AMERICAN ECONOMIC LIBERTIES PROJECT

Before the Federal Trade Commission
Docket ID FTC-2023-0040-0001

Written Comments from the American Economic Liberties Project
Request for Comments on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules: Project No. P239300

September 27, 2023

The American Economic Liberties Project ("Economic Liberties") is a nonprofit research and advocacy organization dedicated to understanding and addressing the problem of concentrated economic power in the United States. We submit this comment in response to a Notice of Proposed Rulemaking ("NPRM") by the Federal Trade Commission ("FTC") that proposes changes to the Hart-Scott-Rodino Premerger Notification Form ("HSR Form") requirements and instructions.

We believe that these proposed changes are in the public interest and that the Commission should adopt them. The proposed changes will help antitrust agencies better determine the competitive impact of large mergers by furnishing the enforcers with the information necessary for them to evaluate these ever-more complex mergers in a timely manner.

The changes will also help the enforcers uncover the motivations underlying these mergers, which could help discourage undertaking mergers with anticompetitive purposes. The proposed changes also will shift some of the costs of

merger enforcement from U.S. taxpayers, who otherwise would pay for substantial investigation and analysis costs, to the merging firms, who are in a better position to ascertain this information.

I. BURDENS ON MERGING PARTES

The chief criticism of the proposed changes to the HSR form—, to the near total exclusion of any substantive complaints—is that the changes overly "burden" the merger parties with unnecessary paperwork, delays in approval, and fact finding. This argument is common in public commentary from corporate law firms,[1] prominent trade groups,[2] and business-friendly research centers.[3] While many of them quibble with several individual aspects of the proposed HSR form, we find that most do not provide sound policy reasoning against the contemplated changes,

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[1] *See*, *e.g.*, Akin Gump, "Antitrust Agencies' Proposed Changes to the HSR Form Will Dramatically Increase the Burden on Filers," July 11, 2023, *available at*: https://www.akingump.com/en/insights/alerts/antitrust-agencies-proposed-changes-to-the-hsr-form-will-dramatically-increase-the-burden-on--filers; Morgan Lewis, "New HSR Form Will Transform the US Merger Review Process," June 30, 2023, *available at*: https://www.morganlewis.com/pubs/2023/06/new-hsr-form-will-transform-the-us-merger-review-process; Winston and Strawn, LLP, "FTC and DOJ Propose Drastic Overhaul of HSR Requirements: New Form, New Frontier," June 28, 2023, *available at*: https://www.winston.com/en/blogs-and-podcasts/competition-corner/ftc-and-doj-propose-drastic-overhaul-of-hsr-requirements-new-form-new-frontier.

[2] *See*, *e.g.*, Managed Funds Association, September 21, 2023, *available at*: https://www.regulations.gov/comment/FTC-2023-0040-0651; the American Hospital Association, September 5, 2023, *available at* https://www.regulations.gov/comment/FTC-2023-0040-0606; Professional Services Council, August 28, 2023, *available at*: https://www.regulations.gov/comment/FTC-2023-0040-0503.

[3] *See*, *e.g.*, comment from the Global Antitrust Institute at George Mason University's Antonin Scalia Law School, September 21, 2023, *available at*: https://www.regulations.gov/comment/FTC-2023-0040-0650.

instead contending that most mergers are harmless and that the proposed changed would either interfere with their benefits or unnecessarily hamper them.

First, the changes will only add slightly to the existing reporting burdens, and they should not result in significant delays. Centrally, these proposed changes only apply to mergers exceeding HSR thresholds, which is, as of 2023, $111.4 million.[4] By comparison, the additional "burdens" place on the merging parties are an estimated increase from 37 hours to 144 hours on average, depending on the complexity of the transaction.[5] Although an increase of 100 hours is not trivial in absolute terms, it is inconsequential considering that these reporting requirements only apply to transactions valued at more than the reporting threshold of $111.4 million. As a percentage of the cost of a merger, these costs are trivial.

Second, and emphatically, the antitrust agencies are dramatically understaffed and overstretched for the herculean task of sorting through thousands of mergers to determine which transactions violate Section 7. And this problem has become more acute in recent years: in 2020, 1,637 merger transactions were reported to the FTC; in 2021, that number jumped to 4,130 in the wake of the post-Covid

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[4] Federal Trade Commission, "Revised Jurisdictional Thresholds," January 26, 2023, 88 FR 5004, *available at*: https://www.federalregister.gov/documents/2023/01/26/2023-01533/revised-jurisdictional-thresholds.

[5] Federal Trade Commission, Notice of Proposed Rulemaking (henceforth "NPRM"), "Premerger Notification; Reporting and Waiting Period Requirements," 88 FR 42178, June 29, 2023, page 42208, *available at*: https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

merger wave.[6] At the same time, the FTC in 2020 had a total staff of 1,123 – including not just the economists and lawyers tasked with reviewing merger transactions but also the litigation staff pursuing enforcement actions for both antitrust and consumer protection, the policy staff dedicated to carrying out industry studies and conducting rulemaking, and any other ancillary staff l.[7] Moreover, the current HSR reporting system gives the agency staff only 30 days to conduct each merger review, a task which has become much more complicated over time and often requires requests for more information.

This means that, to the degree that burdens are being shifted from the agencies to the merging parties, this is entirely appropriate. As the proposed regulations explain, the current situation often necessitates that the enforcers spend a large amount of resources ascertaining the necessary information:

> In the Agencies' experience, the current [HSR] Form does not provide their staff with complete information, including information about the transaction; the filers' business operations and those of any related entities; the premerger relationship between the acquiring person and the acquired entity; individuals or entities that may have influence over the operation of the relevant business lines; the full range of potential competitive implications of the transaction, including effects on workers; and prior acquisitions.
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> To supplement the shortcomings of HSR Filings, Agency staff must often rely on voluntary cooperation from third parties—customers and competitors of the merging parties—during the initial waiting period to

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[6] Steve Gelsi, "M&A activity cooled in the fourth quarter – but it still topped $1 trillion," Market Watch, March 9, 2022, https://www.marketwatch.com/story/m-a-activity-cooled-in-the-fourth-quarter-but-it-still-topped-1-trillion-11646850279.

[7] Federal Trade Commission Agency Financial Report, Fiscal Year 2021, *available at*: https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2021/ftc_fy2021_agency_financial_final.pdf.

> learn basic information about the parties' business dealings and the markets in which they compete. In addition, staff needs to conduct independent research using publicly available information to supplement the modest amount of material submitted with the HSR Filing. Neither of these is reliable as a substitute for information provided by the parties themselves and certified as a complete response.[8]

Common sense says that the merging parties are likely to already have much or all of this information, especially because they are often obligated to provide this same information to foreign agencies such as the European Commission. Indeed, federal courts overseeing discovery in civil litigation routinely order parties to produce documents and information based on the obvious principle that the person already in possession of the information is in the best position to provide it.[9] And so, as the advisory committee stated when drafting the Federal Rules of Civil Procedures:

> Some cases involve what often is called "information asymmetry." One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. *In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.*[10]

In the case of merger review, the party holding the information is clearly the merging one, not the antirust enforcer. Yet as the NPRM states:

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[8] NPRM, page 42180.

[9] *E.g. Dale v. AMC W. Hous. L.P.*, No. 20-cv-00256, 2021 WL 6137270, at *3 (E.D. Wash. June 30, 2021); *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 322 F.R.D. 1, 8 (D.D.C. 2017).

[10] Fed. R. Civ. P. 26(b)(1) advisory committee note (2015).

> The Agencies expend substantial resources during the initial waiting period to discover and confirm basic business information about the filing persons, information that is well known to [the merging parties] but not to Agency staff and is not available from any other source. These information asymmetries have become more acute as deals and companies have become more complex.[11]

The FTC's proposed updates to the HSR Form also restructure how that information is presented so that it is easier to review and evaluate. This means requiring, for example, that the merging parties provide a competitive analysis of horizontal overlaps and supply relationships, the rationale for the transaction, and more detail about the transaction being reviewed.

In sum, the proposed changes are a necessary and appropriate recognition and correction of a severe information asymmetry between merging parties and the antitrust agencies.

II. DETERRENCE

The gaps created by the existing HSR Form make it possible for anticompetitive mergers to go through unnoticed. Parties considering a merger are aware of this, so under the current system, parties are likely more willing to consider or attempt a merger which would be facially unlawful under a more transparent disclosure regime. Correcting this information asymmetry will therefore also deter many anticompetitive and illegal mergers before they are even proposed to the agencies, further lightening their workload. Existing research supports this proposition.

A December 27, 2000 amendment to the HSR Act increased the HSR threshold from $10 million to $50 million and linked the threshold to the gross national product, suddenly exempting mergers between $10 million and $50 million. Within that group, mergers between competitors rose sharply, with an increase of between 253 and 324 additional horizontal mergers (those most transparently likely to be anticompetitive) proposed and consummated. As Professor Thomas Wollman of the University of Chicago explained regarding this newly-exempt group:

> [A]mong newly-exempt deals, antitrust investigations fall to almost zero while mergers between competitors rise sharply. Effectively all of the rise reflects an endogenous response of firms to reduced premerger scrutiny, consistent with large deterrent effects of antitrust enforcement.[12]

In short, disclosure not only provides the enforcers with the information necessary to determine whether the transaction is likely to violate the antimerger statutes, but it also does more of their work for them in the board room, by deterring anticompetitive transactions from being proposed in the first instance.

III. ADDITIONAL INFORMATION REQUIRED

Among the areas that would be especially benefitted by the proposed changes are the analyses of potential competitive issues involving labor markets, substantial corporate debt and complex ownership structures, and mergers that exist as part of a "roll-up" or serial acquisition strategy.

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[12] Thomas G. Wollmann, "Stealth Consolidation: Evidence from an Amendment to the Hart-Scott-Rodino Act", American Economic Review: Insights, Vol. 1, No. 1, at 77-94 (June 2019), *available at*: https://www.aeaweb.org/articles?id=10.1257/aeri.20180137.

A. Labor Market Disclosures

Section 7 of the Clayton Act applies equally to labor markets as it does to product or output markets. Despite this, antitrust enforcement historically has broadly ignored labor markets entirely, and as a result, the existing HSR form only requires disclosures about product markets. Forty-five years ago, most of the antitrust and economics professions believed that labor markets were usually, in fact perhaps almost always, highly competitive. Economic research has caught up to reality, and today we know better. Previously seen as the norm, it is now recognized that labor markets are particularly non-competitive, full of search frictions, transaction costs, and a range of common anticompetitive practices by employers, and centrally for merger analysis, the frequency of monopsony power of large employers. Today, we realize that we must evaluate the effects of mergers on firms' capacity as purchasers of labor and analyze their effects on wages similar to the ways we evaluate the competitive effects of mergers on output markets and other input markets.

The agencies' proposed updates amend this situation by requiring two categories of information. First is the straightforward information that would be required to assess a merger's impacts on the labor market, essentially the labor market equivalent of disclosures regarding product markets and competitive overlaps. This entails disclosing the occupational overlap of each of the merging parties' employees according to occupational codes developed by the Bureau of Labor Statistics, information about the geographic distribution and overlap of the labor market for each of these occupational classifications, and others. These disclosures represent the same information that the agencies are expected to review with respect

to product and output markets, so it is not only laudable for the agencies to add these requirements, but outright negligent for them to not, given how ignored labor markets have been in past merger analysis.

Second, the agencies are requesting that the merging parties disclose any history of findings or penalties for labor law violations by the U.S. Department of Labor's Wage and Hour Division, the National Labor Relations Board, or the Occupational Safety and Health Administration ("OSHA") during the five-year period before the filing. Perhaps even more directly than occupational codes and geographic competitive overlap, this is *direct evidence* of monopsony power in labor markets. Were a given labor market competitive, companies with an abnormal history of violations in this area would struggle. In the presence of alternative employment options, workers of any professional category would look to depart from companies which had a history of stealing wages, putting their employee's health or safety at risk, or intimidating employees in various ways.

B. Ownership Structure Disclosures

The proposed HSR Form updates also address the increased financial and legal complexity of many mergers today, which can be used to hide anticompetitive intent or effects. The existing HSR form only requires that merging parties disclose themselves and their "ultimate parent entities" (UPEs), excluding many layers of corporate ownership, limited partnerships, debt obligations, and management agreements that may exist between those two layers of beneficial economic ownership. Thus, we support the agencies' choice to require that merging parties provide additional information regarding "all minority holders of the filing parties,

including the identification of limited partner,"[13] and further

> … requiring limited partnerships to identify all holders of 5% or more, but less than 50%, to harmonize the requirement for limited partnerships with the requirements for limited liability companies and corporations."[14]

To give an example of the problems caused by this sort of intermediate ownership, private equity firms often own individual portfolio companies through limited partnerships – in which they are the general partners – but where limited partners for those additional layers of ownership include many other categories of institutional investors who may, for many reasons, introduce competitive concerns. Those limited partners may be common investors in either the two merging parties or in the industry the firms operate in generally.

Common board members at these intermediate levels of ownership can also introduce competitive concerns Those board members can influence competition directly, or simply through common investment across a range of similar companies reducing competition.

These concerns apply equally to debt agreements and obligations. The proposed regulations beneficially ask for information concerning the merging firms' major creditors.[15] If a single creditor has large loans to several competing firms, it,

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[13] NPRM, page 42188.

[14] NPRM, page 42188.

[15] See NPRM, page 42189 ("As a result, the Commission proposes that the acquiring person identify certain individuals (other than employees of the acquiring person) or entities that, in relation to the acquiring entity or any entity it directly or indirectly controls or is controlled by, (i) provide credit.....(Credit relationships would be limited to creditors that have, or would have, in conjunction with or result of the transaction, provided credit totaling 10% or more of the value of the entity in question.")

could have an incentive to facilitate their coordination or collusion. This potentially anticompetitive information should be disclosed in advance of the merger. Similarly, the proposed regulations require additional information about the ownership structures of the firms in question because the precise forms of the ownership structure can yield crucial information about any possibly anticompetitive plans for the proposed merged firm.

While many of the proposed disclosures are appropriately targeted towards anticompetitive practices and consolidation by the private equity industry – where data availability and existing research is limited by its very nature – more general evidence reveals the clear harms from shared ownership structures that would violate Section 7. Recent economic research shows that the structural incentives to compete are reduced when competitors share common investors or owners.[16] In addition to increased incentives to collude, common owners are also more willing to tolerate managerial slack, as vigorous competition would harm the profits of competitors also owned by the common owner.[17] Company managers themselves, knowing the performance preferences of their common owners, might likewise choose less competitive business and pricing strategies so as to meet shareholder expectations of broad industry earnings. Compensation packages promoted by

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[16] 15 U.S. Code § 18. *See also* Einer Elhauge, *Horizontal Shareholding*, 129 HARVARD L. REV. 1267 (2016) (more thoroughly discussing the illegality of common ownership under Section 7, based on these structural incentives).

[17] Antón, M., Ederer, F., Giné, M., & Schmalz, M. (2023). *Common ownership, competition, and top management incentives*. JOURNAL OF POLITICAL ECONOMY, 131(5), 1294-1355.

common owners, where executives are compensated based on the performance of their entire industry rather than their own firm over which they have influence, reduces incentives for managers to compete in a way that would harm competitors' earnings.[18]

C. Disclosure of Acquisition History

Another set of important disclosures that the FTC is proposing to add to the HSR form pertains to acquisition history. The FTC proposes that, rather than requiring acquiring party to disclose only acquisitions exceeding $10 million within the past five years, that both the acquiring party and the acquired one must report all acquisitions within the last 10 years.[19]

This change is essential to give force to the antitrust agencies proposed merger guidelines. Guideline 9 specifically outlines the illegality of a series of small acquisitions where any individually would not pose a threat to competition but where, in the collective, competition can be significantly lessened.[20] This business strategy of making a series of small acquisitions – whether an intentional tactic to avoid regulatory scrutiny or not – has become concerningly common in recent decades and led to many consolidated industries.[21]

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[18] Elhauge, *supra* note 17.

[19] NPRM, page 42203.

[20] U.S. Department of Justice and Federal Trade Commission, Draft Merger Guidelines, July 19, 2023, *available at*: https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf.

[21] Denise Hearn, Krista Brown, Taylor Sekhon, and Erik Peinert, "The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions", American Economic Liberties Project, December 15, 2022, *available at*: https://www.economicliberties.us/our-work/the-roll-up-economy/.

Importantly, any additional burden is likely to be small, unless the merger parties have a vast history of recent acquisitions, in which case the antitrust agencies likely have good reason to be concerned about a potential anticompetitive business strategy of serial acquisitions, roll-ups, or the elimination of nascent competitors.

Second, as outlined above, such disclosures can be expected to have a strong deterrent effect. In the case of a serial acquirer who is contemplating an HSR-reportable transaction, knowing that it would be necessary to disclose the details of an anticompetitive acquisition strategy that would tie the transaction to a longer-term strategy of Section 7 violations, the transaction might never be attempted or proposed.

IV. CONCLUSION

In short, we strongly support the FTC's efforts to update the HSR form. These updates are essential in light of decades of learning by the agencies and the changed technological and economic context of the 21st century economy. Many of the additional requirements – labor market disclosures, ownership structure disclosures, and acquisition history – are effective prerequisites for the agencies to enforce the law against certain categories of unlawful mergers and give force to the Draft Merger Guidelines. And so, to make maximum use of the agencies' limited resources, it is entirely appropriate to shift some of the regulatory burden to the well-resourced merging parties, particularly where the additional disclosure requirements will serve as an effective deterrent to unlawful mergers.