Date: January 29, 2024

To: Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

From: John R. Dearie
President
Center for American Entrepreneurship

Re: FTC Proposed Changes to HSR Form 16 CFR parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

The Center for American Entrepreneurship (CAE) respectfully submits this letter in response to the June 27, 2023 notice of proposed rulemaking ("NPRM") by the Federal Trade Commission ("FTC"), in coordination with the Antitrust Division of the Department of Justice, regarding proposed changes to the pre-merger notification form and associated instructions, as well as the pre-merger notification rules implementing the Hart-Scott-Rodino (HSR) Act. The 133-page NPRM represents a major proposed reform of the HSR pre-merger notification requirements and would significantly alter a long-established and well-understood framework that businesses and regulators alike have relied upon for 45 years.

CAE is a nonpartisan, Washington, DC-based 501(c)(3) research, policy, and advocacy organization founded in July of 2017. CAE's mission is to engage U.S. policymakers regarding the critical importance of entrepreneurs and startups to innovation, economic growth, and job creation – and to pursue a comprehensive policy agenda intended to achieve a stronger, more resilient, and inclusive U.S. economy through thriving entrepreneurship.

The purpose of this letter is to respectfully assert that the FTC erroneously certified in its NPRM that the proposed rule changes will not impact a substantial number of small businesses, did not prepare an Initial Regulatory Flexibility Assessment ("IRFA") prior to issuing the NPRM, and, therefore, did not comply with the requirements of the Regulatory Flexibility Act ("RFA"). By skipping this critical step required by statute, the FTC failed to alert many new and small businesses – and the organizations that represent them – of impending regulatory action entailing significant potential impact, and thereby unfairly limited the likelihood and ability of those businesses and their supporting organizations to participate in the comment period and rulemaking record.

Given these circumstances, CAE respectfully encourages the FTC to suspend plans to implement the proposed rule, vacate the rulemaking record, and re-start the process of considering potential reforms by preparing and issuing an IFRA, as required by the RFA. Doing so will properly alert new and small businesses, and their supporting organizations, allowing them to effectively engage in the rulemaking record.

Background

The HSR Act and its implementing rules require parties to certain mergers and acquisitions to submit pre-merger notification to the FTC and the Antitrust Division of the Justice Department, which entails completing HSR forms, and to wait a specified period of time before consummating their transaction. In their June 27, 2023 NPRM press release, the FTC states that "the proposed changes to the HSR Form and instructions would enable the [federal antitrust] [a]gencies to more effectively and efficiently screen transactions for potential competition issues within the initial waiting period, which is typically 30 days."

According to the FTC's announcement, the key proposed changes to the HSR form include:

- Provision of details about proposed transaction rationale and details surrounding investment vehicles or corporate relationships;
- Provision of information related to products or services in both horizontal products and services, and non-horizontal business relationships such as supply agreements;
- Provision of projected revenue streams, transactional analyses, and internal documents describing market conditions, and structure of entities involved such as private equity investments;
- Provision of details regarding previous acquisitions; and,
- Disclosure of information that screens for labor market issues by classifying employees based on current Standard Occupational Classification system categories.

In a previously submitted comment letter dated September 25, 2023, CAE respectfully asserted that the proposed changes to the HSR form would amount to an unnecessary and costly burden on American startups for several reasons:

1) Repeated research has demonstrated that startups are disproportionately responsible for the innovations that drive productivity growth and economic growth, and account for virtually all net new job creation.

2) Research has also revealed that startup rates had been in decline for decades prior to an increase in new business applications stemming from mass lay-offs during the Covid pandemic. Despite the recent increase, American entrepreneurship remains fragile.

3) Acquisition is an essential aspect of a thriving entrepreneurial ecosystem. Acquisition is by far the most likely pathway for entrepreneurs and their employees to successfully realize the value of what they have created through years of hard work and sacrifice. In a typical year, ten times as many startups are acquired as go public.

4) Startups are disproportionately vulnerable to the impact of regulatory burden and complexity. New businesses lack the resources and scale of larger firms over which to absorb and amortize the costs of compliance. Moreover, their very survival – especially during the precarious early years – depends on the energy and focus of their leaders.

5) The types and volume of additional information the Agencies assert as being necessary as part of the proposed changes to HSR forms is very extensive and will dramatically and unnecessarily increase the burden and complexity of production – both time and cost – for businesses seeking to engage in legitimate, efficiency-enhancing, pro-competition merger activity, especially fragile startups. Indeed, the Agencies estimate that the new requirements will increase the time needed to complete an HSR filing by, on average, 107 hours. More complex transactions – which the Agencies acknowledge account for nearly half of all filings – could entail an increase of as much as 222 hours, according to the NPRM. Using the Agencies' own estimate of 37 hours to complete a filing under the current rules, the proposed amendments represent a four- to seven-fold increase in the time necessary to prepare an HSR filing.

The Regulatory Flexibility Act and Its Requirements

The Regulatory Flexibility Act was passed by Congress and signed by President Jimmy Carter in September of 1980. The Act amended the Administrative Procedure Act of 1946 and is regarded as the most important and comprehensive effort by the federal government to balance the social objectives of federal regulations with the economic importance of small businesses and other small entities. The Act was subsequently amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Small Business Jobs Act of 2010.

Congress defined its findings and the purpose of the RFA as follows:

(a) The Congress finds and declares that —

(1) when adopting regulations to protect the health, safety and economic welfare of the Nation, Federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;

(2) laws and regulations designed for application to large scale entities have been applied uniformly to small businesses, small organizations, and small governmental jurisdictions even though the problems that gave rise to government action may not have been caused by those smaller entities;

(3) uniform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources;

(4) the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;

(5) unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;

(6) the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation;

(7) alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes may be available which minimize the significant economic impact of rules on small businesses, small organizations, and small governmental jurisdictions;

(8) the process by which Federal regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities, and to review the continued need for existing rules.

(b) It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

The RFA's central requirement is that federal agencies must analyze the impact of their contemplated regulatory actions on small entities (small businesses, small non-profit organizations, and small jurisdictions of government) and, where the regulatory impact is likely to be "significant," affecting a "substantial number" of small entities, seek less burdensome alternatives.

Importantly, both current and proposed federal regulations are subject to the RFA.

The process for seeking less burdensome regulatory alternatives established by the Act is three-fold. Agencies must:

- Solicit views of affected small entities;
- Consider the views of the SBA Office of Advocacy; and,

- Publish an initial regulatory flexibility analysis (IRFA) and/or a final regulatory flexibility analysis (FRFA) in the Federal Register – or provide a certification that the regulation will have no "significant impact."

The FTC's NPRM was posted in the Federal Register on June 29, 2023. With regard to the requirements of the RFA, the NPRM states:

> Because of the size of the transactions necessary to invoke an HSR Filing, the premerger notification rules rarely, if ever, affect small entities. The 2000 amendments to the Act exempted all transactions valued at $50 million or less, with subsequent automatic adjustments to take account of changes in Gross National Product resulting in a current threshold of $111 million. Further, none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities. Accordingly, the Commission certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Violation of the Regulatory Flexibility Act

It is CAE's contention that in asserting that the pre-merger notification rules "rarely, if ever, affect small entities," and certifying that the proposed amendments of the HSR rules "will not have a significant economic impact on a substantial number of small entities," the FTC erroneously conflated small transaction size – which is exempted from HSR requirements – with potentially affected young businesses that are small with regard to the number of employees or current revenue, as defined by standards determined by the Small Business Administration, which are not exempted from HSR requirements.

For example, it is very common for technology startups to have only a handful of employees and limited current revenue, yet nevertheless enjoy high valuations that attract very significant purchase prices. This is especially true for startups is certain industry sectors. Biotechnology firms, for example, often have very few employees, but may also possess very valuable patents. Similarly, pharmaceutical startups with very few employees and little to no current revenue often have immensely valuable product pipelines.

With these realities in mind, CAE respectfully contends that the FTC erroneously certified that the proposed rule changes will not impact a substantial number of small entities, and therefore, failed to fulfil its statuary obligation to prepare an Initial Regulatory Flexibility Assessment prior to issuing the June 27, 2023 NPRM.

Conclusion

By skipping this critical step required by statute, the FTC failed to alert many new and small businesses – and the organizations that represent them – of impending regulatory action entailing significant potential impact, and thereby unfairly limited the likelihood and ability of those businesses and their supporting organizations to participate in the comment period and rulemaking record.

CAE respectfully encourages the FTC to suspend issuance of a final rule and re-start the process of considering potential reforms by preparing and issuing an IFRA, as required by the RFA. Once properly alerted, new and small businesses and their representative organizations will be able to participate in the comment period and rulemaking record.

The Center for American Entrepreneurship is grateful for the opportunity to submit this letter. Should you have any questions about the letter or any of the information or arguments contained herein, please contact me at john@startupsUSA.org.

cc: Anisha Dasgupta
General Counsel
Federal Trade Commission