November 14, 2023

The Honorable Dick Durbin
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jim Jordan
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Lindsey Graham
Ranking Member, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Durbin, Chairman Jordan, Ranking Member Graham, and Ranking Member Nadler:

On behalf of thousands of businesses in all sectors of the U.S. economy, we write to make you aware of the detrimental impact of the Federal Trade Commission's (FTC) and the Department of Justice's (DOJ) (together, the Agencies) changes to long held U.S. antitrust policy and request your leadership in stopping the self-proclaimed "large-scale reorganization" of the initial phase of the Agencies' merger and acquisition review process.[1]

The Agencies' proposed changes to the premerger notification rules reject the Hart-Scott-Rodino (HSR) Act standards relied upon by businesses for more than 45 years [2] and will dramatically delay and discourage transactions critical to growth, job creation, and innovation for businesses of all sizes.

The FTC's and DOJ's new regime would subject thousands of businesses each year to costly and unnecessary new burdens. Smaller and middle-market businesses will be hit the hardest. Economists project the new regime will equate to over $2 billion in annual costs on these businesses with no identifiable benefit. [3]

[1] FTC, Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42,178 (June 29, 2023).
[2] See 88 Fed. Reg. at 42,180.
[3] See S.P. Kothari, The US Antitrust Agencies' NPRM re Additional Information Requirements for HSR Filings, (Sept. 26, 2023) (Kothari Report). Professor Kothari's report may be found as an attachment to the comment letter filed by the U.S. Chamber of Commerce regarding the proposed rule, available at https://www.regulations.gov/document/FTC-2023-0040-0001.

Under current law, the initial phase of the FTC and DOJ review process reflects the reality that most transactions do not pose any anticompetitive concerns. Companies file a comprehensive notification form with enough information for the FTC and DOJ to determine if an anticompetitive issue may exist. If the Agencies identify potential threats to competition during their initial review, companies are then required to go through a more thorough second review process. In 2021, the FTC and DOJ only required 65 of the 3,520 filings it received to go to the second level of review—roughly 2% of all transactions.

The proposed new regime would flip the process on its head and require *every* company to submit substantial amounts of information in their initial notification, subjecting 100% of transactions to a level of burdensome reporting only potentially necessary for less than 2% of deals. The proposal estimates that the time to prepare an average filing will quadruple. For more complex transactions (which account for nearly half of all merger filings), companies will face a *seven-fold* increase in filing times. This transformation will delay transactions by weeks or months. This burdensome approach is not calibrated for the minimal anticompetitive risk posed by the vast majority of the thousands of transactions to which it will apply.

The full negative impact of the proposed regulations is detailed in the hundreds of comment letters submitted in response to the Agencies' proposed rulemaking by small businesses, startups, manufacturers, retailers, consumers, and others from a variety of sectors across the economy. They warn that the regime will stifle U.S. innovation and chill transactions that could benefit consumers, workers, and the U.S. economy. Furthermore, they warn that the costs and delays associated with the proposed requirements will be detrimental to pro-competitive, pro-consumer transactions that are vital to small business growth across the country—disproportionately harming these businesses with less resources.

The proposed rule will impose considerable costs on businesses and inhibit important transactions that introduce no competitive threat of any kind. Congress has set statutory limits to prevent these kinds of burdensome reporting requirements—those that are neither necessary nor appropriate for the FTC and DOJ to fulfill their mission of protecting consumers. In short, the FTC and DOJ are attempting to impose significant, unnecessary costs on American businesses that Congress did not intend or authorize.

On behalf of the thousands of small businesses and workers who depend on a robust M&A ecosystem, we remain committed to Congress's deliberate design of the HSR process and urge Congress to prevent the Agencies from adopting the proposed overhaul of the HSR pre-merger filing requirements.

Sincerely,

National Association of Manufacturers
U.S. Chamber of Commerce
Center for American Entrepreneurship
International Franchise Association
Business Roundtable
American Investment Council

Engine
National Retail Federation
National Venture Capital Association
Biotechnology Innovation Organization
Federation of American Hospitals
Pharmaceutical Research and Manufacturers of America
Consumer Technology Association
USTelecom – The Broadband Association
Global Business Alliance
Managed Funds Association
Motion Picture Association
National Council of Farmer Cooperatives
Consumer Brands Association
TechNet
Software & Information Industry Association (SIIA)
National Waste & Recycling Association
Metals Service Center Institute
Information Technology Industry Council
ACT | The App Association
American Securities Association
Council for Investor Rights and Corporate Accountability
Professional Services Council
Computer & Communications Industry Association
Technology Councils of North America (TECNA)
CTIA