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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: 16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300 (Docket No. FTC-2023-0040)

To the Federal Trade Commission and U.S. Department of Justice:

The Consumer Technology Association® ("CTA") submits this response to the Notice of Proposed Rulemaking ("NPRM") by the Federal Trade Commission ("FTC" or "Commission"), in coordination with the U.S. Department of Justice ("DOJ," and collectively, the "Agencies"), on potential amendments to the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules ("HSR Filing").[1] CTA is North America's largest technology trade association. CTA's members are the world's leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA also owns and produces CES®—the most influential tech event in the world. CTA members operate in a competitive marketplace to produce innovative products that provide enormous benefits to consumers and power the economy.

The proposed revisions to the HSR Filing rules would substantially and unnecessarily burden companies pursuing straightforward, uncontroversial corporate transactions, while not actually advancing the Agencies' goal of identifying mergers that raise bona fide competition issues. In particular, the proposed revisions would add considerable burdens and uncertainty to transactions involving innovative startups and early-stage companies that have been successful and that depend on a potential acquisition as a viable business strategy. Overall, CTA is concerned that the proposed HSR Filing revisions reflect a hostility to mergers and acquisitions

[1] Request for Comment on the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300, Docket No. FTC-2023-0040 (June 29, 2023), https://www.regulations.gov/docket/FTC-2023-0040/document ("*HSR Rulemaking*").

in the economy generally, rather than a careful and balanced consideration of what information the Agencies need to identify potentially problematic transactions, given that the overwhelming majority of reportable transactions proceed without any competition concerns at all.[2]

As CTA's CEO Gary Shapiro has observed, based on years of experience working with innovators, "Startups are born from the passion and drive of entrepreneurs to create something new. However, startup investors have a different priority: They want a return on their investment. That return can come from intrinsic growth, an IPO, or an acquisition by another company. Remove any leg of this three-legged stool and it will topple."[3]

CTA emphasizes two points in this comment. First, the Agencies should recognize that the technology startup market is highly competitive and successful, and potential acquisitions are an important driver of investment and innovation in that market. Second, the Agencies should reconsider broad changes to the HSR Filing rules, and instead propose much more targeted revisions that minimize burdens on companies engaging in straightforward transactions and recognize the value of a robust market for mergers and acquisitions in U.S. economic competitiveness.

The Technology Startup Market Is Highly Competitive and Successful, and Benefits from a Regulatory Approach That Avoids Unnecessary Friction in Acquisitions.

The technology startup market in the United States has been, and continues to be, the most competitive and successful market of its kind in the world.[4] The United States' startup market's success is due in part to the possibility of a merger or acquisition, which attracts greater investment capital and encourages startups to assume greater risks. For example, a 2020 survey found that nearly 60 percent of startup executives listed acquisition as a realistic long-

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[2] FTC & DOJ Antitrust Division, Hart-Scott-Rodino Annual Report, Fiscal Year 2021 (Feb. 10, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf ("2021 HSR Annual Report").

[3] *See* G. Shapiro, Guest Commentary, Fortune, *I lead the Consumer Technology Association and I've never commented on an FTC lawsuit until now. Lina Khan's new case against Meta is laughable* (Aug. 3, 2022), https://fortune.com/2022/08/03/consumer-tech-cta-ftc-lawsuit-lina-khan-case-v-meta-acquisition-gary-shapiro/.

[4] CTA, 2022 Corporate Report, at 4 (2022), https://cdn.coverstand.com/66948/743840/586e475fac330e7f8abacefed052b4f4b38b4538.1.pdf ("The U.S. consumer technology industry is poised for record growth and projected to generate over $505 billion in retail sales revenue for the first time. . . . The projection represents a 2.8% revenue increase from 2021's impressive 9.6% growth over 2020, driven by strong demand for smartphones, automotive tech, health devices and streaming services.").

term goal, as compared to 17 percent that desired an initial public offering (IPO).[5] Many startups' long-term goal of being acquired plays a major role in the economy, and ultimately contributes to increased competition and innovation in the larger U.S. economy.[6] And as Congress has heard from leading scholars, "exit strategies for startups [] to be acquired. . . . should be encouraged."[7]

CTA has seen firsthand that the startup market for consumer technology continues to drive innovation that directly benefits consumers. CTA proudly count hundreds of startups among our 1500 members, and every year at CES®, CTA's Eureka Park is the premier arena for startups to launch new products, services, and ideas, as well as showcase entrepreneurial talent.[8] At Eureka Park, products on display range from air taxis, connected health devices, and telemedicine to AI-enabled vehicles and robots.[9] This wide range is unsurprising; the current startup market is healthy, and the number of startups and the value of startups have grown over the last decade.[10] Many of these startups are founded by serial entrepreneurs, who use proceeds from previous acquisitions to launch new ventures. CTA's members are part of the vibrant innovation economy that has propelled U.S. economic growth.

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[5] *See* Silicon Valley Bank, 2020 Global Startup Outlook: Key insights from the Silicon Valley Startup Outlook Survey, at 7 (2020), https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf.

[6] For example, in 2021, during the COVID-19 pandemic, venture capital investments reached record heights, with estimates of $330 billion invested in the United States – nearly double the previous record of $166.6 billion raised in 2020 – and global funding up 111% year-over-year. *See* Pitchbook & NVCA, Q4 2021 Venture Monitor, at 5 (Jan. 13, 2021), available at https://pitchbook.com/news/reports/q4-2021-pitchbook-nvca-venture-monitor; CB Insights, State of Venture 2021 Report, at 11 (2021), https://www.cbinsights.com/research/report/venture-trends-2021/.

[7] *The Impact of Consolidation and Monopoly Power on American Innovation: Before the Subcomm. on Competition Policy, Antitrust, and Consumer Rights of the S. Comm. on the Judiciary*, 117th Cong. 3 (Dec. 15, 2021) (statement of Roger P. Alford, Professor of Law, Notre Dame Law School), https://www.judiciary.senate.gov/imo/media/doc/Alford%20Testimony1.pdf ("We should recognize and embrace the fact that one of the most common exit strategies for startups is to be acquired. That should be encouraged.").

[8] Jeremy Snow, *Where Ideas Come to Life: Eureka Park™ at CES*, CES (Feb. 21, 2020), https://www.ces.tech/articles/2020/where-ideas-come-to-life-eureka-park.aspx.

[9] Press Release, CES, That's a Wrap: CES 2022 Concludes In Person with Innovation to Better the World (Jan. 7, 2022), https://www.ces.tech/News/Press-Releases/CES-Press-Release.aspx?NodeID=feda6c3c-116e-4097-8735-60b8e0d7d096.

[10] Engine, The State of the Startup Ecosystem, at 6 (Apr. 22, 2021), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf.

CES®, like many other trade shows, is a welcoming free market entry point to the consumer technology industry. It enables new industry entrants – from startups to large companies entering new business areas – to easily break into our industry. At CES, and many other trade shows, anyone with an idea can present it to hundreds, if not thousands, of potential investors, partners, buyers, and media. This kind of opportunity is important for startups and new entrants to attract customers, obtain needed funding, and garner the attention of bigger companies who may be interested in acquiring them and more quickly bring their ideas to market.

The record levels of success in the tech industry – and dramatic benefits to consumers' lives – have come against the backdrop of stability in the Agencies' merger guidance and review process. The Agencies historically have avoided unnecessary friction for transactions that do not raise serious competition issues, including acquisitions of smaller companies. Startups and other innovative early-stage companies can face many headwinds and challenges, but historically most have avoided dealing with uncertain and burdensome rules and processes around mergers and acquisitions. The proposed rules, unfortunately, create such uncertainty and place unnecessary burdens on transactions that pose no danger to a competitive marketplace.

The Agencies Should Only Implement Targeted Changes to HSR Filing Rules that Do Not Burden Companies Pursuing Economically Beneficial Transactions.

CTA has long supported the Agencies' efforts to craft sensible rules regarding mergers and acquisitions, including efficient premerger reviews that do not place unnecessary burden on startups. When the Agencies proposed – and ultimately adopted – new Vertical Merger Guidelines in 2020, CTA supported them, stressing that clear rules would promote certainty in the market.[11] Although CTA supported the Vertical Merger Guidelines, it cautioned the Agencies against imposing additional and unnecessary burdens on the startup industry.[12]

In this case, the Agencies' own NPRM concedes that the burdens on potential transactions will be substantial. By the Agencies' own estimates, if adopted the proposed changes would nearly quadruple the average amount of time to make an HSR Filing.[13] This represents a significant increase in the time, effort, and expense required to comply, a burden that will disproportionately harm smaller companies with limited resources. Such a broad collection of information is unnecessary, as evidenced by the Agencies' *Hart-Scott-Rodino Annual Report for Fiscal Year 2021*, which shows that the Agencies issued Second Requests in relation to only 1.9

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[11] CTA, Comments on DOJ/FTC Draft Vertical Merger Guidelines, at 5 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/cta_letter_on_ftc_doj_guidelines_2262020.pdf.

[12] *Id*. at 2.

[13] *HSR Rulemaking* at 42208.

percent of reported transactions in 2022.[14] Requiring the remaining 98.1 percent of reported transactions to include substantially more information in their initial HSR Filings, which the Agencies would not request under the current HSR framework, makes little sense, is unnecessarily burdensome and costly, and will divert scarce resources away from hiring, R&D, and other productive uses that companies would otherwise employ.

Examples of the requirements that will unnecessarily burden acquisitions include:

- Requiring the submission of all confidential information memoranda prepared by any officer, director, or individual exercising similar functions that relate to the sale of the acquired entity or its assets;[15]
- Requiring the submission of all studies, surveys, analyses, and reports prepared by any third-party advisors for an officer, director, or individual exercising similar functions that evaluate or analyze "market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets";[16]
- Requiring the submission of all semi-annual or quarterly plans and reports analyzing market shares, competition, competitors, or markets pertaining to any product or service also produced, sold, or known to be under development by the other party if they were provided to the acquired entity's CEO or individuals that report to the CEO; and
- All agreements between the acquiring and acquired person, including but not limited to, narratives about the transaction, deal rationale, and competitive landscape, non-compete or non-solicitation agreements, supply agreements, or licensing agreements including current agreements and those that expired, have terminated, or were canceled within one year of the filing.[17]

The concerns that the Agencies raise in the NPRM do not justify the overly burdensome HSR Filing rules proposed here. In particular, the Agencies attribute some premerger review challenges to the "tremendous growth in sectors of the economy that rely on technology and

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[14] *2021 HSR Annual Report*.

[15] This also raises concerns since such documentation often contains attorney advice and is, therefore, privileged.

[16] *HSR Rulemaking* at 42214.

[17] *Id.* at 42211-16. Several other proposed requirements illustrate the overbreadth of this rulemaking while simultaneously contributing little, if any, useful information for evaluating the effect of a merger on competition for the vast majority of transactions. Examples of these overbroad requirements include proposals that would require parties to produce: (1) deal documents, such as draft agreements and term sheets, draft versions of all deal documents, and documents created by or for deal team leads; and (2) transaction details such as labor market analysis that includes workforce categories, geographic information, and details on labor or workplace safety violations.

digital platforms to conduct business" and that "involve firms whose premerger relationship is not clearly horizontal or vertical."[18] However, that does not justify a fishing expedition for an exhaustive amount of information about the vast majority of transactions that do not raise complicated competition issues, given the Agencies can and do seek more information on certain transactions.

The concerns raised by the Agencies support a targeted, incremental approach to modifying HSR Filing requirements, not the broad approach that would add substantial burdens, costs, and uncertainty to traditionally run-of-the-mill transactions that face their own business challenges without having to deal with unnecessary regulatory barriers. An incremental approach would avoid the risk of slowing and disrupting mergers and acquisitions that benefit competition and consumers alike. An incremental approach would also still allow the Agencies to address their collection of "basic business information" without collecting an overabundance of information that does nothing to help sort through the vast majority of transactions that pose no competition issues at all.[19]

In sum, CTA supports the Agencies' broader goals of increasing competition in the United States. However, CTA cautions the Agencies from making sweeping changes as proposed to the HSR Filing requirements that would not actually increase competition and risk deterring acquisitions in the technology market and ultimately stymieing innovation in the United States and benefits to American consumers.

Sincerely,

CONSUMER TECHNOLOGY ASSOCIATION

/s/ Michael Petricone
Michael Petricone
Senior Vice President, Government Affairs

/s/ J. David Grossman
J. David Grossman
Vice President, Regulatory Affairs

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[18] *Id.* at 42179. The Agencies also seem particularly focused on the merger and acquisition activity of the "five [] largest technology companies in the United States," citing a recent study that showed that "five of the largest technology companies in the United States completed 819 acquisitions that were not reported to the Agencies over a ten-year period from 2010-2019." *Id.* at 42203. More granularly, the "number of transactions per calendar year per [each of the five largest companies in the U.S.] ranged from 2 to 31[.]" FTC, Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study, 10-11 (Sept. 2021), https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

[19] *HSR Rulemaking* at 42180.