Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

September 26, 2023

Re: Comments of FTC Alumni
Proposed Changes to HSR Form, 16 CFR Parts 801 and 803, RIN 3084-AB46
(Matter No. P239300)

Dear Chair Khan, Commissioner Bedoya, and Commissioner Slaughter,

As alumni of the Federal Trade Commission, we are responding to the Agency's proposed amendments to the premerger notification rules. We have devoted significant portions of our careers to protecting consumers and competition and we continue to care deeply about the Agency and its mission. Moreover, we agree that the notification rules are due for revisions given the passage of time and statutory changes, particularly the Merger Filing Fee Modernization Act of 2022, and that development of an e-filing system would streamline the process. We applaud the FTC for tackling these issues.

We write to suggest several ways in which the FTC might strengthen the evidentiary and legal foundations for the proposed amendments. Because the proposed reporting form requests vast amounts of new information as compared to the existing form, a stronger foundation would help to insulate the proposal from legal challenge and to build congressional support:

- *First*, *lay a stronger evidentiary basis for the proposed changes by initiating a comprehensive merger retrospective and economic concentration study*. In the Notice of Proposed Rulemaking (NPRM), the FTC justifies the broad reporting form by suggesting that the antitrust agencies have systemically underenforced the law against problematic mergers. The NPRM, however, provides little support for this proposition, whereas in contrast, recent studies, court decisions, and retrospectives suggest no underenforcement problem.

- *Second, develop a stronger legal foundation for certain information requests*. The proposed reporting form would request detailed information on a range of new topics, such as workplace safety incidents. The NPRM should explain, with case citations, why such topics have legal relevance for an initial merger review.

- *Third, ensure that Congress is prepared to fund more personnel, or to extend the statutory time frame in which the Agencies must complete their initial review*. According to a recent survey, former enforcers overwhelmingly believe that, with the proposed form, the agencies could not complete their initial merger reviews at current staffing levels within the existing statutory time frame. As a result, prior congressional support becomes paramount.

Again, we applaud the Agency for revising the form. Nevertheless, given the NPRM's legal and evidentiary shortcomings, we encourage the FTC to adopt only those changes that are required legally, and to table other changes until the Agency lays a stronger foundation.

I. The FTC should lay a stronger evidentiary basis for the proposed rule via a comprehensive merger retrospective and study on economic concentration

The Agency should lay a stronger evidentiary foundation for its proposed rule. For instance, the NPRM bases the proposal, in large part, on "evidence that the U.S. economy is becoming increasingly concentrated overall." For this proposition, the NPRM cites papers from 2016, 2019, and 2020.

The most recent Census data, however, contradicts the NPRM's assertion. In 2022, in an exhaustive study of all available census data from the past two decades -- including data that was unavailable to the studies cited in the NPRM – Dr. Robert Kulick found that, since 2002, U.S. economic concentration has remained flat. In fact, since 2007 in both the manufacturing sector and the broader economy, the economy became *less* concentrated.[1] Another study, from 2021, found that "just 4 percent of U.S. industries are highly concentrated, and the share of industries with low levels of concentration grew by around 25 percent from 2002 to 2017."[2] Because these recent studies call into question one of the NPRM's core assumptions, the FTC should initiate a new study into economic concentration.

The Agency also should conduct a comprehensive merger retrospective. The NPRM asserts that "despite the Agencies' efforts to prevent market consolidation through merger enforcement, many markets suffer from a lack of robust competition and mergers continue to cause harm." For this proposition, the NPRM cites several papers relating to hospital mergers, and one paper from 2014 that reached narrow conclusions regarding certain horizontal mergers.

Again, the empirical evidence casts doubt on the NPRM's core assumption. In 2023, former Acting Chair Maureen Ohlhausen co-authored a study on the existing empirical literature and found that "There is zero basis to doubt the once-settled wisdom underpinning the basic framework for merger review: mergers can and do advance procompetitive business objectives."[3] Based on this type of evidence, former Assistant Attorney General Christine Varney declared that "the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign."[4] Similarly, the agencies themselves have recognized that mergers "are one means by which firms can improve their ability to compete."[5]

Moreover, many of the FTC's own merger retrospectives do not support the NPRM's assertions about mergers and competition. For instance, one paper, from 2020, examined a large potash merger and concluded that the "evidence does not indicate that the firms were able to impose an

---

[1] See U.S. Chamber, *Industrial Concentration in the U.S. is Declining, Not Increasing* (Mar. 9, 2022), at https://www.uschamber.com/finance/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing.

[2] See Atkinson and Lage de Sousa, *No, Monopoly Has Not Grown* (June 7, 2021), at https://itif.org/publications/2021/06/07/just-4-percent-us-industries-are-highly-concentrated-itif-finds-analysis-new/.

[3] U.S. Chamber, Evidence of Efficiencies in Consummated Mergers (June 1, 2023), at https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf.

[4] Statement of Ass't Att'y Gen. Christine Varney, *Merger Guidelines Workshops*, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 22, 2009).

[5] OECD, Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development (June 4, 2020) at 5, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

anticompetitive price increase in the wake of the merger."[6] Another retrospective from 2009, into hospital mergers, found mixed results; one merger resulted in higher prices, the other did not.[7] Finally, a retrospective into grocery mergers found that "mergers in highly concentrated markets are most frequently associated with price increases, while mergers in less concentrated markets are most often associated with price decreases."[8] In short, because these studies do not support the NPRM's central assumption that mergers harm competition, the FTC should conduct further study prior to imposing substantial new requirements for initial merger review.

Recent court losses further weaken the FTC's assumption about mergers and competition. In *FTC v. Microsoft*, for example, the court agreed that "many vertical mergers create vertical integration efficiencies between purchasers and sellers," that "vertical integration creates efficiencies for consumers," and that "Vertical integration is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets."[9]

Similarly, federal courts recently have rejected almost all the agencies' other litigated merger challenges. In the past few years, the government has lost challenges to *Meta-Within* (virtual reality), *Booz Allen Hamilton-EverWatch* (cybersecurity), *UnitedHealth Group-Change Healthcare* (insurance reimbursement), *AT&T-Time Warner* (content distribution), *U.S. Sugar Corp.-Imperial Sugar*, and, of course, *Microsoft-Activision* (cloud gaming).[10] Although DOJ persuaded one district court to block a merger in the publishing market, in most cases, courts are rejecting the legal theories of both the FTC and DOJ because those theories focus on artificial measures of competition, such as the number of competitors in a marketplace, ignore the pro-competitive aspects of mergers, such as increased investment and innovation, and fail to show how the challenged conduct actually harms consumers. These losses, ignored in the NPRM, cast doubt on the need for vast new reporting requirements.

Finally, former enforcers agree that there is little reason to expand the form. A survey asked former enforcers, "Do you believe deficiencies in the current HSR form are in fact allowing competitively problematic deals above the HSR threshold to escape antitrust review?"[11] Overwhelmingly, these former enforcers responded "No" (21 to 3), that the current form is not allowing competitively problematic deals to close. The survey also asked the former enforcers,

---

[6] See Kreisle, Bureau of Economics, *Price Effects from the Merger of Agricultural Fertilizer Manufacturers Agrium and PotashCorp* (July 2020), https://www.ftc.gov/system/files/documents/reports/price-effects-merger-agricultural-fertilizer-manufacturers-agrium-potashcorp/working_paper_345.pdf.

[7] See Haas-Wilson and Garmon, Bureau of Economics, *Two Hospital Mergers on Chicago's North Shore: A Retrospective Study* (Jan. 2009), at https://www.ftc.gov/sites/default/files/documents/reports/two-hospital-mergers-chicago%E2%80%99s-north-shore-retrospective-study/wp294_0.pdf.

[8] See Hosken et al, Bureau of Economics, *Do Retail Mergers Affect Competition? Evidence from Grocery Retailing* (Dec. 2012), https://www.ftc.gov/sites/default/files/documents/reports/do-retail-mergers-affect-competition%C2%A0-evidence-grocery-retailing/wp313.pdf.

[9] *FTC. v. Microsoft Corp.*, No.23-cv-2880-JSC, 2023 WL 4443412 (N.D. Cal. Jul. 10, 2023) (citations omitted).

[10] See generally, WSJ, *Biden's Antitrust Batters Strike Out* (Oct. 18, 2022), at https://www.wsj.com/articles/bidens-antitrust-batters-strike-out-department-of-justice-merger-lawsuits-unitedhealth-11665868777?utm_source=sfmc&utm_medium=email&utm_campaign=&utm_term=Comp+EO+October+Newsletter&utm_content=11/2/2022.

[11] The U.S. Chamber of Commerce surveyed numerous antitrust practitioners with merger experience, including in-house and external counsel; 25 of the respondents formerly served at the FTC and/or the Department of Justice's Antitrust Division. See Chamber survey, at https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-merger-process.

"On balance, do you support the proposed new form?" Every single former enforcer who responded to this question, 22 out of 22, responded "No." In other words, among former enforcers -- those most likely to sympathize with the Agency's mission -- none support the proposed form's dramatic changes.

Because recent data, studies, surveys, and court cases all undermine core tenets of the proposed rule, comprehensive new studies could help to place the proposed rule on a much firmer evidentiary foundation.

II. The FTC should lay a stronger legal foundation for certain information requests

According to the NPRM, the proposed reporting form would request detailed information on a range of new topics. For most topics, the NPRM fails to provide any legal citations, or other authority, explaining their relevance to an initial merger review.

For example, the NPRM proposes to create a "Worker and Workplace Safety Information" section that would require filing persons to identify any penalties from the preceding five years. The NPRM asserts that, "If a firm has a history of labor law violations, it may be indicative of a concentrated labor market where workers do not have the ability to easily find another job." The NPRM cites no cases in which a court has found workplace safety incidents relevant to a merger analysis (nor, for that matter, does the NPRM cite any studies linking concentration and workplace safety).

In the same vein, a proposed "Officers, Directors, and Board Observers" section would require disclosure of other boards on which these individuals serve. Such material certainly relates to Section 8 of the Clayton Act, regarding interlocking directorates, but the NPRM fails to identify any cases in which a court indicated that this information has relevance for a merger review under Section 7 of the Act.

Finally, the NPRM proposes to extend the time frame on reporting prior acquisitions from five years to ten years "because the current five-year requirement for prior acquisitions is often insufficient to meaningfully identify patterns of serial acquisitions or a trend toward concentration or vertical integration." Again, the NPRM fails to identify a single case in which a court based a decision on a ten-year old transaction; in most markets, decade-old transactions would appear to have little relevance to current competitive conditions.

Former enforcers worry that these requirements would afford the Agency too much discretion in the merger review process and, ultimately, open the Agency to charges of politicization. As part of the survey, practitioners were asked, "Under the proposed form, are you concerned about the agencies potentially 'bouncing' a filing and having to engage in a lengthy EU-style iterative process to 'perfect' filings?" Every single former enforcer who responded to this question, 24 out of 24, responded "Yes." This newfound discretion could easily lead to charges of improper politicization of the merger review process.

Accordingly, the FTC should revise the NPRM to identify firm legal bases for the relevance of each new information request. Such a revision would help the NPRM gain acceptance within the antitrust community and to insulate it from legal challenge.

III. The FTC should ensure that Congress is prepared to fund more personnel, or to extend the statutory time frame, for initial merger reviews

Prior to finalizing the proposed rule, the FTC should ensure that Congress will increase funding for the agencies to hire more personnel, extend the statutory time frame of thirty days (for most mergers) for initial review, or both.[12]

If adopted, the proposed form would generate mountains of additional paper and data for Agency staff to review. By the FTC's own estimate, the proposed form would require companies to spend an additional 759,272 hours gathering and creating additional documents. According to the survey, however, the costs to file a single merger would be nearly five times greater than the FTC's estimate.[13] The newly required documents would span a range of topics, including but not limited to labor, supply chains, past transactions, external board affiliations, minority ownership, organizational structure, other types of influence holders, additional transaction details, competition and overlaps, and drafts.

Ironically, by flooding the agencies with new documents, the proposed form could degrade the merger review process. The NPRM acknowledges that, "Given 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." Nevertheless, with the proposed form, Agency staff would have to wade through mountains of information, for thousands of reported transactions, most of it likely irrelevant to any issues of genuine competitive concern. In a survey response, one former enforcer worried that "such changes will undoubtedly significantly increase the number of materials that the Agency will have to review. … They'll be receiving a lot more 'noise' in the quality of the information that they are receiving." Instead of focusing on the key issues in the relatively small percentage of potentially problematic filings, staff would face the prospect of reviewing everything, from everyone and everywhere, within thirty days.

These mountains of merger materials could overwhelm staff – perhaps leading them to overlook key facts in matters that raise issues of genuine competitive concern. In response to the survey, one former enforcer responded, "I suspect staff will not care what the responses are to the additional information requested except in very few filings that raise antitrust issues." Other former enforcers agreed that the agencies are likely to ignore much of the submitted information, noting that "staff can be as cursory or detailed in their review as they want to be" and that "Staff will always be able to technically complete their review, as there is no criteria that staff has to read every document to issue a second request."

Neither the FTC nor DOJ have sufficient personnel to review all this information within the existing statutory time frame. According to the survey of former enforcers, the proposed form would prevent the agencies from completing their initial review within current statutory timeframes. Almost every former enforcer, 24 out of 25, responded that the proposed form would adversely affect the timeliness of the submission and review process.

---

[12] See generally WSJ, *Khan Rewrites the Merger Rulebook* (July 2, 2023), https://www.wsj.com/articles/lina-khan-federal-trade-commission-antitrust-merger-filing-requirements-8eaaec94.

[13] See Chamber survey, *supra*.

Many former enforcers responded that the new form would at least double the amount of time necessary for initial review or require double the staff to adhere to current timeframes. A few narrative responses highlight the potential impact on the Agency's workload:

- "Overall, I expect that it will triple the time for a good-faith review of routine deals."

- "staff will not be able to review the volume of information provided in 30 days, so staff may issue more second requests to be safe even when those requests would not otherwise be issued. I think staff would need 60 days to review everything."

- "For even the most basic transaction, staff may need a month or more just to get through the information requested in the proposed form for one filing."

- "By dramatically increasing the number of documents required of the parties, the Agency will be committing themselves to an extraordinarily long review."

Other former enforcers predicted that the proposed form would require more Agency personnel:

- "The answer [to timeliness] is dependent on whether the FTC/DOJ massively increase staffing levels. At current staffing levels, I anticipate that for the vast majority of transaction staff will not be able to review most of the additional information required by the proposed new HSR Form. For those that it does review, I would anticipate that review of the filing will take at least 40 hours or longer."

- "The agencies have suspended early termination because of staffing. With the amount of information requested in the proposed form, dedicated HSR staff levels would need to increase significantly, likely by 100%."

As a result, the FTC should ensure that Congress supports adoption of the proposed form. Congress would have to extend the statutory deadline, fund new personnel, or both.

There is, however, reason to believe that Congress may disapprove the proposed form. When Congress enacted the Hart-Scott-Rodino Act, Congress stressed that the statute was limited and would affect only the largest deals. For example, Chairman Rodino stated that the premerger notification requirement would capture only "[g]iant corporations," and "the terms of the bill are such that it will reach only about the largest 150 mergers a year."[14] Similarly, the Senate believed the Act would not "unduly burden[] business with unnecessary paperwork and delays," and "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[15] Moreover, only last year, Congress enacted the Merger Filing Fee Modernization Act of 2022, which requires companies to provide a limited amount of additional information, rather than dozens of new categories contemplated by the proposed rule.

For these reasons, we encourage the FTC not to adopt the form until Congress endorses the proposal and until it has laid a stronger evidentiary and legal foundation.

[14] 121 CONG. REC. 8143 (1975); 122 CONG. REC. 25052 (1976).
[15] S. REP. No. 94-803, pt. 1, at 65-66 (1976).

Signed,

Alumni of the FTC[16]

Asheesh Agarwal
Former Assistant Director
Office of Policy Planning

Theodore A. Gebhard
Former FTC Senior Attorney
Office of Policy & Evaluation

Dan Caprio
Former Attorney Advisor
Office of Commissioner Orson Swindle

Liad Wagman
Former Senior Economic and Technology Advisor
Office of Policy Planning

Daniel J. Gilman
Former Attorney Advisor
Office of Policy Planning

[16] Every signatory is signing in his or her individual capacity, rather than on behalf of an organization.