



September 26, 2023

Comments of the Competitive Enterprise Institute

RE: Premerger Notification; Reporting and Waiting Period Requirements

Docket ID No.: FTC-2023-0040-0001

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit comments regarding the Federal Trade Commission's (FTC) notice of proposed rulemaking (NPRM) on Premerger Notification; Reporting and Waiting Period Requirements pursuant to Section 7A(d) of the Clayton Act. Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a free-market perspective.

The FTC proposes amending the Rules, Form, and Instructions for premerger filings required under the Hart-Scott-Rodino Act (HSR) Premerger Notification Program, which is administered by the FTC and the Department of Justice (the Agencies). The changes are extensive. And the FTC estimates a substantial increase from the existing regulatory burden under the current rules. Section 7A(d)(1) of the Clayton Act instructs the FTC, with the concurrence of the Assistant Attorney General, to require premerger filings to "be in such form and contain such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to determine whether such acquisition may, if consummated, violate the antitrust laws."¹ But this is not an unfettered invitation to impose arbitrary requirements.

The NPRM goes beyond what is "necessary and appropriate." Not only would the NPRM create a less efficient HSR Filing process, but it will also have the primary effect of discouraging parties from merging. The FTC should reconsider the proposed changes that follow in this comment. However, this comment is in no way an exhaustive account of the problems contained in the NPRM.

¹ 15 U.S.C §18a(d)(1).

I. The NPRM fails to consider relevant data on HSR Premerger Filings.

I.A. *The NPRM disregards the Agencies' HSR Annual Report as well as external analysis of data on HSR Filings.*

According to the text of the NPRM, the FTC has concluded “after a comprehensive review of the premerger notification process and based on the Agencies’ experience conducting in-depth investigations of challenged mergers” that the information currently requested from merging parties under the HSR Act is “insufficient.”² But the NPRM fails to consider extensive data collected over the course of decades on HSR Filings.

Every year, the FTC and Department of Justice (DOJ) publish an HSR Annual Report that provides a statistical profile of the premerger notification program.³ Yet the proposed rule fails to consider or cite to any of the 44 annual reports produced since the ratification of the HSR Act. For nearly 50 years, the FTC with the concurrence of the DOJ Antitrust Division has compiled an annual report on the Agencies’ administration of Premerger Notification program under the HSR Act of 1976.

The statutory mandate for this report terminated in 2000.⁴ Despite the absence of a congressional mandate to submit the HSR Annual Report, the FTC and the DOJ continue to do so.⁵ Some may say that the HSR Annual Report is meant to be directed to Congress for legislative reform, not the FTC’s and DOJ’s procedural rulemaking.⁶ However, the text of the terminated provision

² Federal Trade Commission, “Premerger Notification; Reporting and Waiting Period Requirements,” Notice of Proposed Rulemaking, 88 Fed. Reg. 42178 (June 29, 2023), <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>.

³ “Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976,” Federal Trade Commission, last accessed August 21, 2023, <https://www.ftc.gov/policy/reports/annual-competition-reports>.

⁴ 15 U.S.C §18a(j), *repealed by* Federal Reports Elimination and Sunset Act of 1995. The Editorial Notes in the U.S. Code states, “Subsection (j), which required the Federal Trade Commission, with the concurrence of the Assistant Attorney General, to report annually to Congress on the operation of this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance.” The entirety of the terminated statutory provision reads, “Beginning not later than January 1, 1978, the Federal Trade Commission, with the concurrence of the Assistant Attorney General, shall annually report to the Congress on the operation of this section, of the effects, purpose, and need for any rules promulgated pursuant thereto, and any recommendations for revisions of this section.”

⁵ It wasn’t until 2006 that the annual report stopped citing the terminated Subjection (j) of Section 7A of the Clayton Act. Also, in 2006, the title of the report was changed from “Annual Report to Congress” to “Hart-Scott-Rodino Annual Report.” Compare Federal Trade Commission and Department of Justice, *Annual Report to Congress Fiscal Year 2005*, https://www.ftc.gov/sites/default/files/documents/reports_annual/28th-report-fy-2005/p989316twentyeighthannualhsrreport_0.pdf, with Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Annual Report Fiscal Year 2006*, https://www.ftc.gov/sites/default/files/documents/reports_annual/29th-report-fy-2006/p110014hsrreport_0.pdf.

⁶ On February 10, 2023, in conjunction with the release of Fiscal Year 2021 HSR Annual Report, Commissioner Rebecca K. Slaughter cited and quoted the terminated statutory mandate for the HSR Annual Report in her published statement on the matter. Commissioner Slaughter mistakenly cites the terminated provision as 15 U.S.C. § 201(j). The § 201 refers to the Public Law version of the HSR Act, not the U.S. Code. She wrote, “The text of the HSR Act invites the agencies to discuss the efficacy of the statutory scheme and to submit ‘any recommendations for revisions[.]’” “Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan and Commissioner Alvaro M. Bedoya,” Commission File No. P110014, February 10, 2023, p. 1, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy21hsrannualreportrksstatement.pdf.

specifically requires the “need for any rules promulgated pursuant thereto” to be included in the report.⁷ Further, if the Agencies’ continue to produce the report in the absence of a congressional mandate, the FTC should consider the HSR Reports’ findings in the HSR Form rulemaking.

The content discussed in the HSR Annual Reports has gone relatively unchanged, covering the background of the HSR Act, a statistical profile of the premerger notification program, developments within the premerger program, merger enforcement activity, and ongoing reassessment of the effects of the premerger notification program. Under the statistical profile of the premerger notification program, the HSR Annual Reports consistently provide data and graphics on the percentage of transactions resulting in second requests during the past 10 years as well as the percentage of transactions by industry group of acquired entities. The reports also provide the percentage of transactions receiving early termination during the past 10 years.

Additionally, the NPRM fails to consider recent literature and data analysis on HSR filings compiled outside the FTC. Most notably, the proposed rule disregards a recent article in the *Antitrust Law Journal* by Logan Billman and Steven C. Salop entitled “Merger Enforcement Statistics: 2001-2020.”⁸ The article provides aggregated data on total HSR outcomes and consummated merger challenges, as well as enforcement results for HSR filings and outcomes, second requests issued as a percentage of total HSR filings, and agency clearance and challenge trends.

I.B. The NPRM disregards relevant data on second requests and early terminations.

The HSR Annual Reports and other publications, which the FTC has not considered, contain relevant information about the administration of the HSR Premerger Notification program.

First, the percentage of transactions resulting in second requests is particularly pertinent to this rulemaking, as the proposed changes substantially expand the amount of information and documents required for HSR filings that could be and are usually obtained through a second request under Subsection (e)(1)(A) of Section 7A of the Clayton Act.⁹

In Billman and Salop’s “Merger Enforcement Statistics: 2001-2020,” the authors found that only 3.1 percent of HSR filings from 2001 to 2020 received a second request (969 of 31,530 filings).¹⁰ Further, in 70.3 percent of matters in which a second request was issued, the transactions were either settled with consent decrees, never completed, or reached a litigated decision in which the government prevailed.¹¹ This illustrates that second requests are an efficient mechanism for the Agencies to challenge the most concerning mergers within their allotted budgets and time frame.

⁷ 15 U.S.C § 18a(j), *repealed by* Federal Reports Elimination and Sunset Act of 1995.

⁸ Logan Billman and Steven C. Salop, “Merger Enforcement Statistics: 2001-2020,” *Antitrust Law Journal*, Vol. 85, No. 1 (2023), <https://scholarship.law.georgetown.edu/facpub/2473/>.

⁹ 15 U.S.C. § 18a(e)(1)(A).

¹⁰ Billman and Salop, “Merger Enforcement Statistics: 2001-2020,” p. 9.

¹¹ *Ibid.*

And the percentage of second requests are trending downward with only 1.8 percent of transactions receiving a second request in 2021.¹²

Second, the percentage of early terminations is also pertinent to the NPRM. Under Subsection (b)(2) of Section 7A of the Clayton Act, the FTC and Assistant Attorney General may grant an “early termination,” allowing parties to merge before the ending of the mandatory waiting period when the transaction raises no anticompetitive concern.¹³ In February 2021, the FTC and the DOJ “temporarily” suspended the discretionary practice of early termination.¹⁴ While the FTC purported that this suspension would be “brief,” the Agencies have yet to continue the practice.

Each year, the HSR Annual Report provides the number of transactions reported, the number of transactions involving a request for early termination, the number of transactions granted an early termination, and the number of transactions not granted an early termination.

Table 1: Transactions Receiving Early Termination¹⁵

Year	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
Transactions Reported	1,429	1,326	1,663	1,801	1,832	2,052	2,111	2,089	1,637	3,520	19,460
Request for Early Termination	1,094	990	1,274	1,366	1,374	1,552	1,500	1,570	1,133	2,124	13,977
Granted	902	797	1,020	1,086	1,102	1,220	1,170	1,107	861	417	9,682
Percent of Total Transactions	63%	60%	61%	60%	60%	59%	55%	52%	52%	11%	49.7%
Not Granted	192	193	254	280	272	332	330	400	272	1701	4226

From 2012 to 2021, a total of 19,460 transactions were reported under the HSR Premerger Filing process. Of those transactions, 9,682 (49.7 percent) were granted early termination. Omitting 2021, the year the granting of early terminations was suspended, the percentage of transactions receiving early termination was 58 percent. This means, prior to 2021, transactions were granted early terminations more often than not. It’s also important to note that the 58 percent figure includes all HSR reportable transactions, not just those requesting an early termination. Of HSR reportable transactions requesting an early termination from 2012 to 2020, over 78 percent were granted.

If the FTC has good faith intentions to “improve the efficiency and effectiveness” of the initial review process within their allotted budgets, the NPRM would take a more serious, data driven,

¹² Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Annual Report: Fiscal Year 2021*, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf.

¹³ 15 U.S.C. § 18a(b)(2).

¹⁴ “FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination,” Federal Trade Commission, press release, February 2, 2021, <https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination>.

¹⁵ The most recent HSR Report (2021) was used to compile this data.

analysis of historical HSR enforcement to determine how best to do so. Past enforcement trends illustrate that the NPRM goes too far by requiring the production of information that will serve no purpose in determining whether an acquisition may violate U.S. antitrust laws.

II. The NPRM improperly relies on irrelevant and anecdotal evidence.

The NPRM improperly relies on an FTC study regarding non-HSR reportable transactions by technology firms. In concluding that the information currently reported in an HSR Filing is insufficient, the FTC states that “there has been tremendous growth in sectors of the economy that rely on technology and digital platforms to conduct business and, given the dynamic nature of these markets and the importance of acquisition strategies to success and market growth, merger and acquisitions in these sectors present a unique challenge for the Agencies.” For support of this assertion, the NPRM cites an FTC study produced under Section 6(b) of the FTC Act entitled “Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study.”

The FTC published this study in September of 2021 after issuing Special Orders to Alphabet, Amazon, Apple, Facebook, and Microsoft to provide information and documents on transactions consummated between January 1, 2010, and December 31, 2019, that did not require notification to the Agencies under the HSR Act. Because the report analyzed certain aspects of “non-HSR reportable transactions,” the reliance on it is misplaced and irrelevant.

III. The NPRM is contrary to congressional intent.

III.A. The NPRM improperly elevates the statutory goal of collecting sufficient information for HSR Filings, while deemphasizing the statutory goal of mitigating the burden on filers.

If the form and document requirements specified in the NPRM were put in place in 2012, 9,265 transactions that pose no anticompetitive concerns would have been faced with the needless compliance burdens set out in the NPRM. This is neither necessary nor appropriate and runs contrary to congressional intent.

Section 7A(d) of the Clayton Act instructs the FTC with the concurrence of the Assistant Attorney General to promulgate procedural rules in administering the HSR Premerger Filing program. That Section stipulates that the notification “be in such form and contain such documentary material and information relevant to a proposed acquisition as is *necessary and appropriate* . . . to determine whether such acquisition may, if consummated, violate the antitrust laws.” (emphasis added). However, the language under Section 7A(d) of the Clayton Act cannot be “taken in isolation.”¹⁶ Justin Hurwitz, Senior Fellow and Academic Director of the University

¹⁶ Valerie C. Brannon, *Statutory Interpretation: Theories, Tools, and Trends*, Congressional Research Service, CRS Report No. R45153, March 10, 2023, <https://crsreports.congress.gov/product/pdf/R/R45153>; see also Antonin Scalia and Bryana A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2012), p. 167 (“Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the

of Pennsylvania Carey Law School’s Center for Technology, Innovation and Competition, points out in a recent opinion piece for *The Regulatory Review* that “this text must be read in conjunction with the statutory authority to make second requests”¹⁷ The terms “necessary and appropriate” should be read in light of two mitigation tools available to the FTC and the DOJ under Section 7A of the Clayton Act that facilitate speedy merger review.

First, under Section 7A(e)(1)(A) of the Clayton Act, the FTC and the Assistant Attorney General may “require the submission of additional information or documentary material relevant to the proposed acquisition” prior to the expiration of the 30-day waiting period. These “second requests” are used when the Agencies still have antitrust concerns following the initial premerger notification filing. Also noted previously, from 2001 to 2020, only 3.1 percent of transactions received a second request. And second requests are an effective tool for the FTC and the DOJ to narrow their investigations and collect additional data and information without placing undue burdens on the merging parties.

Second, under Section 7A(b)(2) of the Clayton Act, the FTC and the Assistant Attorney General may “terminate the waiting period . . . and allow any person to proceed with any acquisition subject to this section.” These “early terminations” are granted for transactions that pose little to no anticompetitive concerns.¹⁸ As mentioned previously, the Agencies suspended the practice of early terminations in 2021 and have yet to reinstate it. Also, in the 9 years prior to its suspension, early terminations were granted in 58 percent of total HSR reportable transactions and in 78 percent of HSR reportable transactions that requested early termination.¹⁹

These two mitigation tools have the purpose of balancing the Agencies’ ability to gather information on merger filings with the need to not unduly burden the merging parties with unnecessary delays. According to Professor Hurwitz,

Another issue is that “necessary” and “appropriate” are best read together. Given that all necessary information could be acquired through a second request, “appropriateness” is a question of whether “necessary” information should be requested of all transactions subject to premerger notification or only of those subject to second requests. . . . “Appropriate” rules would balance the costs of this process while maximizing its benefits. Rather than consider this balance, the proposed changes ignore appropriateness, the primary factor that Congress had intended for

judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.”)

¹⁷ Justine (Gus) Hurwitz, “Premerger Notification Proposal Faces a Rocky Path,” *Regulatory Review*, August 28, 2023, <https://www.theregreview.org/2023/08/28/hurwitz-premerger-notification-proposal-faces-a-rocky-path/>.

¹⁸ Carrie G. Amezcua, “FTC and DOJ Temporarily Suspend Early Termination Program for HSR Filings,” *Buchanan*, February 4, 2021, <https://www.bipc.com/ftc-and-doj-temporarily-suspend-early-termination-program-for-hsr-filings>.

¹⁹ Federal Trade Commission and Department of Justice, *Hart-Scott-Rodino Annual Report: Fiscal Year 2021*, Appendix A.

the agencies to consider, and they rely instead on an overexpansive understanding of necessity.²⁰

The proposed rule improperly elevates the statutory goal of collecting sufficient information while deemphasizing two mitigation tools under the same statutory section. It would require all premerger filings to contain what is needed in only a small percentage of cases.

III.B. The NPRM quotes discrete language from Rep. Rodino in the Congressional Record while excluding language immediately following that emphasizes expediency and the avoidance of unnecessary delays.

The legislative history cited by the NPRM further demonstrates the NPRM's imbalance of the statutory goals. In footnote 11 of the NPRM, the Agencies cite the Congressional Record from September 16, 1976. The Agencies selectively quote remarks by Rep. Rodino as justification for the expansive new filing requirements. The quotation reads,

The House conferees contemplate that, in most cases, the Government will be requesting the very data that is already available to the merging parties, and has already been assembled and analyzed by them. If the merging parties are prepared to rely on it, all of it should be available to the Government.²¹

The NPRM conveniently omits language following these remarks that discuss concerns for unnecessary delays. The immediate language following the quoted remarks states:

But lengthy delays and extended searches should consequently be rare. It was, after all, the prospect of protracted delays of many months—which might effectively “kill” most mergers—which led to the deletion, by the Senate and the House Monopolies Subcommittee, of the “automatic stay” provisions originally contained in both bills.²²

The proposed rule would have the primary effect of delaying and dissuading companies from merging, a consequence that Congress specifically intended to avoid. The Agencies' estimated burden on filers would quadruple under the new HSR Filing rules from 37 hours to 144 hours. Even assuming the estimated 144 hours is correct, these hours may be dispersed over the course of months leading to substantial burdens on the front end of the merger process.

The substantial increase in the estimated compliance burden is also inconsistent with the statements of Rep. Rodino quoted by the NPRM. Rep. Rodino indicated that in most cases the government will request information that is “already available to the merging parties, and has already been assembled and analyzed by them.” But the NPRM includes documentation that is

²⁰ Hurwitz, “Premerger Notification Proposal Faces a Rocky Path.”

²¹ Federal Trade Commission, Notice of Proposed Rulemaking (citing 122 Cong. Rec. H30877 (Sept. 16, 1976) (remarks of Rep. Rodino).

²² 122 Cong. Rec. H30877 (Sept. 16, 1976) (remarks of Rep. Rodino) <https://www.govinfo.gov/content/pkg/GPO-CRECB-1976-pt24/pdf/GPO-CRECB-1976-pt24-2-2.pdf>.

not already available to the merging parties. One instance, pointed out by Professor Hurwitz, requires “filing persons provide a narrative that would identify and explain each strategic rationale for the transaction.” There are other instances. The NPRM proposes the creation of a “Supply Relationship Narrative” section that “would require each filing person to provide information about existing or potential vertical, or supply, relationships between the filing persons.” According to attorneys from the firm Faegre Drinker Biddle & Reath LLP,

The narrative responses, a competitive effects analysis for the transaction, must describe the markets and rationale for undertaking the transaction, describe all business relationships between the parties (including existing or potential vertical agreements), describe and analyze the competitive landscape, identify overlaps between direct competitors, and provide sales data and a list of top customers that includes their contact information. *This kind of information, which is routinely provided in response to a Second Request or a Voluntary Request Letter,* would now be required with respect to all transactions as part of the HSR filing. Significantly, the FTC expects that the narratives will cross-reference supporting data²³

The NPRM also proposes a number of narratives involving labor markets that are normally gathered through more rigorous second requests.²⁴ The NPRM proposes the creation of a “Labor Markets Information” section that “would require each filing person to provide certain information about its workers in order to screen for potential labor market effects arising from the transaction.” Within the Labor Markets Information section, filers would be required to provide information and data on “Largest Employee Classifications,” “Geographic Market Information for Each Overlapping Employee Classification,” and “Worker and Workplace Safety Information.” According to Professor Hurwitz, “This, again, requires creating information that firms are not likely to maintain in the ordinary course of business.”²⁵

According to former FTC attorney Amanda Wait, the FTC is attempting to turn the HSR Form into a mandatory “mini second request.”²⁶ “That’s not the purpose of the HSR,” she said.²⁷ If the requested information is readily available, as the NPRM implies, it does not follow that a quadrupled compliance burden is necessary or appropriate. Further, Rep. Rodino’s remarks state that “extended searches should consequently be rare.” The NPRM cannot bypass the intent and

²³ Robin Sampson et al., “Proposed HSR Rules Upend M&A and Merger Control Review,” Faegre Drinker, July 10, 2023, <https://www.faegredrinker.com/en/insights/publications/2023/7/proposed-hsr-rules-upend-m-a-and-merger-control-review> (emphasis added).

²⁴ “Second requests now factor in additional aspects of market competition that may be impacted, such as how a proposed merger will affect labor markets” Onna Technologies, Inc., “Understanding HSR Second Requests,” JD Supra, July 19, 2022, <https://www.jdsupra.com/legalnews/understanding-hsr-second-requests-4836163/>.

²⁵ Hurwitz, “Premerger Notification Proposal Faces a Rocky Path.”

²⁶ Dan Papsun, “Antitrust Deal Cops to Peek at Worker Abuses, Stirring Backlash,” *Bloomberg Law*, September 15, 2023, <https://news.bloomberglaw.com/antitrust/antitrust-deal-cops-to-peek-at-worker-abuses-stirring-backlash>.

²⁷ *Ibid.*

purpose of the HSR Act’s statutory scheme by shifting extended searches from the back end of premerger filing to the front end.

IV. The NPRM fails to adequately explain why quadrupling the amount of paperwork to be reviewed by the Agencies would create a more efficient HSR filing process.

Instead of using their “resources efficiently and effectively to focus primarily on transactions that may harm competition,” under the new filing requirements, the Agencies will expend considerable resources reviewing transactions that pose no harm to competition. This is neither efficient nor effective, and the NPRM fails to explain how it would be more efficient and effective. The NPRM fails to explain how the NPRM would enable the Agencies to better conduct HSR merger review with their available resources.

The NPRM states that the HSR premerger notification program is “an essential tool for effective and efficient merger enforcement.” Further, the NPRM states that “[g]iven the large number of HSR Filings submitted each year, the Agencies must use their resources efficiently and effectively to focus primarily on transactions that may harm competition.” As previously noted, the NPRM would largely expand the volume of documents and data required to file with the HSR program. In turn, this would increase the volume of documents and data to be reviewed by the Agencies.

Also previously noted, historically, the majority of HSR filings under the current form requirements have received early termination, indicating that there is little to no anticompetitive harm. In footnote 22 of the NPRM, the FTC notes that “[t]he Agencies experienced a surge in HSR reportable transactions during 2021 and 2022” and “The pace and volume of HSR filings . . . during that time . . . required the Agencies to adjust their HSR review process, including suspending the granting of requests for early termination” The NPRM does not assert or imply that transactions previously granted early termination were done so improperly. It should also be noted HSR transaction thus far in FY 2023 have dropped, “represent[ing] a 46.6% decrease in deal volume year-over-year so far.”²⁸

Considering most HSR reportable transactions were granted early termination, it makes little sense to expand the documents and data required to file under the HSR program transactions that pose no anticompetitive concerns. The increase in documents and data for the Agencies to review would likely further stress the resources available to the them.

²⁸ “HSR Transaction Volumes See Steep Decline So Far in FY 2023 (August 2023 Update),” Complex Discovery, September 14, 2023, <https://complexdiscovery.com/hsr-transaction-volumes-see-steep-decline-so-far-in-fy-2023-august-2023-update/>.

V. The NPRM underestimates the compliance burden.

The Agencies estimate that the proposed changes would increase the hours needed to prepare HSR Filings from 37 hours to 144 hours per filing, a 107 hour increase. Further, the Agencies estimate that the changes would yield approximately \$350 million in additional labor costs.

This is likely an underestimate, and it raises questions about the benefit-cost analysis used in the NPRM.²⁹ Several prominent law firms have raised doubt as to the Agencies' burden calculation. Attorneys for Arnold & Porter said “[w]hile the Commission anticipates that it will take 144 hours to complete the revised HSR form (up from 37 hours), our estimate is that it will take multiple times that figure.”³⁰ Others at Faegre Drinker Biddle & Reath LLP said “[w]e view this as a low estimate; for those companies with complex structures or multiple business lines (such as multinational companies, PE funds, hedge funds, limited partnerships, etc.), the time investment, and thus costs, will be significantly higher.”³¹ Attorneys from the firm of King & Spalding said,

We believe that the Agencies' time estimate is understated. Based on our decades of experience and with merger filing processes in other jurisdictions like the European Union and the UK, our view is that the actual time and associated additional costs will be substantially longer and higher.³²

The firm of Crowell & Moring LLP said the changes “could very well underestimate the burden involved.”³³ Sidley Austin LLP points out that “[s]ome experts believe that is a significant underestimate.”³⁴ The firm of Shearman & Sterling contends that the current estimate is “likely a significant underestimate.”³⁵ Lawyers from McDermott Will & Emery likewise say that the

²⁹ “The FTC and DOJ-Proposed ‘Dramatic’ and ‘Sweeping’ Changes to the HSR Notification Form Are Burdensome, Time-Intensive, and Costly,” Springboard, last accessed August 21, 2023, <https://springboardccia.com/2023/07/28/the-ftc-and-doj-proposed-dramatic-and-sweeping-changes-to-the-hsr-notification-form-are-burdensome-time-intensive-and-costly/>.

³⁰ Debbie Feinstein, C. Scott Lent, and Peter G. Danias, “FTC Proposes Substantial Revisions to HSR Form as Part of Increasing Aggressiveness Against Transactions,” Arnold & Porter, July 5, 2023, <https://www.arnoldporter.com/en/perspectives/advisories/2023/07/ftc-substantial-revisions-to-hsr-form>.

³¹ Robin Sampson et al., “Proposed HSR Rules Upend M&A and Merger Control Review,” Faegre Drinker, July 10, 2023, <https://www.faegredrinker.com/en/insights/publications/2023/7/proposed-hsr-rules-upend-m-a-and-merger-control-review>.

³² Norman Armstrong, Jr. et al., “FTC and DOJ Jointly Announced Proposed Changes to the HSR Premerger Notification Form,” JDSupra, July 11, 2023, <https://www.jdsupra.com/legalnews/ftc-and-doj-jointly-announced-proposed-5662867/>.

³³ “Proposed Rule Would Enact Significant and Procedural Changes to Premerger Filings and Increase Time and Costs to Merging Parties,” Crowell & Moring, June 30, 2023, <https://www.crowell.com/en/insights/client-alerts/ftc-proposes-major-overhaul-of-hart-scott-rodino-process>.

³⁴ “The Impact of the FTC’s Proposed Changes to Hart-Scott-Rodino Filing Requirements,” Sidley Austin, July 10, 2023, <https://www.sidley.com/en/insights/newsupdates/2023/07/the-impact-of-the-ftcs-proposed-changes-to-hsr-filing-requirements>.

³⁵ Ben Gris, “Proposed Overhaul of HSR Form Will Dramatically Increase Burden on Filers,” Shearman & Sterling, June 30, 2023, <https://www.shearman.com/en/perspectives/2023/06/proposed-overhaul-of-hsr-form-will-dramatically-increase-burden-on-filers>.

calculations “may underestimate the burden.”³⁶ Lawyers from Schulte Roth & Zabel LPP also conclude that the estimates are “likely-underestimated.”³⁷

Further, other experts have cast doubt on the veracity of the burden estimate. According to Daniel J. Gilman, former Attorney Advisor in the FTC’s Office of Policy Planning, the Agencies’ estimate is a “lowball” and isn’t based off any actual data. He said,

This seems a “guestimate” at best, and a lowball one. It’s based on talking to FTC staff who have private-side HSR experience, so there’s that, but it’s not based on any data or tests, and of course, not on any experience with the proposed requirements.³⁸

Also, according to Fred Ashton, Competition Economics Analyst at the American Action Forum, the present cost estimate does not consider the additional costs of delaying mergers, “another effect of the added paperwork burden.”³⁹ Ashton explains “Delaying mergers and acquisitions, specifically those that are contingent on market conditions, risks lowering the value of the planned transactions or abandoning them altogether.”⁴⁰

In order to allow the public to better understand and respond to the anticipated regulatory burden, the FTC should delineate the additional compliance costs prompted by the Merger Filing Fee Modernization Act of 2022 from those not required under the Act.

VI. Even if the compliance burden estimate is accurate, the purported benefits of the HSR Filing changes are outweighed by the harm.

Historically, the Agencies have narrowed their focus primarily on transactions that may harm competition. This is accomplished by issuing second requests. Due to the massive burden increase estimated in the NPRM, the new rules would primarily have the effect of discouraging mergers and acquisitions altogether. The new HSR Filing rules would ultimately make mergers and acquisitions slower and more costly.⁴¹

³⁶ Graham J. Hyman et al., “Antitrust M&A Snapshot|Q2 2023,” McDermott Will & Emery, July 31, 2023, <https://www.mwe.com/insights/antitrust-ma-snapshot-q2-2023/>.

³⁷ Peter Jonathan Halasz and Ngoc Pham Hulbig, “Proposed HSR Changes: What Fund Managers Need to Know,” Lexology, June 27, 2023, <https://www.lexology.com/library/detail.aspx?g=28391553-4106-4b3f-9ca8-3ad94b660725>.

³⁸ Daniel J. Gilman, “Antitrust at the Agencies Roundup: Kill All the Widgets Edition,” *Truth on the Market* (blog), August 4, 2023, <https://truthonthemarket.com/2023/08/04/antitrust-at-the-agencies-roundup-kill-all-the-widgets-edition/>.

³⁹ Fred Ashton, “Changes to Hart-Scott-Rodino Act a Boon for Lawyers, Not for Competition,” American Action Forum, June 29, 2023, <https://www.americanactionforum.org/insight/changes-to-hart-scott-rodino-act-a-boon-for-lawyers-not-for-competition/>.

⁴⁰ *Ibid.*

⁴¹ Jeetander Dulani, “New FTC Rules Will Make Mergers Slower, More Costly, More Complex,” *Bloomberg Law*, July 21, 2023, <https://news.bloomberglaw.com/us-law-week/new-ftc-rules-will-make-mergers-slower-more-costly-more-complex>.

The proposed changes in the NPRM have been described as “extensive.” Professor Gus Hurwitz puts the increase burden on filers in perspective by comparing the compliance costs to the FTC’s and DOJ’s combined budgets.

Perhaps the best way to capture their scope is to note that FTC’s own estimate of annual compliance costs, which would increase from approximately \$120 million today to more than \$470 million under the proposed changes. That amount exceeds the \$465 million combined 2023 antitrust budgets for the FTC and U.S. Department of Justice’ Antitrust Division.⁴²

The fact that the estimated compliance burden exceeds the Agencies’ combined antitrust budgets should raise concern. While the FTC and DOJ may be discontent with the size of their budgets, that discontent does not justify shifting regulatory costs to merging parties.

Respectfully,

Alex R. Reinauer
Research Fellow
Competitive Enterprise Institute
Alex.Reinauer@cei.org

Ryan Young
Senior Economist
Competitive Enterprise Institute
Ryan.Young@cei.org

Jessica Melugin
Director of the Center for Technology & Innovation
Competitive Enterprise Institute
Jessica.Melugin@cei.org

⁴² Hurwitz, “Premerger Notification Proposal Faces a Rocky Path.”