICLE is a nonprofit, nonpartisan research center working to promote the use of law & economics methodologies to inform public policy debate. We have a long history of participation in regulatory proceedings relating to competition and antitrust law, including recent revisions to the merger guidelines<sup>1</sup> and the proposed revisions to the HSR premerger notification process.<sup>2</sup> We are consistently grateful for the opportunity to participate in proceedings such as these.

We write to express our concern about an important omission in the FTC's proposed changes to the premerger notification form: its failure to address the requirements of the Regulatory Flexibility Act (RFA).<sup>3</sup> We appreciate your interest in this matter and the opportunity to share our concern with your offices.

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<sup>1</sup> Geoffrey A. Manne, Dirk Auer, Brian Albrecht, Eric Fruits, Daniel J. Gilman, & Lazar Radic, *Comments of the International Center for Law and Economics on the FTC & DOJ Draft Merger Guidelines*, INTERNATIONAL CENTER FOR LAW AND ECONOMICS (Sept 18, 2023), <https://laweconcenter.org/resources/comments-of-the-international-center-for-law-and-economics-on-the-ftc-doj-draft-merger-guidelines/>.

<sup>2</sup> Brian Albrecht, Dirk Auer, Daniel J. Gilman, Gus Hurwitz, & Geoffrey A. Manne, *Comments of the International Center for Law & Economics on Proposed Changes to the Premerger Notification Rules*, INTERNATIONAL CENTER FOR LAW AND ECONOMICS (Sept 27, 2023), <https://laweconcenter.org/resources/comments-of-the-international-center-for-law-economics-on-proposed-changes-to-the-premerger-notification-rules/>.

<sup>3</sup> 5 U.S.C. §§ 601-612 (2018).

This concern involves two legislative frameworks: the HSR premerger notification process and the requirements of the RFA. Under the HSR Act's amendments to the Clayton Act, firms engaging in mergers above a statutorily defined minimum value<sup>4</sup>—including many that would involve smaller businesses to which the RFA applies—are required to provide information about a proposed merger to the FTC and the Department of Justice (DOJ) before the transaction can close. To bolster information gathering in merger enforcement, the FTC (with concurrence from the DOJ) proposed an extensive set of amendments to the filing process outlined by the HSR Act.<sup>5</sup> The proposed changes to the HSR process would dramatically expand the disclosure obligations for merging companies that meet the minimum valuation threshold.<sup>6</sup>

Under the RFA, federal agencies “shall prepare and make available for public comment an initial regulatory flexibility analysis. . . describ[ing] the impact of the proposed rule on small entities,”<sup>7</sup> except where “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>8</sup> If the agency believes the amendment will not have a substantial impact on small businesses, then it must provide “the factual basis” for its conclusion.<sup>9</sup>

The statement certifying that the proposed HSR changes in the NPRM won't affect small businesses reads, in full:

Because of the size of the transactions necessary to invoke an HSR Filing, the premerger notification rules rarely, if ever, affect small entities. The 2000 amendments to the Act exempted all transactions valued at \$50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of \$111 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities.<sup>10</sup>

Unfortunately, this is insufficient to satisfy the requirements of the RFA. Although the FTC stresses the \$111 million HSR threshold to assert that small entities will not be affected, the Small Business Administration (SBA) “generally defines a small business as an independent business having fewer

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<sup>4</sup> 15 U.S.C. § 18a(a)(2) (2018).

<sup>5</sup> NPRM, 88 FR 42178 (Jun. 29, 2023).

<sup>6</sup> See *id.* at 42208 (estimating the hours and expenses required to comply with the new rules). According to antitrust practitioners, however, the NPRM's estimate likely substantially underestimates the true burden and cost of the proposed rules. See, e.g., Sean Heather, *Antitrust Experts Reject FTC/DOJ Changes to Merger Process*, CHAMBER OF COMMERCE (Sept 19, 2023), <https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process>.

<sup>7</sup> 5 U.S.C. § 603(a) (2018).

<sup>8</sup> 5 U.S.C. § 605(b) (2018).

<sup>9</sup> *Id.*

<sup>10</sup> NPRM, 88 FR 42178, 42208 (Jun. 29, 2023).

than 500 employees.”<sup>11</sup> The SBA also offers more detailed, industry-specific identification of small businesses.<sup>12</sup> Indeed, the NPRM cites to the SBA’s own standards, but these, too, do not align with the FTC’s “factual statement,” and it is not evident that the Commission sufficiently delved into those standards to understand their relevance for the size thresholds under the HSR Act.

Even a quick review of the SBA’s “Small Business Size Standards by NAICS Industry” table reveals that the SBA classifies the size of a firm based on either annual receipts or number of employees,<sup>13</sup> depending upon the characteristics of their industry.<sup>14</sup> Neither of these, it should go without saying, is the same as a “size-of-transaction” threshold under the HSR Act. Nor does the NPRM’s “factual basis” statement contain information sufficient to determine that there is any correlation between the SBA’s size thresholds and the size of a *transaction* (which typically represents something between the discounted present value of a firm’s expected returns under new ownership and current ownership over an indefinite time period).

Despite the FTC’s claim that the \$111 million deal threshold will ensure that small businesses are not substantially affected, the agency’s own data from 2022 shows that nearly a quarter of all HSR filings covered transactions involving firms with sales of \$50 million or less.<sup>15</sup> The same data shows that, out of the 3029 reported transactions in 2022, 513 involved firms with between \$50 and \$100 million in sales and 305 with between \$100 and \$150 million in sales. Here, again, the SBA’s metrics for identifying small businesses bear emphasis: where the SBA relies on dollar values instead of employee headcounts to define small businesses at all, it does so based on annual average receipts, not on the overall value of the firm.

This distinction underscores a point made in a letter filed by the App Association, a trade group representing small technology firms, that it is important not to conflate *valuation* with *size*.<sup>16</sup> A company, such as an innovative tech startup, can have a small number of employees but a high value based on projected sales, intellectual property, and forthcoming products. Indeed, the App

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<sup>11</sup> *Frequently Asked Questions*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (2023), <https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf>.

<sup>12</sup> See 13 CFR § 121.101, et seq. (1996)

<sup>13</sup> 13 CFR § 121.201 (2024).

<sup>14</sup> Indeed, the SBA’s standards entail a review of a wide range of such characteristics. See 13 CFR § 121.102 (1996) (“SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.”).

<sup>15</sup> See Fed. Trade Comm’n and Dept of Just., HART-SCOTT-RODINO ANNUAL REPORT (2022), at Table IX, *available at* [https://www.ftc.gov/system/files/ftc\\_gov/pdf/FY2022HSRReport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf).

<sup>16</sup> See Letter from Morgan Reed, President of App Association, to Lina Khan, Chair of Fed. Trade. Comm’n and Members of Congress (Feb 1, 2024), *available at* <https://actonline.org/wp-content/uploads/App-Association-HSR-RFA-Ltr-1-Feb-2024-1.pdf>.

Association notes that a number of its members are already subject to HSR disclosures and that that number can only increase under the proposed amendments.<sup>17</sup>

To provide further context regarding whether many of these deals involve small businesses, a 2013 CrunchBase dataset showed that the average successful American startup sold for \$242.9 million.<sup>18</sup> Furthermore, the FTC's 2022 HSR report highlights at least one challenged transaction involving a small business: *Meta/Within*.<sup>19</sup> Within, a virtual-reality startup with 58 employees, was acquired by Meta for \$400 million.<sup>20</sup> Not only was there an HSR filing, but the FTC attempted to challenge the transaction—and lost in district court.<sup>21</sup>

Small businesses are clearly burdened by the HSR premerger notification requirements—and this burden would only increase under the proposed changes. By the FTC's own estimate the new requirements would quadruple the hours required to prepare an HSR filing and raise costs by \$350 million. By other, more realistic estimates, that increase in work hours would entail a cost of more than \$1.6 billion<sup>22</sup>—or, indeed, considerably more.<sup>23</sup> There is no question that drastically increasing the cost of merger filings will make it much harder for small businesses to merge or be acquired, which is a primary form of success for small businesses.

Indeed, the NPRM's proposed changes are, in part, *specifically designed to affect small businesses*. “Acquisitions of small companies can cause harm, including in sectors where competition occurs on a local level. . . . Thus, the Commission proposes several changes to expand the requirements for information related to prior acquisitions beyond what is currently required by Item 8.”<sup>24</sup> Furthermore, “*given the difficulties in determining the value of small or nascent companies*, the Commission believes it would be less burdensome for filers to report *all acquisitions*. . . .”<sup>25</sup> Indeed, the FTC is aware of the potential burden on small businesses that such an approach would entail, but

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<sup>17</sup> See *id.*

<sup>18</sup> See Mark Lennon, *CrunchBase Reveals: The Average Successful Startup Raises \$41M, Exits at \$242.9M*, TECHCRUNCH (Dec 14, 2013), <https://techcrunch.com/2013/12/14/crunchbase-reveals-the-average-successful-startup-raises-41m-exits-at-242-9m>.

<sup>19</sup> See Fed. Trade Comm'n and Dept of Just., HART-SCOTT-RODINO ANNUAL REPORT (2022), available at [https://www.ftc.gov/system/files/ftc\\_gov/pdf/FY2022HSRReport.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf).

<sup>20</sup> See, e.g., *Within (Virtual Reality) Overview*, PITCHBOOK (last visited Feb. 29, 2024), <https://pitchbook.com/profiles/company/117068-59#overview>.

<sup>21</sup> *In the Matter of Meta/Zuckerberg/Within*, Fed. Trade Comm'n Docket No. 9411 (Aug. 11, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/221-0040-metazuckerbergwithin-matter>.

<sup>22</sup> See Albrecht, et al., *supra* note 2, at 7 (“The U.S. Chamber of Commerce conducted ‘a survey of 70 antitrust practitioners asking them questions about the proposed revisions to the HSR merger form and the new draft merger guides.’ Based on average answers from the survey respondents, the new rules would increase compliance costs by \$1.66 billion, almost five times the FTC’s \$350 million estimate.”).

<sup>23</sup> See *id.* (“For the current rules, the average survey response puts the cost of compliance at \$79,569. Assuming there are 7,096 filings (as the FTC projects for FY 23), the total cost under the current rules would be \$565 million. Under the new rules, the average survey response estimates the expected cost of compliance to be \$313,828 per transaction, *for a total cost of \$2.23 billion*.”) (emphasis added).

<sup>24</sup> NPRM, 88 FR 42178, 42203 (Jun. 29, 2023).

<sup>25</sup> *Id.* at 42204 (emphasis added).

nevertheless aims to ensure that its proposed rules “still captur[e] acquisitions of entities worth *less than \$10 million*.”<sup>26</sup>

And there is yet a further problem: These concerns take into account only the *direct* costs the NPRM would impose on small businesses. But, as the National Federation of Independent Business highlighted in 2023, several agencies have arguably failed to comply with the RFA by failing to consider *indirect* effects on small businesses.<sup>27</sup> Obviously, there is no such analysis provided here—and, indeed, as noted above, a clear intent of the NPRM is to affect the likelihood of small-business acquisition by reducing the incentive for firms to serially acquire small businesses. Doing so, of course, reduces funders’ incentives to invest in startups and small businesses and raises these companies’ cost of capital. Arguably that increase is itself a direct cost, but certainly its indirect effect is incredibly significant to the health of small businesses in the U.S.

The dramatic changes to the HSR premerger notification requirements proposed by the FTC have already created substantial uncertainty within the antitrust bar. Procedural defects such as failing to comply with the requirements of the RFA increase the likelihood that any rules adopted by the FTC will be challenged in court. This would increase the uncertainty (and thus the cost) surrounding the HSR process. This would be an unfortunate outcome. Fortunately, it is one that can be avoided if the FTC addresses these issues prior to finalizing its proposed rules.

Sincerely,



Geoffrey A. Manne  
President, ICLE



Gus Hurwitz  
Director of Law & Economics Programs, ICLE

cc:

Rep. Jim Jordan, Chairman  
House Judiciary Committee

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<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> See Rob Smith, *The Regulatory Flexibility Act: Turning a Paper Tiger Into a Legitimate Constraint on One-Size-Fits-All Agency Rulemaking*, NFIB SMALL BUSINESS LEGAL CENTER (May 2, 2023), <https://strgnfibcom.blob.core.windows.net/nfibcom/NFIB-RFA-White-paper.pdf> (collecting examples).

Rep. Jerry Nadler, Ranking Member  
House Judiciary Committee

Rep. Thomas Massie, Chairman  
House Judiciary Committee, Subcommittee on Administrative State, Regulatory Reform and  
Antitrust

Rep. Lou Correa, Ranking Member  
House Judiciary Committee, Subcommittee on Administrative State, Regulatory Reform and  
Antitrust

Sen. Dick Durbin, Chairman  
Senate Judiciary Committee

Sen. Lindsey Graham, Ranking Member  
Senate Judiciary Committee

Sen. Amy Klobuchar, Chairwoman  
Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust and Consumer  
Rights

Sen. Mike Lee, Ranking Member  
Senate Judiciary Committee, Subcommittee on Competition Policy, Antitrust and Consumer  
Rights Subcommittee