



February 28, 2024

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
lkhan@ftc.gov

Re: Notice of Proposed Rulemaking, Hart-Scott-Rodino Premerger Notification Process, Docket No. FTC-2023-0040

Dear Chair Khan:

The Computer & Communications Industry Association (“CCIA”),¹ having filed comments in September 2023,² takes this opportunity to address some key concerns relating to the Federal Trade Commission’s (“FTC’s”) Notice of Proposed Rulemaking (“NPRM”) on the Hart-Scott-Rodino (“HSR”) premerger notification process,³ particularly in connection with the Regulatory Flexibility Act (“RFA”).⁴

The RFA requires that federal agencies evaluate the impact of their regulatory proposals on small entities and, where there is a likelihood of a significant impact on a substantial number of said entities, seek a less burdensome alternative. It is important to differentiate between entities that fall within the HSR “small transaction size” exemption, and small entities as defined by the Small Business Administration’s (“SBA”) standards. The latter, which are not categorically exempted from HSR requirements, would be substantially harmed by the proposed HSR rulemaking.

The FTC, in the proposed rulemaking, merely indicates that no RFA analysis is required under the proposed rule. However, the agency has not provided an evidentiary basis to support this conclusion. Hence, the FTC’s certification that the proposed HSR changes would not hurt a substantial number of small businesses may be in error. Further, as the FTC did not prepare an Initial Regulatory Flexibility Assessment (“IRFA”)⁵ before issuing the NPRM, it may have not complied with the relevant

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 www.ccianet.org.

² CCIA, “CCIA Comments on HSR Proposed Rulemaking” (Sep. 27, 2023), <https://ccianet.org/library/cia-comments-on-hsr-proposed-rulemaking/>.

³ U.S. Dep’t of Justice & the Fed. Trade Comm’n, “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>, (“NPRM”).

⁴ See 5 U.S.C. §§ 601–612.

⁵ See 5 U.S.C. § 603; see also Congressional Research Service, “The Regulatory Flexibility Act: An Overview” at 1 (Aug. 16, 2021), <https://crsreports.congress.gov/product/pdf/IF/IF11900#:~:text=Initial%20Regulatory%20Flexibility%20Analysis,->



requirements of the RFA. By failing to do so, the FTC process harmed small businesses and their representatives by not providing them with the necessary notice for them to properly participate in a regulatory proposal that would significantly impact their businesses.

In the NPRM, the FTC stated that, given the current notification thresholds, its proposed rulemaking “will not have a significant economic impact on a substantial number of small entities.”⁶ However, the FTC-DOJ’s joint HSR Annual Report for Fiscal Year 2022⁷ submitted to Congress seems to contradict this statement. According to the report, during the 2022 Fiscal Year, 709 mergers required a HSR notification where the revenue of the acquired company fell within the “less than \$50 million” category,⁸ likely pointing towards a small company being acquired. Further, transactions under \$50 million represented 23.4% of the total number of transactions,⁹ constituting the highest number of transactions of the measured ranges during the 2022 Fiscal Year.

The changes proposed in the NPRM would significantly increase the filing burden and timeline for parties required to provide notification of a merger. As the FTC estimates, the additional requirements would add between 12 and 222 person hours¹⁰ for merging parties to comply with the new requirements, which is four times what the current notification process takes. It is worth noting that a great number of startups seek to be acquired by larger companies,¹¹ as being acquired is part of their business-building strategy.¹² Hence, smaller companies would end up suffering the harshest consequences of the proposed HSR rulemaking, with many deals being scrapped as small companies could not face the increased regulatory burdens and filing requirements.

Studies have shown that, for technology startups, “exits via acquisitions are five times more likely than IPOs,” which brings an innate incentive for these companies to innovate.¹³ The more burdensome the

[When%20issuing%20a&text=IRFAs%20are%20also%20required%20to,proposed%20rule%20on%20small%20entities.%E2%80%9D.](#)

⁶ See 13 CFR part 121 (regulations defining small business size).

⁷ U.S. Dep’t of Justice & the Fed. Trade Comm’n, “Hart-Scott-Rodino Annual Report Fiscal Year 2022” (2022), at 35, https://www.ftc.gov/system/files/ftc_gov/pdf/FY2022HSRReport.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ NPRM at 42208.

¹¹ See Faster Capital, “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>.

¹² 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/>.

¹³ Froeb, Luke M. and Sokol, D. Daniel and Wagman, Liad, Cost-Benefit Analysis Without the Benefits or the Analysis: How Not to Draft Merger Guidelines (Aug. 10, 2023), Southern California Law Review, Forthcoming, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4537425; 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>.



requirements for a merger to be green-lit, or even notified, the less likely another company will buy or finance a smaller up-and-coming entrant.¹⁴ Hence, the proposed changes to the HSR form significantly affect start-ups and other small companies.

Therefore, CCIA recommends that the FTC terminate this rulemaking and, should the FTC wish to reissue the NPRM, the agency should restart the process of potential reforms by preparing and issuing an appropriate IFRA, as required by the RFA. By doing so, the FTC would properly notify small businesses of the proposed rulemaking and gain a better understanding of the potential effects the HSR changes might have on small entities.

Respectfully submitted,

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¹⁴ 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>.