

February 23, 2024

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

**Re: Request to Vacate Proposed Rulemaking on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Docket No. FTC-2023-0040, Due to Procedural Error**

To the Federal Trade Commission:

The Consumer Technology Association® (“CTA”)<sup>1</sup> is writing on behalf of its members, in particular its small business members that comprise the technology sector, who are likely to be substantially impacted by the Federal Trade Commission’s (“FTC” or “Commission”) Proposed Rulemaking on potential amendments to the Hart-Scott-Rodino Act (“HSR”) Coverage, Exemption, and Transmittal Rules.<sup>2</sup> CTA is proud to count 80% of its members as small businesses, and at CES® 2024, there were more than 1400 startups within Eureka Park, where startups can launch new products, services, and ideas, as well as showcase entrepreneurial talent. Many of these startups look to CES as part of their long-term goal to be acquired and are concerned about regulatory barriers that would inhibit those opportunities.

In September 2023, CTA submitted comments<sup>3</sup> in response to the FTC’s proposed rulemaking updating the HSR reporting requirements. As a part of those comments, CTA noted that the proposed revisions to the HSR Filing rules would substantially and unnecessarily burden companies pursuing straightforward, uncontroversial corporate transactions, while not actually advancing the FTC’s and the Department of Justice’s (“DOJ”) goal of identifying mergers that raise bona fide competition issues. In particular, we noted that the proposed revisions would add considerable burdens to transactions involving innovative startups and early-stage

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<sup>1</sup> As North America’s largest technology trade association, CTA® is the tech sector. Our members are the world’s largest innovators—from startups to global brands—helping support more than 18 million American jobs. CTA owns and produces CES®—the most powerful 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.

<sup>2</sup> *Premerger Notification; Reporting and Waiting Period Requirements*, Notice of Proposed Rulemaking, 88 Fed. Reg. 42,178, Docket No. FTC-2023-0040-0001 (June 29, 2023), <https://www.regulations.gov/docket/FTC-2023-0040/document> (“HSR Rulemaking”).

<sup>3</sup> Comments of CTA, Docket No. FTC-2023-0040 (filed Sept. 27, 2023), <https://www.regulations.gov/comment/FTC-2023-0040-0692>.

companies that have been successful and that depend on a potential acquisition as a viable business strategy.

It has come to our attention that many others, particularly small businesses, share that same concern, but due to procedural error, may not have been aware of the potential impact of the proposed rulemaking. We are writing today to notify the agency of that error and request that it be remedied to allow for those most impacted by the proposed rulemaking to be permitted to participate in the rulemaking record.

Under the Regulatory Flexibility Act, any federal agency that engages in a regulatory action (*i.e.*, a rulemaking) must consider the potential impact that that regulatory action has on small businesses. This, we believe, would apply to the Notice of Proposed Rulemaking (“NPRM”) updating the HSR reporting requirements. We believe the FTC erred in certifying that the rulemaking would not substantially impact small businesses as it erroneously conflated the size of the transaction with the size of the businesses that are often subject to reporting requirements under HSR. For instance, there are dozens if not hundreds of small businesses (as defined by number of employees or by revenue) that are subject to HSR reporting annually. These businesses include startups that are the subject of an acquisition or substantial investment who have a handful of employees or who have yet to realize revenues, biotech and pharmaceutical companies that hold valuable patents but that have unrealized revenue, and smaller businesses who are seeking to merge to better compete in their respective industries.

Taking a very simple estimate, in the DOJ’s and FTC’s report to Congress on HSR notification for 2022, of the roughly 3100 reportable transactions for that year, approximately 1350 were transactions of less than \$300 million.<sup>4</sup> Additionally, reportable transactions for that year involved 709 companies that had revenues of less than \$50 million. It is safe to say that HSR reporting is not only for large businesses but has a substantial impact on those small businesses that engage in healthy, competitive transactions.

In its error, the FTC did not produce the required initial regulatory flexibility assessment, which would measure the impact of its regulatory action on small businesses, and in failing to do so, did not properly put small businesses on notice to participate in a rulemaking that would substantially impact them. With the rulemaking comment period closed, the hundreds of thousands of small businesses in this country missed an opportunity to participate in a regulatory action that would greatly impact them.

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<sup>4</sup> FTC, *FTC, DOJ Issue Fiscal Year 2022 Hart-Scott-Rodino Notification Report* (Dec. 21, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/12/ftc-doj-issue-fiscal-year-2022-hart-scott-rodino-notification-report>.

We understand that while this may be an oversight by the agency, the harm is considerable. On behalf of small businesses, particularly those in the technology industry, we would respectfully request that the agency vacate the current rulemaking process for updating the HSR reporting requirements.

Sincerely,

CONSUMER TECHNOLOGY ASSOCIATION

/s/ Michael Petricone

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