TECHNET
THE VOICE OF THE INNOVATION ECONOMY

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September 27, 2023

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610
Washington, D.C. 20580

Re: "Premerger Notification; Reporting and Waiting Period Requirements" Proposed Rulemaking ('*16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300*)

To Whom it May Concern:

TechNet appreciates the opportunity to provide comments on the Federal Trade Commission's ("Commission") proposed amendments to the premerger notification rules that implement the *Hart-Scott-Rodino Antitrust Improvements Act* ("HSR"). We are concerned that the proposed amendments to premerger notification rules will have a chilling effect on merger and acquisition (M&A) activity in the United States at a time when we are in a global race to win the next era of innovation, which hinges on our ability to remain the leader in emerging technologies.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.5 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

For years, American entrepreneurs and workers have benefited from M&A activity. TechNet has long supported federal policies that promote competition and reduce unnecessary barriers to mergers and acquisitions. This includes support for an approach to evaluating existing antitrust laws that promotes consumer welfare and reduces bias against procompetitive acquisitions by companies to avoid unintended, long-term consequences on investment and innovation. In addition, TechNet wholeheartedly supports a regulatory approach that recognizes mergers and acquisitions are essential to a thriving startup ecosystem. For the startups that do not grow large enough to become sustainable, long-term businesses, mergers and acquisitions are a common and attractive opportunity for these companies to enter

the market and provide consumer benefits. These transactions also enable new investments in the next generation of entrepreneurs, which drives innovation, creates new jobs, and strengthens our economy.

In 1976, Congress enacted the *Hart-Scott-Rodino Antitrust Improvements Act* ("HSR") to allow federal antitrust agencies sufficient time to investigate the potential competitive effects of proposed mergers. In crafting HSR, Congress balanced the benefits of premerger notification against the burdens on agencies and regulated companies of reporting transactions that were unlikely to raise competitive concerns. Congress also intended for the premerger notification process to not require the creation of additional, marginally relevant information or impose undue delays in the consummation of mergers.[1] Finally, Congress rejected the inclusion of language that would have allowed the Commission, after consulting with the Department of Justice, to selectively "require pre-merger notifications from particular companies or industries or from any class or category of persons."[2]

This longstanding framework, which allows acquisitions to serve as an attractive and common exit opportunity for startups, has contributed to the health of our economy. Last year, 1,164 venture-backed companies were acquired, while just 36 went public.[3] In addition, this framework has provided agencies the ability to challenge M&A activity if they so choose. Between 2001 and 2020, the government has challenged approximately 780 mergers, with the merging parties winning in court only 11 times. With a success rate of 98.5 percent, the Commission already has the tools to protect competition.[4]

As discussed in more detail below, the Commission's proposed amendments to the premerger notification rules that implement HSR will place an undue burden on proposed mergers with no anti-competitive concerns, will create uncertainty, confusion, and prohibitively high costs for companies that are seeking to comply with HSR in good faith. As drafted, the proposed amendments will have a chilling effect on the innovation economy and America's ability to win the next era of innovation.

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[1] See remarks of Rep. Peter Rodino (D-NJ) (House Debate, September 16, 1976, 122 Cong. Rec. H30877): *"[P]lainly, government requests for additional information must be reasonable. The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government. But lengthy delays and extended searches should consequently be rare…In sum, a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable."*

[2] 122 CONG. REC. 29,342 (Sept. 8, 1976) (referring to S. 1284 (May 6, 1976))

[3] NVCA 2023 Yearbook (March 22, 2023)

[4] Linda Moore, Bobby Franklin, and Neil Bradley, "*Fundamentally Altering Antitrust Laws Will Harm US Startups and Slow the Economy*" (October 28, 2021)

TechNet Comments

Currently, the HSR premerger notification process requires businesses to report proposed mergers and other transactions valued above specified thresholds. If the reviewing agency needs additional information to examine whether the proposed merger complies with federal antitrust laws, the agency may require the transacting parties to provide more detailed information, referred to as a "Second Request." Historically, Second Requests as a percentage of reported transactions were consistently less than four percent of the total.

However, the Commission's proposed amendments to the premerger notification process would impose the equivalent of a Second Request on every transaction subject to HSR. In a recent survey, antitrust practitioners estimated that the proposed revisions would increase the external costs for preparing a filing from $79,569 to $313,828 and the length of time for a company to prepare a filing from 10.7 days to 32.7 days.[5] According to the Commission's own estimates, the proposed revisions will quadruple the burden on parties, without regard to concentration concerns, and increase the average time to complete an HSR filing form from 37 hours to 144 hours per filing.[6]

Several of the Commission's proposed amendments to the HSR premerger notification rules are burdensome and unrelated to the Commission's evaluation of mergers. First, the proposed rules seek to unreasonably expand the scope of Item 4(c)/4(d) documents to include documents at all stages of the drafting process. Second, the proposed rules' director and officer information requirements are disruptive to businesses and unrelated to the Commission's or DOJ's evaluation of mergers. Finally, the imposition of a 10-year lookback period for "Prior Acquisitions" is unduly burdensome and far outweighs the potential benefit that information about immaterial prior transactions could provide to the Commission's and DOJ's evaluation of a merger.

Unreasonable Expansion of Scope of Item 4(c)/4(d) Documents

Currently, Item 4(c) requires parties to include "all studies, surveys, analyses, and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets." Item 4(d) targets confidential information memoranda, bankers' books and other third-party consultants' materials, and synergies documents.

[5] U.S. Chamber HSR/Merger Guidelines Practitioner Survey (September 19, 2023)
[6] 88 Fed. Reg. 42208 (June 29, 2023)

The Commission proposes to depart from historical practice by requiring the submission of draft documents in HSR filings. We urge the Commission to narrow this requirement by only applying to a draft version only when it is first submitted to an officer/director/supervisory deal team lead and prevent a situation where filing parties have to provide a nearly limitless amount of redlines. In the Commission's own words, such excessive document productions could "overwhelm the Agencies and undermine the goal of effective and efficient screening for transactions that require an in-depth investigation."[7] The longstanding position of the Commission's Premerger Notification Office ("PNO") is that draft versions of documents responsive to Item 4(c) or 4(d) are not required unless there is no final version available. In a significant departure from this norm, the Commission proposes that any such draft document, if provided to an officer, director, or supervisory deal team lead, must also be submitted to the Commission regardless of whether any competitive concerns exist. The Commission provides no guidance as to what stage of drafting constitutes a "draft of responsive transaction-related documents," which will create unnecessary confusion and uncertainty by requiring the submission of potentially hundreds of versions of the same document.

In addition, the Commission states that the documents responsive to Item 4(c) and 4(d) are helpful but do not "always convey each filing person's cumulative views on the rationale(s) for the transaction."[8] To address this alleged shortfall in the current HSR filing process, the Commission proposes a requirement that parties submit documents prepared by or for the supervisory deal team lead(s). However, as drafted, the proposed rules do not provide clarity as to which individual or individuals would constitute a "supervisory deal team lead," noting that such an individual could be an officer that may "lead the day-to-day activities of the deal team," but could also be someone other than an officer or director. As the Commission further explains, the burden is on the filing person to make this determination. As one approach, we would urge the Commission to clarify that such an individual should be the most senior member of a filing parties' deal team responsible for the company's strategic vision and who otherwise would not qualify as a director or officer.

<u>Director and Officer (D&O) Information Requirements are Disruptive to Businesses and Unrelated to the Commission's and DOJ's Evaluation of Mergers</u>

The Commission's proposed rule seeks to require the identification of every officer, director, or board observer of all entities within the acquiring party and acquired entity, as well as the identification of other entities for which those individuals currently serve or in the past two years have served, as an officer, director, or board observer.[9] While this proposal appears to be an attempt by the Commission to identify potential interlocking directorate issues pursuant to Section 8 of the *Clayton Act*, the text of the proposed rule contains no limitations and could

[7] Id. at 42195
[8] See Id. at 42191
[9] Id. at 42189

encompass disclosure of nonprofit board membership. Currently, filers are not required to disclose the identity of the members of their boards of directors because such information is not relevant at this stage of the premerger notification process. If this information becomes relevant for a particular investigation, the agencies are empowered under existing processes to request extensive D&O information.

Proposed "Prior Acquisitions" Requirement is Unduly Burdensome

Finally, while the Commission's proposed "Prior Acquisitions" section is similar to the existing information requirements under Item 8, the Commission seeks to impose a 10-year Lookback Period and eliminate the materiality threshold for reportable prior transactions. These changes could require filing parties to collect information about and report an excessive volume of immaterial transactions over the last decade and far outweigh any potential benefits that such information could provide the Commission in their review of a merger. We propose removing the 10-year Lookback Period and urge the Commission to retain the existing monetary thresholds for disclosing prior transactions.

Conclusion

When viewed cumulatively, each of these proposed revisions to the HSR premerger notification rules will have a chilling effect on procompetitive mergers and acquisitions. As a result, we believe the Commission's proposed rule will lead to an over-deterrence of acquisitions that have the potential to spur innovation.

We note that the Commission's proposed HSR rules apply to businesses of all sizes. The increased compliance burden, acknowledged by the Commission in their Notice of Proposed Rulemaking, may make acquisitions of smaller companies cost-prohibitive and make it more difficult for smaller companies to expand and compete effectively to the benefit of American consumers. In tandem with the Commission's proposed Merger Guidelines revisions, this proposal is a significant departure from longstanding antitrust principles and appears designed to deter merger activity at the outset. As former FTC Commissioner Noah Phillips observed, "[t]he 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."[10]

Efforts to arbitrarily restrict mergers will disproportionately impact startups, which thrive when they have access to capital and markets and operate within a balanced regulatory regime that promotes innovation and does not restrict access to exit opportunities, including mergers and acquisitions. The consequence of this proposal, and others that are unduly biased against mergers and acquisitions, will

[10] Noah Joshua Phillips, Competing for Companies: How M&A Drives Competition and Consumer Welfare (May 31, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf

be a disruption to the startup ecosystem, which will hurt America's economy and hamper our ability to win the next era of innovation.

Thank you for your attention to our views on this matter. We appreciate the opportunity to submit comments and provide feedback on the Commission's revisions to the HSR premerger notification rules and stand ready to serve as a resource to you in your examination of this important issue.

Sincerely,

Carl Holshouser
Senior Vice President