

Before the

United States Federal Trade Commission
Washington, D.C.

In re

FTC-DOJ proposed rulemaking on the Hart-
Scott-Rodino premerger notification process

Docket No. FTC-2023-0040

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

The Computer & Communications Industry Association (“CCIA”)¹ is pleased to provide comments in response to the proposed rulemaking undertaken by the Federal Trade Commission (“FTC”), with the concurrence of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice (“DoJ”),² on the Hart-Scott-Rodino (“HSR”) premerger notification process.

CCIA appreciates the FTC and DoJ’s (jointly “Agencies”) efforts to ensure that merger notification regulations properly reflect market developments and economic advancements. However, the proposed changes to the HSR notification process seem unduly burdensome and will have a harmful effect on businesses across the economy. Many of the proposed changes would affect the Agencies’ efficiency reviewing proposed mergers, which would significantly

¹ CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit <https://ccianet.org>.

² FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (Jun. 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

hinder transactions that would otherwise benefit innovation. These comments discuss CCIA’s concerns and recommendations regarding the proposed changes.

1. The proposed rulemaking converts the HSR process into a Second Request and increases the burden for all transactions regardless of competitive harm.

The premerger notification process is designed to “*enable the agencies to determine whether a proposed merger or acquisition may violate the antitrust laws.*”³ The HSR statute, when triggered, requires the merging parties to certain transactions to provide the Agencies with preliminary information to determine whether the proposed transaction is likely to cause competitive harm. If the Agencies determine that additional information is needed to assess a transaction, they can extend the evaluation period and request additional documents through a Second Request.⁴

Commentators agree that the vast majority of mergers are either procompetitive or competitively benign in nature.⁵ Studies have found that most mergers are beneficial to competition because they allow companies to better serve consumers and increase efficiencies.⁶ It is the rare exception, and not the norm, that a merger harms competition. In fact, as the Agencies have often noted, most transactions do not raise competitive concerns.⁷ In recent

³ Notice of Proposed Rulemaking re Premerger Notification (“NPRM”), Federal Register / Vol. 88, No. 124, at 42178, (hereinafter “NPRM”), <https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf>.

⁴ See Hart-Scott-Rodino Antitrust Improvements Act of 1976”, Pub. L. 94-435, Sep. 30, 1976, 90 Stat. 1383, 15 U.S. Code § 18a, <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-section18a&edition=prelim>; “Model Request for Additional Information and Documentary Material (Second Request), FTC Premerger Notification Office, (May, 2019), https://www.ftc.gov/system/files/attachments/merger-review/may2019_model_second_request_final.pdf.

⁵ See David L. Meyer, Merger Enforcement is Alive and Well at the Department of Justice, U.S. DEP’T OF JUST. (Nov. 15, 2007), <https://www.justice.gov/atr/file/519351/download>; Maureen K. Ohlhausen, Taylor M. Owings, “The Case for M&A: Evidence of Efficiencies in Consummated Mergers,” (Aug. 29, 2023), at 1, <https://content.pymnts.com/wp-content/uploads/2023/08/8-THE-CASE-FOR-M-A-EVIDENCE-OF-EFFICIENCIES-IN-CONSUMMATED-MERGERS-Maureen-K-Ohlhausen-Taylor-M-Owings-1.pdf>; Mark J. Niefer, Donald F. Turner at the Antitrust Division: A Reconsideration of Merger Policy in the 1960s, 29 Antitrust 53 (Summer 2015) at 57, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622795.

⁶ *Id.*

⁷ “An Update on FTC Merger Enforcement,” Christine S. Wilson, Commissioner, U.S. Federal Trade Commission, Remarks at International Bar Association’s 19th Annual International Mergers and Acquisitions Conference (Jun. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CWilsonUpdateMergerEnforcement.pdf; see also “How Mergers are Reviewed,” Federal Trade Commission, <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review> (“The vast majority of deals reviewed by the FTC and the Department of Justice are allowed to proceed after the first, preliminary review.”).

years, less than 2 percent of reported transactions prompted a Second Request,⁸ and less than 1 percent of transactions led to an agency challenge or a consent order.⁹ However, through this proposed change, the Agencies seem to seek to merge the initial review and Second Request processes and impose immense burdens on merging parties. The proposed rulemaking imports many of the procedures and requests regarding documents and custodians that are typically reserved for a Second Request.¹⁰ As a result, the proposed rulemaking will essentially subject every transaction to an in-depth review that should be reserved for the minority of cases in which an agency has identified a potential competitive concern.¹¹

The HSR process should be a screening mechanism for transactions that may present a risk to competition. The Agencies' proposal to combine the two filing stages would wipe out the purpose of the initial review process, which will significantly increase the burden on all parties, as well as the workload within the Agencies.

The proposed changes to the notification process significantly increase the costs of transactions¹² for merging parties without an evidence-based analysis that these additional obstacles are necessary and warranted. As a result, the Agencies' limited resources will be

⁸ See "Hart-Scott-Rodino Annual Report Fiscal Year 2021," (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

⁹ See "A Record-Breaking Year of Mergers and Acquisitions," (Feb. 22, 2023), <https://www.dwt.com/insights/2023/02/hart-scott-rodino-antitrust-mergers-acquisitions>.

¹⁰ *E.g.*, draft documents (NPRM at 42194), ordinary course documents on the market structure and competitive dynamics (NPRM at 42195), and an expansive search for documents beyond those sent to officers and directors of a company (MPRM at 42193) are examples from the proposed rulemaking that are typically reserved for the Second Request process.

¹¹ "ICN Recommended Practices For Merger Notification And Review Procedures," (Apr. 2004), at 19, <https://www.ftc.gov/system/files/attachments/merger-workshop-competition-authorities-caribbean/rec-practices-merger-notification.pdf>; "Recommendation of the Council on Merger Review," OECD, (Mar. 22, 2005), at 5, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333>.

¹² "Proposed HSR Changes: What Fund Managers Need to Know," Peter Jonathan Halasz and Ngoc Pham Hulbig (Jul. 14, 2023), <https://www.srz.com/resources/proposed-hsr-changes-what-fund-managers-need-to-know.html>; "U.S. antitrust agencies propose massive changes to HSR merger review process: What's changing, why, and how will it impact your next deal?," ReedSmith (Jun. 28, 2023), <https://www.reedsmith.com/en/perspectives/2023/06/us-antitrust-agencies-propose-massive-changes-to-hsr-merger>; "New Hart-Scott-Rodino Proposal Signals Sea Change in U.S. Merger Review Process That Will Delay Transactions and Raise Costs," Dechert (Jul. 05, 2023), <https://www.dechert.com/knowledge/onpoint/2023/7/new-hart-scott-rodino-proposal-signals-sea-change-in-u-s-merger.html>.

inadequately used to analyze transactions the majority of which will likely not raise competitive concerns.¹³

2. The Agencies’ proposal will exponentially increase document production that will add a significant and onerous burden to all parties involved.

CCIA welcomes the proposed change to enable parties to file HSR documents electronically and commends the Agencies for this step towards modernization. However, the possibility for electronic submissions does not alleviate the increased workload in preparation for the filing. Regardless of the means of submission, the man-hours required to properly prepare the filing to comply with the proposed changes would be extremely onerous and burdensome for merging parties.

The proposed changes to the HSR process will significantly increase the scope of documents merging parties are required to submit as part of an initial filing. While final documents were previously sufficient for HSR filings, the Agencies are now requiring that companies submit drafts of the relevant documents as well.¹⁴

The production of the aforementioned drafts is expected to cause a significant increase in the volume of documents required to be sought, gathered, and filed by merging parties.¹⁵ While the Agencies propose to mitigate this burden by allowing parties to collect drafts and hold them until requested, this proposed solution ignores the realities from the business perspective and does not address the core of the additional burden. Filing parties must still make significant

¹³ See, e.g., D. Bruce Hoffman, Antitrust in the Digital Economy: A Snapshot of FTC Issues (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf, (“Having to review close to 5000 filings was an inefficient use of agency resources that could interfere with investigating serious competition problems. Second, more recent evidence suggests that reducing the HSR thresholds would not likely generate many good cases. Analysis of enforcement activity shows that enforcement is roughly correlated with transaction size—in other words, the bigger the deal, the more likely it is to result in a remedy, abandonment under challenge, or litigation. And, in particular, enforcement action rates are quite low at the lower end of the HSR reporting thresholds”).

¹⁴ NPRM at 42183.

¹⁵ WilmerHale, “FTC and DOJ Propose Sweeping Changes to HSR Notification Form: Convergence and Intensifying Idiosyncrasy,” (Jul. 6, 2023), <https://www.wilmerhale.com/insights/client-alerts/20230706-ftc-and-doj-propose-sweeping-changes-to-hsr-notification-form-convergence-and-intensifying-idiosyncrasy>, “the FTC estimates that businesses would need on average 144 hours to prepare the revised notification, or 4 times more than the current average, and 7 times more for complex transactions.”

efforts to gather and review an exorbitant number of documents, determine their relevance, compile, and preserve them for production. This is especially true given the short processing time (48 hours) proposed by the Agencies if the documents are subsequently requested.¹⁶

In considering this additional administrative burden, the Agencies should take into account how the proposed changes relate to the mandates in the Paperwork Reduction Act (“PRA”).¹⁷ The PRA requires federal agencies to minimize the paperwork burden that they impose when seeking information. There is no clear justification as to the reasoning behind the significant increase in the document production requirement in the proposed rulemaking, which goes directly against the PRA’s mandate. This heavy burden on the initial stage of filing not only goes against the PRA, but is inconsistent with the purpose Congress had for the HSR Act.

The draft changes also propose to expand the scope of relevant custodians to all “supervisory deal team leads.”¹⁸ This change will significantly expand the employees who need to be sought and conferred with, heavily increasing the volume of documents being produced. Merger leads collect a significant amount of information and are charged with filtering the key relevant information required by decision-makers. Requiring companies to produce this additional information will be both onerous and unwarranted.

The draft changes would further require parties to submit high-level strategic business documents that are prepared in the ordinary course of business and that are not directly related to the transaction under review. The proposed rulemaking intends for companies to be required to submit any documentation that mentions “*market shares, competition, competitors, or markets of any product or service.*”¹⁹ This applies to all the cases where the document was disclosed with the company’s CEO, Board of Directors, or their teams. This additional requirement would not only significantly increase the volume of documents to be produced, but it would be especially burdensome and unnecessary given that the majority of these documents will likely not be

¹⁶ NPRM at 42195.

¹⁷ See 44 U.S.C. 3501 *et seq.* at <https://www.govinfo.gov/content/pkg/PLAW-104publ13/html/PLAW-104publ13.htm>.

¹⁸ NPRM at 42193-94.

¹⁹ *Id.* at 42195.

relevant to the transaction under review and would be difficult to track throughout the company in a short period of time.

The proposed changes also increase the breadth of prior acquisitions that companies must report from five to ten years.²⁰ Further, they propose removing the filing threshold limiting reporting to acquisitions of companies with annual net sales or total assets greater than \$10 million.²¹ These changes would require considerable investment by merging parties to properly identify a comprehensive list of the transactions required, not to mention the overload of transactions that would now need to be reported that would have little to no competitive relevance to the transaction being reviewed.

Further, there are several communication systems and tools that companies use within their business units. The proposed rulemaking does not seem to account for this reality and would require the merging parties to identify all communication systems used to “store or transmit information or documents related to its business operations.”²² The proposal is not limited to communication systems relevant to the transaction, which might be a disproportionate requirement for document review at an early stage. Given the breadth of the request, companies would have the burden to preserve the information in each communication system regardless of the information’s relevance to the transaction. CCIA notes that this requirement needs further in-depth review to avoid unnecessary and disproportionate burdens on merging parties.

3. The proposed changes to the HSR process will have a deterrent effect on procompetitive transactions.

The substantive changes imposed by the proposed rulemaking will significantly increase the cost of transactions and have a deterrent effect on merging parties as potential transactions become more onerous. As a result, consumers and the overall innovation ecosystem would be the ones hurt the most.²³ The revised HSR process will deter companies from pursuing mergers

²⁰ *Id.* at 42203.

²¹ *Id.* at 42187

²² *Id.* at 42205.

²³ See Susan Woodward, Irreplaceable Acquisitions: Proposed Platform Legislation and Venture Capital (Nov. 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf; Jeffrey Bartel, “Exploring Trends In Venture Capital Acquisitions For 2023” (Dec. 1, 2022),

and will likely make them question if the benefit from the transaction is worth the cost and burden of the notification process.²⁴

Moreover, the proposed changes treat merging parties with an *equality for the unequal* approach as they impose the same burdens and requirements to small companies as they do to big businesses. This not only makes HSR requirements prohibitive from a cost-based perspective to smaller companies, but it also stymies their efforts to enter the market and quickly expand to better compete with bigger participants.²⁵

The proposed changes will likely also stifle innovation. A great number of startups seek to be bought by bigger companies²⁶ and use this as an incentive to innovate and develop their ideas and products. Being acquired is part of their business-building strategy.²⁷ Many startups and small companies have an “exit-based” mentality in which they enter the market with an exit in mind and without an actual interest in competing in the long run. The harder it is for a company to exit a market, the higher the cost of entering the market.²⁸ In the end, startups and smaller companies would end up suffering the harshest consequences of the new HSR rules. The

<https://www.forbes.com/sites/forbesfinancecouncil/2022/12/01/exploring-trends-in-venture-capital-acquisitions-for-2023/?sh=3bb28c54443c>.

²⁴ “U.S. Chamber HSR/Merger Guides Practitioner Survey,” U.S. Chamber of Commerce, (Sep. 19, 2023), at 2–3, <https://www.uschamber.com/assets/documents/20230919-U.S.-Chamber-Antitrust-Survey.pdf>; “Proposed HSR Rules Upend M&A and Merger Control Review,” Robin Sampson, Alicia J. Batts, Jason D. Kimpel, Matthew R. Levy, Joanne C. Lewers, Kathy L. Osborn, Kenneth M. Vorrasi, Jonathan H. Todt, Allison C. Schten (Jul. 10, 2023), <https://www.faegredrinker.com/en/insights/publications/2023/7/proposed-hsr-rules-upend-m-a-and-merger-control-review>; “New HSR Form Will Transform The Us Merger Review Process,” Harry T. Robins, David R. Brenneman, M. Luisa Di Lauro, Jonathan M. Rich, Bernard W. Archbold (Jun. 30, 2023), <https://www.morganlewis.com/pubs/2023/06/new-hsr-form-will-transform-the-us-merger-review-process>.

²⁵ “Proposed HSR Changes: What Fund Managers Need to Know,” Peter Jonathan Halasz and Ngoc Pham Hulbig (Jul. 14, 2023), <https://www.srz.com/resources/proposed-hsr-changes-what-fund-managers-need-to-know.html>; “Mergers, Industries, and Innovation: Evidence from R&D Expenditure and Patent Applications,” Robert Kulick, Ph.D., Andrew Card (Feb. 2023), at 10, <https://www.uschamber.com/assets/documents/NERA-Mergers-and-Innovation-Feb-2023.pdf>.

²⁶ See “Reasons why startups get acquired”, (Jun. 13, 2023), <https://fastercapital.com/content/Reasons-why-startups-get-acquired.html#:~:text=Acquisitions%20of%20startups%20are%20often,to%20build%20something%20from%20scratch>; Dan Wang, Emily Cox Pahnke, & Rory M. McDonald, The Past Is Prologue? Venture-Capital Syndicates’ Collaborative Experience and Start-Up Exits, 65 ACAD. MGMT. J. [], <https://foster.uw.edu/wp-content/uploads/2021/04/Wang-Pahnke-McDonald-2021.pdf>.

²⁷ See “Getting acquired is a legitimate strategy for building your business” (Aug. 2, 2022), <https://techcrunch.com/2022/08/02/getting-acquired-is-a-legitimate-strategy-for-building-your-business/>.

²⁸ See Noah Joshua Phillips, Competing for Companies: How M&A Drives Competition and Consumer Welfare (May 31, 2019), at 17, https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_competing_for_companies_5-31-19_0.pdf.

more requirements for a merger to be green-lit, the less likely it is for a big company to buy or finance a smaller up-and-coming entrant.²⁹

The FTC estimates that the additional requirements would add between 12 and 222 additional hours³⁰ for merging parties to comply with the new requirements, which is four times what the current notification process takes, an estimate that could grow to up to seven times the current processing period for complex transactions. CCIA, based on discussions with companies, believes that this assessment significantly underestimates the true consequences in man-hours that the additional notification requirements would require. Companies predict that the cost of completing an HSR filing under the proposed rule would be nearly five times greater than what the FTC estimates.³¹ The proposed changes will not only require substantial and burdensome additional work from employees of the merging companies, but impose significant time and financial costs associated with outside counsel, eDiscovery firms, and consultants who assist in the preparation of merger filings, thereby making merger notification much more onerous.

The proposed changes also require merging parties to certify that “the filing person has taken the necessary steps to prevent the destruction of documents and information related to the transaction.”³² This requirement for document preservation would be an increased burden on companies, especially in a nascent stage of the review process. As previously stated, the proposed changes to the HSR process would *de facto* turn every merger filing into a Second Request, even for transactions that do not require that level of scrutiny. This change might lead to additional sanctions and consequences for companies even where they sought to preserve relevant documents in good faith.

²⁹ See Jan Bena & Kai Li, Corporate Innovations and Mergers and Acquisitions, 69 J. FIN. 1923 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917215; see also Marianna Makri, Michael A. Hitt & Peter J. Lane, Complementary Technologies, Knowledge Relatedness, and Invention Outcomes in High Technology Mergers and Acquisitions, 31 STRATEGIC MGMT. J. 602 (2010), <https://www.jstor.org/stable/40587498>.

³⁰ NPRM at 42208.

³¹ See U.S. Chamber of Commerce, Antitrust Experts Reject FTC/DOJ Changes to Merger Process (Sept. 19, 2023), <https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process#:~:text=The%20agencies%27%20proposed%20changes%20to.companies%20looking%20to%20close%20mergers.>

³² NPRM at 42206.

Finally, the proposal to create an additional section on labor markets³³ is unduly burdensome and does not relate to antitrust law and the scope of the HSR process. While the geographic scope of the proposal is unclear, requiring companies to provide granular information about their employees, particularly on a global basis, might be unduly onerous while its necessity remains uncertain.³⁴

4. Conclusion

CCIA recognizes the Agencies' efforts to update the HSR notification process. However, the proposed changes seem unwarranted and would significantly increase costs and government red tape for companies looking to close mergers. As a result, the proposed changes will likely have a chilling effect not only on future U.S. merger activity but also on the broader innovation and competitive ecosystem.

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CCIA thanks the Agencies for inviting input on these important issues and is available to provide any additional information that they may require.

Respectfully submitted,

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³³ *Id.* at 42197.

³⁴ “Antitrust Deal Cops to Peek at Worker Abuses, Stirring Backlash,” Dan Papszun (Sep. 15, 2023), <https://news.bloomberglaw.com/antitrust/antitrust-deal-cops-to-peek-at-worker-abuses-stirring-backlash>; “Proposed Overhaul of HSR Premerger Notification Process,” Farrah Short, Bruce D. Sokler, Joseph M. Miller, Robert G. Kidwell (Jun. 28, 2023), <https://www.mintz.com/insights-center/viewpoints/2191/2023-06-29-proposed-overhaul-hsr-premerger-notification-process>; “FTC Proposes Sweeping Changes to HSR Filing Requirements,” Snell & Wilmer (Aug. 29, 2023), <https://www.jdsupra.com/legalnews/ftc-proposes-sweeping-changes-to-hsr-2736460/>.