

Congress of the United States

Washington, DC 20515

September 27, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

The Honorable Alvaro Bedoya
Commissioner
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

Dear Chair Khan, Commissioner Slaughter, and Commissioner Bedoya:

We write in support of the Federal Trade Commission (FTC)'s proposed changes to its premerger notification form and associated instructions, and the premerger notification rules implementing the Hart-Scott-Rodino Antitrust Improvement (HSR) Act.¹ The FTC proposed the changes with the collaboration and concurrence of the Antitrust Division of the Department of Justice (DOJ) on June 27, 2023.² The new form requires parties proposing certain mergers and transactions to provide the FTC and DOJ with additional information so the agencies can, within the short statutory review period, better understand a deal's competitive impact. This revised form requires, for example, details on the transaction's rationale, competitive overlaps between the transacting firms, and previous related transactions. These changes will strengthen antitrust enforcement, promote innovation and competition, and protect national security and economic growth.

This update to the premerger notification process is necessary to respond to increased consolidation³ and the digital transformation of our economy.⁴ Over the last quarter century, 75

¹ U.S. Federal Trade Commission, Federal Register Notices, "16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements," June 27, 2023, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>; U.S. Federal Trade Commission, "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review," press release, June 27, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>

² *Id.*

³ The New York Times, "The Charts That Show How Big Business is Winning," David Leonhardt, June 17, 2018, <https://www.nytimes.com/2018/06/17/opinion/big-business-mergers.html>; The Roosevelt Institute, "The Effects of Consolidation on the Economy, Presentation to the Congressional Progressive Caucus, Opening Remarks," Marshall Steinbaum, October 5, 2017, <https://rooseveltinstitute.org/2017/10/18/the-effects-of-consolidation-on-the-economy/>

⁴ The Brookings Institute, "How Digital Transformation is Driving Economic Change," Zia Qureshi, January 18, 2022, <https://www.brookings.edu/articles/how-digital-transformation-is-driving-economic-change/>

percent of American industries have become more concentrated,⁵ and since 2008, American companies have engaged in mergers and acquisitions worth over \$10 trillion.⁶

Unchecked consolidation hurts consumers, small businesses, workers, and the economy. Consolidation leads to higher prices,⁷ less innovation,⁸ and reduced quality for consumers⁹. It prevents small businesses from entering markets or competing fairly: for example, it is twice as expensive for small businesses to borrow money compared to dominant ones,¹⁰ and there are fewer startups in states where a few companies dominate markets.¹¹ Consolidation also results in fewer firms,¹² leading to a concentrated labor market with fewer job options,¹³ lower wages,¹⁴ and

⁵ Swiss Finance Institute, “Are U.S. Industries Becoming More Concentrated?,” Gustavo Grullon, Yelena Larkin, and Roni Michaely, October 25, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047; The American Economic Liberties Project, “Economic Liberties Decries Trump Embrace of Corporate Monopolies,” press release, February 20, 2020, <https://www.economicliberties.us/press-release/economic-liberties-decries-trump-embrace-of-corporate-monopolies/>

⁶ The Economist, “Too Much of a Good Thing,” March 26, 2016, <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing>

⁷ The Economist, “Too Much of a Good Thing,” March 26, 2016, <https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing>; The American Economic Liberties Project, “Confronting America’s Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All,” August 6, 2020, <https://www.economicliberties.us/our-work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/>

⁸ Chicago Booth Review, “Do Monopolies Actually Benefit Consumers,” October 13, 2021, <https://www.chicagobooth.edu/review/do-monopolies-actually-benefit-consumers>

⁹ Chicago Booth Review, “Do Monopolies Actually Benefit Consumers,” October 13, 2021, <https://www.chicagobooth.edu/review/do-monopolies-actually-benefit-consumers>; White House, Council of Economic Advisors, “The Importance of Competition for the American Economy,” Heather Boushey and Helen Knudsen, July 9, 2021, <https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/>

¹⁰ The American Economic Liberties Project, “Confronting America’s Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All,” August 6, 2020, <https://www.economicliberties.us/our-work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/>; International Monetary Fund, Global Financial Stability Report: Markets in the Time of COVID-19,” April 2020, https://www.imf.org/en/Publications/GFSR/Issues/2020/04/14/global-financial-stability-report-april-2020?mkt_tok=eyJpIjoiT0RRNU5qZG1NR015TkRZeisInQoiJjYkMrWVA5NXhnMktBXC85a09QVVkrRjFvVEpOUUpKYjRKTzRcL1c4K0QxTHVrejRUVW5QdkRmb04wblZYVFwvZWRLZ2RrVmM1aW51c2ttOktCUkVWVVh3QmY3cGZyYTFHUmlhSXFrd110Nyt5WUR2VmFmdkk3RVh1K0NNUXRkOUc0YiJ9

¹¹ The American Economic Liberties Project, “Confronting America’s Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All,” August 6, 2020, <https://www.economicliberties.us/our-work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/>; The Brookings Institute, “What’s Driving the Decline in the Firm Formation Rate? A Partial Explanation,” Ian Hathaway and Robert E. Litan, November 2014, https://www.brookings.edu/wp-content/uploads/2016/06/driving_decline_firm_formation_rate_hathaway_litan.pdf

¹² White House, “Background Press Call on the White House Competition Council Announcement,” press release, July 19, 2023, <https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/19/background-press-call-on-the-white-house-competition-council-announcement/>

¹³ The American Economic Liberties Project, “Confronting America’s Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All,” August 6, 2020, <https://www.economicliberties.us/our-work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/>

¹⁴ The American Economic Liberties Project, “Confronting America’s Concentration Crisis: A Ledger of Harms and Framework for Advancing Economic Liberty for All,” August 6, 2020, <https://www.economicliberties.us/our->

worse conditions for workers.¹⁵ Massive corporations exercise unwarranted influence over politics and Americans' lives,¹⁶ with foreign subsidiaries using their market power to influence U.S. elections or politics.¹⁷

Congress enacted the HSR Act in 1976¹⁸ to facilitate the FTC and DOJ's review of proposed mergers and other transactions under federal antitrust laws.¹⁹ The Act requires companies to report to the FTC and DOJ proposed transactions valued above specified thresholds, and allows companies to complete the transaction only after a statutory waiting period has expired.²⁰ If the reviewing agency determines a transaction would be likely to substantially lessen competition, the agency may initiate an investigation and then negotiate with the transacting parties to address its concern or act to block the merger.²¹

The FTC's proposed updates to the HSR process are merited and long overdue. The HSR Act authorizes the FTC and DOJ to specify via rulemaking the information parties must submit so the agencies can determine whether a proposed transaction would violate federal antitrust laws.²² But despite rapid changes in our economy and an acceleration in merger activity,²³ the premerger notification form (the "HSR Form") has not been updated in almost 45 years.²⁴ The current form requires only basic information such as the name of the transacting parties, the final documents constituting the agreements, and final documents evaluating the transaction.²⁵ These materials do

[work/confronting-americas-concentration-crisis-a-ledger-of-harms-and-framework-for-advancing-economic-liberty-for-all/](#)

¹⁵ White House, "Background Press Call on the White House Competition Council Announcement," press release, July 19, 2023, <https://www.whitehouse.gov/briefing-room/press-briefings/2023/07/19/background-press-call-on-the-white-house-competition-council-announcement/>

¹⁶ The New York Times, "The Charts That Show How Big Business is Winning," David Leonhardt, June 17, 2018, <https://www.nytimes.com/2018/06/17/opinion/big-business-mergers.html>

¹⁷ U.S. Department of Justice, "Grand Jury Indicts 12 Russian Intelligence Officers for Hacking Offenses Related to the 2016 Election," press release, July 13, 2018, <https://www.justice.gov/opa/pr/grand-jury-indicts-12-russian-intelligence-officers-hacking-offenses-related-2016-election>

¹⁸ Public Law 94-435, September 30, 1976. <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf>

¹⁹ Public Law 94-435, September 30, 1976. <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf>

²⁰ Congressional Research Service, "Pre-Merger Review and Challenges Under the Clayton Act and the Federal Trade Commission Act," Kathleen Ann Ruane, September 27, 2017, https://www.crs.gov/Reports/R44971?source=search#_Toc494295438

²¹ U.S. Federal Trade Commission, "How Mergers are Reviewed," <https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review>; Congressional Research Service, "Pre-Merger Review and Challenges Under the Clayton Act and the Federal Trade Commission Act," Kathleen Ann Ruane, September 27, 2017, https://www.crs.gov/Reports/R44971?source=search#_Toc494295438

²² 15 U.S.C. 18a(d).

²³ U.S. Federal Trade Commission, Federal Register Notices, "16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements," June 27, 2023, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>

²⁴ U.S. Federal Trade Commission, Federal Register Notices, "16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements," June 27, 2023, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>

²⁵ U.S. Federal Trade Commission, "Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions," revised February 4, 2023,

not, on their own, give regulators clarity as to whether a proposed deal may substantially lessen competition. For example, they may not include details on the purpose of the deal, the competitive overlaps between the firms, prior related acquisitions, or financing details.

The new proposed HSR Form and associated instructions will facilitate efficient premerger review and ensure effective enforcement of antitrust laws. Antitrust enforcers have limited resources and a short window of time in which to identify proposed transactions that may harm competition. The number of full-time FTC staff is similar to its size in the late 1980s,²⁶ while FTC and DOJ funding has remained stagnant or in decline until recent years,²⁷ while deal volume has grown 146 percent between 2012 and 2021.²⁸ You have explained that “the information currently collected by the HSR form is insufficient for [your] teams to determine, in the initial 30 days, whether a proposed deal may violate the antitrust laws,” such that the staff must “expend[] significant time and effort to develop even a basic understanding of key facts.”²⁹ FTC and DOJ need additional information to understand transactions’ competitive impacts and more efficiently utilize agency resources investigating transactions that require scrutiny. Such additional information could ultimately save taxpayer dollars and lead to additional transparency and productive conversations between enforcers and transacting parties.

The new HSR processes will empower antitrust enforcers to fulfill their congressional mandate to identify “which transactions should be challenged to prevent harm to American consumers and workers.”³⁰ It will “fill key gaps that [antitrust enforcement] staff most routinely encounter, such as inadequate information about deal rationale or the details of how a particular investment vehicle is structured.”³¹ It will also gather information about competition, such as information on labor markets, information related to both horizontal and non-horizontal business relationships, details on previous acquisitions, and transactional analyses and internal documents describing market conditions.³²

https://www.ftc.gov/system/files/ftc_gov/pdf/HSRFormInstructions02.27.23.pdf

²⁶ U.S. Federal Trade Commission, “FTC Appropriation and Full-Time Equivalent (FTE) History,” <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.

²⁷ U.S. Federal Trade Commission, “FTC Appropriation and Full-Time Equivalent (FTE) History,” <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>.; U.S. Department of Justice, “Appropriation Figures for the Antitrust Division,” <https://www.justice.gov/atr/appropriation-figures-antitrust-division>.

²⁸ U.S. Federal Trade Commission and U.S. Department of Justice, “Hart-Scott-Rodino Annual Report, Fiscal Year 2021,” p.2, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf

²⁹ Statement of Chair Lina M. Khan Joined by Commissioners Slaughter and Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, June 27, 2023, p. 3, https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_comms_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf

³⁰ Public Law 94-435, September 30, 1976. <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg1383.pdf>; U.S. Federal Trade Commission, Federal Register Notices, “16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements,” June 27, 2023, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>

³¹ *Id.*

The new form also implements provisions of the Merger Filing Fee Modernization Act of 2022, which includes provisions that require agencies to collect information on subsidies received from certain foreign governments or entities that are strategic or economic threats to the United States.³³ These changes will help prevent subsidies from foreign entities of concern from distorting the competitive process, undermining competition, and harming national security.

Requiring transacting parties to provide regulators with the information necessary to examine a proposed merger is a commonsense way to save taxpayer dollars and enable antitrust enforcers to fulfill their congressional mandate and protect consumers, the economy, and national security. Transacting parties already gather much of the information that would be required under the proposed HSR Form. Indeed, antitrust enforcers in other jurisdictions already require information about a transaction's structure and rationale, business lines, and vertical and other relationships.³⁴

The FTC's proposed rule is needed to address the realities of our ever-changing economy, promote competition, and protect national security. We urge the FTC to issue a final HSR Form and associated instructions in line with those that have been proposed, and commend both FTC and DOJ for their efforts to ensure that our economy is competitive, robust, and fair for all participants.

Sincerely,



Elizabeth Warren
United States Senator




Joe Neguse
Member of Congress

³² U.S. Federal Trade Commission, "FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review," press release, June 27, 2023, <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>

³³ H.R.3843, *Merger Filing Fee Modernization Act of 2022*, Section 202, <https://www.congress.gov/bill/117th-congress/house-bill/3843/text#toc-H929E7A8DD78E4F20A6ED3471713AB10D>.

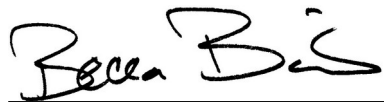
³⁴ U.S. Federal Trade Commission, Federal Register Notices, "16 CFR Parts 801 and 803: Premerger Notification; Reporting and Waiting Period Requirements," June 27, 2023, <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-parts-801-803-premerger-notification-reporting-waiting-period-requirements>; Statement of Chair Lina M. Khan Joined by Commissioners Slaughter and Bedoya Regarding Proposed Amendments to the Premerger Notification Form and the Hart-Scott-Rodino Rules, June 27, 2023, p. 3, https://www.ftc.gov/system/files/ftc_gov/pdf/statement_of_chair_khan_joined_by_commsrs_slaughter_and_bedoya_on_the_hsr_form_and_rules_-_final_130p_1.pdf



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United States Senator



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