



Office of the Chair

UNITED STATES OF AMERICA
Federal Trade Commission
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**Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
Regarding Proposed Amendments to the
Premerger Notification Form and the Hart-Scott-Rodino Rules
Commission File No. P239300**

June 27, 2023

Today, the Federal Trade Commission, with the collaboration and concurrence of the Department of Justice’s Antitrust Division, is issuing a Notice of Proposed Rulemaking (“NPRM”) to amend the Hart-Scott-Rodino (“HSR”) Form and Instructions.¹ This marks the first time in 45 years that the agencies have undertaken a top-to-bottom review of the form (the “HSR Form”) that businesses must fill out when pursuing an acquisition that must be notified in accordance with the HSR Act.²

These proposed changes are designed to effectuate the goals that Congress laid out when crafting the HSR Act. Lawmakers passed that statute to solve a specific problem. While the Clayton Act had prohibited mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly,” antitrust enforcers had struggled to block unlawful mergers prior to their consummation and before they could cause widespread harm. A primary reason was that businesses faced limited obligations to report their proposed mergers to antitrust enforcers and—critically—faced no restrictions on their ability to consummate the deal right away. “Midnight deals” were the norm, allowing companies to close deals quickly to avoid government detection. As a result, even once the FTC implemented a limited merger notification program in 1969,³ the agencies were left seeking post-acquisition relief.

¹ The Hart-Scott-Rodino Act of 1978 provides that the FTC, with the concurrence of the Assistant Attorney General, shall require parties to file notifications of transactions that “contain such documentary material and information . . . as is necessary and appropriate” to allow a determination “whether such acquisition may, if consummated, violate the antitrust laws” and to “prescribe such other rules as necessary and appropriate.” 15 U.S.C. § 18a(d)(1), (2)(C).

² Congress determined that only deals over a certain size should be notified. The original valuation threshold was set at \$15 million, but was raised to \$50 million in 2000 and is adjusted every year to reflect changes in gross national product. Currently, transactions valued at \$111.4 million or more must be reported. *See* Revised Jurisdictional Thresholds, 88 Fed. Reg. 5,004 (Feb. 27, 2023).

³ In order to assist antitrust enforcers in obtaining preliminary injunctions, the FTC initiated a merger notification program on May 6, 1969. The program was expanded by resolutions in 1972, 1973, and 1974, but proved ineffective because the Commission could not require a waiting period. *See* Bill Baer, *Reflections on 20 Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, Speech at the 35th Annual Corporate Counsel Institute, at nn.24-26 (Oct. 31, 1996), <https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.

For lawmakers, the agencies' inability to halt mergers pre-acquisition contravened the prophylactic orientation of the Clayton Act, which was designed to stop monopolies in their incipiency, before they ripened into full-scale violations of the Sherman Act.⁴ In practice, it would take on average five years for antitrust enforcers to obtain a court order requiring the unwinding of an illegal merger.⁵ During this time, the acquiring firm would reap ill-gotten gains; the assets and management of the companies would become commingled; and key employees would have often left.⁶ As a result, post-consummation merger enforcement was often a “costly exercise in futility.”⁷

The HSR Act addressed this problem by creating for certain transactions a premerger notification regime that included two key requirements: (1) that firms proposing a merger submit information needed to assess preliminarily whether a deal may violate the antitrust laws, and (2) that these firms wait for a short period, typically 30 days, after filing before consummating the deal. As a result of these requirements, enforcers now have a short period after a merger filing comes in to determine whether it is likely to violate the antitrust laws and whether to open an in-depth investigation. Absent any further inquiry from the agencies during that period, the merging parties are free to consummate their deal after the initial waiting period expires, usually 30 days or less.

Much has changed in the 45 years since the HSR Act was passed. Deal volume, for example, has soared. The House Report for the HSR Act estimated that the statute would “requir[e] advance notice” for approximately “the largest 150 mergers annually.”⁸ Today, the agencies often receive more than 150 filings each month.⁹ Transactions are increasingly complex, in both deal structure and potential competitive impact. Investment vehicles have also changed, alongside major transformations in how firms do business.

⁴ S. REP. NO. 1775, 81st Cong., 2d Sess. 4-5 (1950) (“The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.”). *See generally* *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁵ H.R. REP. NO. 1373, 94th Cong., 2d Sess., at 9 (1976) [hereinafter “House Report”]. The House Report on what would become the HSR Act recounted the saga of the El Paso Natural Gas merger challenge, which spawned seventeen years of litigation before the illegally-acquired firm was successfully divested. As the Report noted, “But the costs—to the firms, the courts and the marketplace—were immense.” House Report at 10.

⁶ House Report at 8 (“Yet by the time it wins the victory . . . it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm’s assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged.”). *See also* John Warren Titus, *Stop, Look and Listen: Premerger Notification Under Hart-Scott-Rodino Antitrust Improvements Act*, 1979 DUKE L. J. 355, 357 (1979).

⁷ 122 Cong. Rec. 25051 (remarks of Rep. Rodino).

⁸ House Report at 11.

⁹ FTC, Premerger Notification Program, <https://www.ftc.gov/enforcement/premerger-notification-program> (last visited June 27, 2023). *See also* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress (Nov. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf; Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro Bedoya Regarding the HSR Premerger Notification (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy21hsrannualreportrksstatement.pdf.

The HSR form, meanwhile, has largely stayed the same. Against the backdrop of these vast changes, the information currently collected by the HSR form is insufficient for our teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws. Our staff are put in the position of expending significant time and effort to develop even a basic understanding of key facts. They must often rely on extensive third-party interviews and materials, information that can be challenging to obtain in 30 days. Much of the key information, moreover, is known only to the firms proposing the merger, such as the exact timeline of the proposed transaction, the deal rationale, and the structure of each relevant entity. Seeking this information on a voluntary basis can leave key gaps.

The lack of relevant information is especially problematic during periods of high merger activity, including the recent surge where the number of HSR reportable transactions doubled.¹⁰ The Commission's recent 6(b) inquiry into unreported acquisitions by Apple, Amazon, Facebook (now Meta), Google, and Microsoft during 2010-2019 also highlighted the importance of collecting more information on the firm's history of acquisitions, including non-horizontal and small prior acquisitions.¹¹ The study captured how these firms structured acquisitions, the sectors they had identified as strategically important for acquisitions, and how these acquisitions figured into the companies' overall business strategies.¹²

The proposed revisions to the HSR form draw on learnings from these experiences. They seek to fill key gaps that our staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured. In addition, the current HSR form fails to capture information about key aspects of competition, such as labor markets or research and development activity. The NPRM proposes to address these and other shortcomings.

Congress also recently recognized that assessing risks to competition in today's economy will require collecting additional forms of information. The Merger Filing Fee Modernization Act of 2022 requires that merging firms provide data about any subsidies they have received from certain foreign governments and other entities of concern.¹³ The NPRM proposes changes to fulfill this statutory requirement.

Many of the updates in the proposal are consistent with data already collected by antitrust authorities around the world. For example, competition enforcers in other jurisdictions already require firms to provide narrative responses with information about business lines, the transaction's structure and rationale, business overlaps, and vertical and other relationships.

¹⁰ FY 2021 HSR reportable transactions were double those of FY 2020—3,520 versus 1,637.

¹¹ FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019 (Sept. 15, 2021), <https://www.ftc.gov/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study>; see Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies>.

¹² See Press Release, Fed. Trade Comm'n, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021) and accompanying statements, <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies>.

¹³ The Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459.

Accordingly, much of what would be required in the updated HSR form should be familiar to market participants and their counsel.

This NPRM reflects tremendous work by staff across the FTC, in particular from the Premerger Notification Office, the Office of Policy and Coordination, and the Office of Policy Planning, as well as from throughout the Bureau of Competition, the Office of General Counsel, and the Bureau of Economics. We are deeply grateful to this team for their diligent efforts, as well as to our partners at DOJ for their collaboration.

This proposal is designed to ensure that we can efficiently and effectively discharge our statutory obligations and faithfully execute on the mandate that Congress has given us. We look forward to the public comments.
