

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted via Regulations.gov

**Re: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules: Project No. P239300
FTC-2023-0040**

Introduction

Public Knowledge and Writers Guild of America West submit these comments in response to the Department of Justice (DOJ) and the Federal Trade Commission's (FTC) (hereinafter "the Agencies") proposed rules updating the Hart-Scott-Rodino ("HSR") Form and Instructions. We applaud the Agencies' proposals to improve the pre-merger filing review process for the first time in 45 years. As the current HSR requirements are incompatible with the staffing levels, number of mergers seeking review, and statutory deadlines, the Agencies rightfully should amend the regulations to better comply with the requirements of the statute and improve antitrust enforcement overall. Additionally, Public Knowledge and Writers Guild of America West believe that Congress must pass additional laws to lengthen the HSR deadline and expand the Agencies' capacity to enforce our nation's antitrust laws.

The Current Hart-Scott-Rodino Review Process is Not Working

The premerger review process is designed to provide the Agencies with the information needed to assess whether a proposed transaction presents a potential anticompetitive harm. An essential tool for merger enforcement, the HSR process challenges harmful transactions before they are consummated and before the companies are so integrated, that effective post-merger relief is nearly impossible. However, given the volume and magnitude of mergers, the Agencies are struggling to keep up with current statutory requirements. Mergers are at an all-time high - what was once a yearly estimate for the number of mergers that agencies would need to evaluate (approximately 200), is now happening every two weeks.¹

The HSR Act and Rules specify that most transactions subject to the HSR Act cannot be consummated until 30 days after the parties submit an HSR Filing to the Agencies. During the

¹ Federal Trade Commission, *Premerger Notification Program*, <https://ftc.gov/enforcement/premerger-notification-program> (showing approx. 400 filings per month).

initial waiting period, the Agencies must review the filing to ensure it's in compliance with the rules. Once the Agencies complete the analysis of the possible anti-competitive harms the transaction may present, the Agencies must then examine their staff's recommendations and decide whether to request more information, as well as coordinate with state Attorneys General that may be investigating the same transaction.

The 30-day statutory deadlines for conducting this initial review are extraordinarily short. The Agencies must work quickly to determine whether to take steps to prevent the approval of potentially anti-competitive transactions. Those steps are varied – it may be a lawsuit or a settlement, and the potential remedies may be complex. However, consideration of these steps is difficult for Agencies to achieve within 30 days. The Agencies already have limited resources, and struggle with the capacity to address potentially harmful mergers and acquisitions.²

The Proposed HSR Requirements are Feasible for Industry and Beneficial to Enforcement

Changes to the HSR requirements like those proposed by the Agency here are essential to ensuring that the Agencies can meet the statutory deadline. They restructure existing requirements and ask companies to provide more information in their filings. For example, for transaction analysis, the proposed changes require a description of “all the business operations of all entities within the acquiring person to provide a clear overview of all aspects of the acquiring person's pre-transaction business.”³ For competition analysis, the proposed changes mandate a description of basic business lines and product or service information for all related entities, identification of current and potential future horizontal overlaps/supply relationships; and disclosure of information on employees and services they provide.⁴

The basic tenets of justice and fairness lean towards putting initial burdens on the merging parties themselves in a wider range of circumstances. Parties are often better situated to find or have access to the relevant documents and information needed to analyze the merger. Antitrust enforcement agencies work for the public, not the merging parties. The pre-merger notification process confers a benefit on would-be merging parties seeking an advance indication from the agencies if their proposed deal would result in litigation.⁵

² For more, *see* Hearing on Trends in Vertical Enforcement Before the Subcomm. on Competition Pol., Antitrust, & Consumer Rights of the H. Comm. on the Judiciary, 118th Cong. (2023) (statement of Charlotte Slaiman, Competition Policy Director, Public Knowledge), <https://publicknowledge.org/policy/public-knowledge-charlotte-slaiman-testimony-before-senate-judiciary-on-vertical-merger-enforcement/>.

³ Draft Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules for Public Comment (proposed Jun. 26, 2023), 88 Fed. Reg. 42178 (to be codified at 16 CFR pts. 801 and 803).

⁴ *Id.*

⁵ *Supra* note 2.

Additionally, a more substantive process to pre-merger filing is not unfamiliar to industry players; these proposed changes are in line with the filing requirements of Europe, the United Kingdom, China, etc. As the guidelines state, “most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis, including details about the transaction's structure and rationale, horizontal overlaps, vertical and other relationships, and more detailed sales data.”⁶ As such, companies have proven they are capable of complying with filing requirements of this nature.

Congress Needs to Update the HSR Deadline to Improve Antitrust Enforcement Overall

Public Knowledge and Writers Guild of America West support these changes to the HSR requirements. These changes are an important next step in streamlining antitrust enforcement. To ensure agencies comply with the statute, companies seeking to merge must bear more of the evidentiary burden. HSR filings should facilitate the Agencies to thoroughly and quickly assess a proposed transaction. Likewise, these evidentiary burdens are not unfamiliar to companies of the size and scale required for submitting themselves for merger review – many of these suggestions are already implemented by competition authorities abroad.

In addition, in order to ensure that agencies have the capacity to oversee all of the merger requests, Congress must step in and extend the deadline for assessing whether a merger presents anti-competitive concerns. The new HSR requirements, along with an extended deadline, will give Agencies the time and resources necessary to effectively enforce our nation’s antitrust laws and better protect consumers from anti-competitive harm.

Public Knowledge
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⁶ *Supra* note 3.