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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex H)
Washington, DC 20580

Re: 16 CFR Parts 801–803 — Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P239300

To whom it may concern:

On behalf of Axinn, Veltrop & Harkrider LLP ("Axinn"), I write to offer the following comments on the Federal Trade Commission's Notice of Proposed Rulemaking ("NPRM")[1] regarding Premerger Notification, Reporting and Waiting Period Requirements, RIN 3084–AB46 under the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"). This letter does not necessarily reflect the opinions of and is not submitted on behalf of any of Axinn's clients.[2]

Axinn's antitrust practice is one of the largest and most experienced in the world. Our lawyers have served as lead or co-lead counsel on nearly half a trillion dollars in transactions and regularly file dozens of HSR Act notifications every year on behalf of our clients. One of our founding partners, Stephen Axinn, co-authored the seminal treatise on the HSR Act: *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act: A Practical Analysis of the Statute & Regulations*.[3] Axinn hopes that these comments will be useful to the Federal Trade Commission ("FTC") and the Department of Justice, Antitrust Division ("DOJ") (the FTC and DOJ, collectively, the "Agencies") as they consider the revisions to the HSR Form.

Congress's intent in enacting the HSR Act was to give the Agencies advance notice of transactions and provide a process for the Agencies' review and, if necessary, challenge of potentially anticompetitive deals. In particular, Congress intended the HSR Act as a "narrowly tailored law" to permit the Agencies the opportunity to review large mergers that previously had been "negotiated and finalized in secret" – so-called "Saturday Night Specials" – to identify those transactions most likely to have "probable anticompetitive effects"[4] and to "eliminate

[1] Notice of Proposed Rulemaking on the Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 [hereinafter NPRM].
[2] Axinn Partners Jeny Maier and Lisl Dunlop, Counsel James Hunsberger, and Associate Aigerim Saudabayeva contributed significantly to this comment.
[3] Stephen M. Axinn, Blaine V. Fogg, et al., *Acquisitions Under the Hart-Scott-Rodino Antitrust Improvements Act: A Practical Analysis of the Statute and Regulations* (3d ed. 1988).
[4] *See, e.g.*, George S. Cary, Senior Deputy Director, FTC Bureau of Competition, *Failure To Comply with the Hart-Scott-Rodino Act: Braveheart or Dead Man Walking?*, The Clayton Act Committee, 44th Annual Spring Meeting,

endless post-merger proceedings like the El Paso and Papercraft cases, and replace them with far more expeditious and effective premerger proceedings."[5] Congressman Rodino argued that premerger notification was necessary to avoid "long and costly and generally futile attempts to unscramble the illegal mergers after the damage has been done."[6] The HSR notification rules respected this intent by balancing the Agencies' need for basic information to enable them to identify which transactions to review closely, on the one hand, with the burden on parties attempting to consummate transactions, on the other.[7]

Over the decades, Congress and the Agencies have made changes to the HSR regime, including by increasing notification thresholds,[8] eliminating certain reporting obligations, expanding reporting obligations for investment funds, and expanding the types of internal party documents required to be produced with the filing.[9] But the core intended purpose of the HSR Act's notification regime has remained to provide "advance notice to the agencies and production of a minimal amount of easily retrievable information for a small number of large mergers."[10]

The proposed rule amendments here depart from the intent and purpose of the premerger notification program as prescribed by the HSR Act and are not likely to yield the desired results. *First*, the proposed changes would impose a disproportionate burden on all notified transactions. *Second*, the proposed changes push the information requests beyond the scope of what is "necessary" and "appropriate." *Third*, the proposed changes strip the current HSR Form of its objective nature and add ambiguity to starting the "clock" of the statutory waiting period. *Fourth*, the FTC's NPRM draws on foreign jurisdictions as examples of premerger notification procedures that are more burdensome on transacting parties at the outset of an antitrust review

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American Bar Association (March 28, 1996), https://www.ftc.gov/news-events/news/speeches/failure-comply-hart-scott-rodino-act-braveheart-or-dead-man-walking ("Before the Act went into effect in 1978, mergers could be negotiated and finalized in secret. Competitive analysis of the merger by the enforcement agencies often occurred after the fact. Of course, this made effective remedy of an anticompetitive merger difficult. It was concern over these 'Saturday Night Specials' that motivated Congress to provide the agencies with a process that would allow them to analyze large mergers before they were consummated. We can say with confidence that this is a narrowly tailored law that has been highly successful in accomplishing the objectives of its sponsors. It has enabled the Commission and the Department of Justice to make a pre-closing competitive analysis of the majority of mergers that have probable anticompetitive effects, without causing undue delay for the bulk of transactions that are procompetitive or competitively neutral.").

[5] H. Rep. No. 94-1373, at 10 (1976).

[6] 94 Cong. Rec. 30874 (1976).

[7] A year following the implementation of the HSR premerger notification program, Malcolm Pfunder, the former Assistant Director for Evaluation at the FTC's Bureau of Competition, described the purpose of the program as "alert[ing] the government to [] impending transactions and [] provid[ing] basic information which would permit a government review of their antitrust impact." *See* Malcolm R. Pfunder, *Premerger Notification After One Year: An FTC Staff Perspective, Twenty-Seventh Annual Meeting: Part I (August 13-15, 1979)*, 48 Antitrust Law Journal 1487, 1488 (1979).

[8] 15 U.S.C. § 18a (1976), *amended by* 114 Stat. 2762 (Dec. 21, 2000).

[9] Premerger Notification; Reporting and Waiting Period Requirements, Final Rule, 76 Fed. Reg. 42471 (July 19, 2011).

[10] Joe Sims & Deborah P. Herman, *The Effect of Twenty Years on Hart-Scott-Rodino Practice: A Case Study in the Law of the Unintended Consequences Applied to Antitrust Legislation*, *Symposium: Twenty Years of Hart-Scott-Rodino Merger Enforcement*, 65 Antitrust Law Journal 865, 866 (1997).

without acknowledging that these jurisdictions, such as the European Commission ("EC"), are moving to simplify and streamline premerger notification processes.

1. The Proposed Changes Impose a Disproportionate Burden on All Transactions

Section 7A(d)(1) authorizes the FTC, with the concurrence of the DOJ's Assistant Attorney General, to determine the nature of the notification to be required under the Act and to designate for inclusion such "documentary material and information relevant to a proposed acquisition as is necessary and appropriate" to determining the legality of the proposed acquisition under the antitrust laws.[11] This section does not grant the FTC unrestricted rulemaking authority, but instead puts trust in the agency's expertise to balance the objectives of the HSR Act while also imposing a minimum burden on businesses.[12] Indeed, Congress's goal of providing the Agencies with advance notice of large mergers and acquisitions in order to facilitate intervention against deals that would violate the antitrust laws was not unqualified. The legislative history clearly indicates that the HSR Act's notification regime must be accomplished "without unduly burdening business with unnecessary paperwork or delays."[13] Congress granted the FTC rulemaking authority under the statute to ensure that a balance was maintained between "the needs of effective enforcement of the law and the need to avoid burdensome notification requirements or fruitless delays."[14]

The NPRM recognizes that the proposed changes are "significant and impose additional burden" on businesses but asserts that the changes would "provide a more reliable and robust set of information to determine when the transaction does not warrant an in-depth investigation."[15] The NPRM estimates an increase in 12 to 222 additional hours per filing depending on complexity, with an estimated average of 107 additional hours per filing.[16] The current estimate for completing an HSR filing of 37 hours would increase nearly 400%.[17] The Agencies estimate that these changes will increase filing costs by $350 million annually.[18] The Agencies based these estimates by surveying PNO staff "who had previously prepared HSR filings while in private practice to estimate the projected change in burden."[19] While we do not have further detail on the methodology used by the Agencies, based on our experience these estimates likely understate (i) the time it will take for clients and their counsel to collect the incremental information and documents requested, as well as (ii) the average hourly rate for an attorney or other professional(s) to prepare the HSR filing.

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[11] 15 U.S.C. § 18a(d)(1).
[12] *See, e.g.*, William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act*, FTC (October 31, 1996), https://www.ftc.gov/news-events/news/speeches/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.
[13] S. Rep. No. 94-803, at 65 (1976).
[14] *Id*. at 67.
[15] NPRM, *supra* note 1, at 42184.
[16] *Id.* at 42208.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 42207.

However, increasing the burden on all notified transactions is disproportionate and unnecessary, as historical data demonstrates that the Agencies identify competition issues worth investigating further through a "Second Request" in only approximately 2-3% of notifications, a figure that has remained consistent across both Democratic and Republican administrations.[20] In prior instances when the Agencies have considered potential changes to HSR regulations, they weighed the costs and burdens of HSR filing requirements on companies (particularly smaller firms and those companies engaged in transactions that are unlikely to violate the antitrust laws) against the Agencies' need to exercise their law enforcement function.[21]

The proposed rule revisions exacerbate the practical burden of the HSR process on transacting parties as well as on reviewing Agency Staff. These burdens are placed upon all filing parties regardless of the degree to which the reported transaction implicates competition issues. 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."[22] Per the latest available HSR Annual Report (FY21), a total of 3,520 transactions were reported under the HSR Act, and only 32 of these transactions resulted in an enforcement challenge by either the FTC or the DOJ, which is not even 1% of all notified transactions.[23] A mere 65 Second Requests were issued out of the 3,520 reported transactions, representing less than 2% of reported transactions.

Even looking at an alternative metric to represent transactions potentially raising competition issues worthy of agency investigation, examining the data on transactions in which either agency received "clearance" to undertake a preliminary investigation shows that only 270 transactions – just 7.9% – received an investigation in FY21. This underscores the fact that the overwhelming majority of transactions notified under the HSR Act pose little to no threat to competition, an observation bolstered by the Agencies' use of the Early Termination ("ET") process to terminate the HSR waiting period early where no competitive concerns are identified. For FY12-FY20

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[20] Lina Khan and Jonathan Kanter, *The Hart-Scott-Rodino Annual Report Fiscal Year 2021* (2021) at 5, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf [hereinafter HSR FY21 Report].

[21] *See* Pfunder, *supra* note 7, at 1491 ("[W]e now know from experience that we do not need to monitor all of the many mergers and acquisitions which occur in this size range, and we do not need to devote the staff resources to review these filings. More importantly, we know from experience that the filing requirements tend to be relatively more costly for the small firm than for the large, and we feel it important to reduce that burden where the reduction does not compromise the law enforcement functions which *Congress required us to undertake*."); *Molly S. Boast, Report from the Bureau of Competition*, American Bar Association Antitrust Section Spring Meeting (March 29, 2001), https://www.ftc.gov/public-statements/2001/03/report-bureaucompetition ("The premerger staff also has proposed a number of other rules changes, most of them ministerial, but some substantive, to streamline the premerger notification process and make it less burdensome."); Department of Justice and Federal Trade Commission, *DOJ, FTC Announce Changes to Streamline the Premerger Notification Form* (July 7, 2011), https://www.justice.gov/opa/pr/doj-ftc-announce-changes-streamline-premerger-notification-form ("The revisions are part of ongoing efforts by the department and the FTC to review their regulations, ensure that the rules are necessary and up-to-date, and eliminate unnecessary or potentially overly burdensome reporting requirements for business. The changes will make the HSR form easier to complete, reduce the burden for most filers and make the premerger notification review program more effective for both agencies.").

[22] NPRM, *supra* note 1 at 42178 (June 29, 2023).

[23] HSR FY21 Report, *supra* note 20, at 5.

(representing the last eight years before the Agencies suspended the practice of granting ET), ET was granted in approximately 80% of notified transactions in which it was requested.[24]

The NPRM further states that the proposed changes to the Form and Instructions would allow the Agencies to "potentially narrow the scope of any investigation or reduce the need to conduct a more in-depth investigation of the proposed transaction."[25] As displayed by the statistics from the HSR FY21 Annual Report, the positive benefit of narrowing the scope of investigation will only affect less than ten percent of notified transactions (i.e., those in which one of the Agencies receives clearance to open an investigation). As the number of transactions resulting in a preliminary investigation (or, indeed, a Second Request) is already low, this underscores that the need to increase the burden on all notified transactions is disproportionate and unjustified. Moreover, to the extent merging parties in a particular transaction have information that would tend to reduce the need for or narrow a Second Request investigation, they have a strong incentive to produce it voluntarily at the Agencies' request during a preliminary investigation.

The NPRM increases the volume of information available to Staff in the initial stages. In certain ways, the expansion of the documents requested by the HSR form even goes beyond the scope of documents that are routinely requested in a Second Request, e.g., the request calling for all existing contracts and agreements between the parties. The NPRM expands the scope of documents to be provided with an HSR filing beyond the current requirements, in at least four ways:

(1) submission not only of transaction-related documents, but also of certain ordinary course of business analyses;[26]

(2) expanding the scope of transaction-related (known as "Item 4(c) and 4(d)") documents to also include documents prepared by or for the "supervisory deal team leads" for a given transaction;[27]

(3) expanding the scope of "Item 4(c) and 4(d)" documents to also include all *draft* documents that were shared with an officer, director, or supervisory deal team lead;[28] and

(4) submission of *any* agreement between the acquiring person and any entity within the acquired person that is either in effect at the time of the filing or at any point in the preceding year.[29]

This document production expansion could create a substantial burden not only on the companies but also on the Staff and may lead to resource constraints at the Agencies, which the leaders at both Agencies have already identified as a challenge even under the current HSR regime.

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[24] *Id.*
[25] NPRM, *supra* note 1 at 42178.
[26] *Id*. at 42195.
[27] *Id.* at 42193.
[28] *Id.* at 42178.
[29] *Id*. at 42207.

2. The Initial Notification Should Contain "Necessary" and "Appropriate" Information

"[T]he act clearly contemplates that the initial notification should contain all information and documents 'necessary and appropriate.'"[30] While the terms "necessary" and "appropriate" are not explicitly defined by the statute, the legislative record and the initial rulemaking process shed light on these key terms.

Congressman Rodino, a key sponsor of the HSR Act, stated in a September 16, 1976, address to the House of Representatives the "bill's rationale – that the premerger data sought by the Government can be compiled rapidly, and that premerger 'discovery' can be satisfactorily compressed into a few weeks' time because the merging companies will have already compiled, prepared, and analyzed this very data well in advance of the planned consummation date."[31] Congressman Rodino's words emphasize the "rapid" nature of the document collection as the premerger discovery targets documents and data "that is already available to the merging parties, and has already been assembled and analyzed by them."[32] These words qualify information and documents that are "appropriate."

This notion of appropriate documents also appears in Congressman Rodino's discussion of "substantial compliance" with the HSR Form or a Second Request. Congressman Rodino noted that "a government request for material of dubious or marginal relevance, or a request for data that could not be compiled or reduced to writing in a relatively short period of time, might well be unreasonable," and therefore a party's "failure to comply with such unreasonable portions of a request would not constitute a failure to 'substantially comply' with the bill's requirements."[33]

Narrative responses describing transaction rationale, horizontal overlaps, supply relationships, and labor markets go against the type of information that Congressman Rodino envisioned the HSR Act would provide the Agencies. The NPRM recognizes that requiring "filing parties to compile or generate the requested information specifically for the HSR Filing, such as items requesting narrative responses, . . . would involve additional effort"[34]

"Necessary" is tied to relevance. The final HSR rules that became effective on August 30, 1978, underwent an extensive comment period, and in response to one of the comments, the FTC stated that "all items on the form were designed to evoke the information most relevant to an antitrust analysis."[35]

Another proposed rule change that goes beyond what is "necessary" and "appropriate" for a preliminary merger analysis is the obligation to provide detailed labor and employment information. While this request reflects the Agencies' focus on labor market competition, it exceeds the scope of "necessary" by creating a "Worker and Workplace Safety Information"

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[30] Premerger Notification; Reporting and Waiting Period Requirements, Promulgation of Final Rules 43 Fed. Reg. 33450, 33520 (July 31, 1978) [hereinafter Promulgation of Final Rules].
[31] 94 Cong. Rec. 30876 (1976).
[32] *Id.* at 30877 (1976).
[33] *Id.*
[34] NPRM, *supra* note 1, at 42184 (June 29, 2023).
[35] Promulgation of Final Rules, *supra* note 30, at 33509 (July 31, 1978).

section that would require the disclosure of enforcement actions brought by the Department of Labor, NLRB, or OSHA (whether or not related to the proposed transaction).[36] The proposed obligation to provide labor and employment information is not "appropriate," because it requires filing parties to generate new information and documentary support through requests such as the identification of headcounts for each of the largest "standard occupational classifications," and the further breakdown of those headcounts into "commuting zones."[37]

3. The Proposed Rule Changes Risk Undermining the Objective Nature of the HSR Filing

In addition to substantially increasing the projected time for preparing an HSR Form, the introduction of required narrative responses describing current business operations, horizontal overlaps, and transaction rationale risks undermining the objective nature of the current HSR Form. The objective nature of the HSR Form is further challenged by the introduction of ambiguous terms such as "supervisory team lead," which could be interpreted differently by the parties and the Agencies. These new requirements create subjectivity and ambiguity regarding the completeness of the notification, prompting uncertainty over the start of the waiting period.

One of the benefits of the current HSR Act process is "the existence of an established, uniform process [which] facilitates business planning. For example, firms desiring to close a transaction by year end for tax reasons are, in most cases, able to do so because of the predictability of HSR timing."[38] Filing parties will lose this predictability with the implementation of the proposed rules and possible delays in acceptance of HSR filings for not adequately disclosing the newly requested information. Many of the new proposed requirements are subjective in nature and the Agencies will have no objective standards or precedent against which compliance (or substantial compliance) can be judged.

This subjectivity introduces a degree of uncertainty and deal timing risk never envisioned by Congress. A disagreement with Agency Staff could lead to threats of Staff "bouncing" the original filing for not adequately disclosing an overlap in a narrative response, a rationale for the transaction, a supply relationship, contact information for top customers, or failing to meet several other of the subjective new requirements. HSR practice has never involved the lengthy and open-ended premerger notification process used in the European Union, United Kingdom, China, and other jurisdictions (from which the new proposed rules draw inspiration) to ensure that filings will be deemed complete before they are formally submitted. As a result, clouds of uncertainty will loom over all HSR filings if the amendments are adopted in their current form.

Moreover, the uncertainty in timing brought on by the proposed rule changes undermines the cash tender offer ("CTO") provisions of the HSR Act, which were put in place to honor the Williams Act mandate. "[C]ash tenders depend on speed and surprise,"[39] and with this in mind, the Williams Act was passed to "impose only a ten-day pre-consummation waiting period on cash tenders" to ensure that shareholders receive timely information for the evaluation of a CTO

[36] NPRM, *supra* note 1, at 42207.
[37] *Id.* at 42198.
[38] *See* Baer, *supra* note 12.
[39] H. Rep. No. 94-1373, at 12 (1976).

and to prevent incumbent management from "frustrat[ing] many pro-competitive cash tenders."[40] Congress's thoughtful weighing of shareholders' needs with the Agencies' ability to analyze the competitive implications of a CTO resulted in a compromise of 15 days for the HSR waiting period for CTOs. The legislative history of the HSR Act further explains that the concession to reduce the waiting period for antitrust review was justified by the target entity's enhanced incentives to cooperate with the Agencies, because CTOs "are almost always made in a hostile setting, where the target company opposes the raiding company's offer."[41]

The proposed rules fail to address the unique nature of CTOs and their heightened need for speed and certainty of timing. The NPRM makes no accommodation for CTOs, nor does it explain how to reconcile new subjective filing standards with the Williams Act's (and HSR Act's) vision of the objective and predictable nature of HSR timing.

4. The European Commission - a Model for the NPRM - Is Actually Streamlining the Merger Notification Process

The NPRM notes that the "Agencies' experience gained while cooperating with international competition agencies that are conducting their own merger investigation reveals that better information can help address the increased complexity of premerger review and improve its efficiency," and that "most international jurisdictions have merger filing forms that ask filers to provide significantly more information that their staff considers relevant to the competition analysis."[42] One such jurisdiction is the European Commission ("EC"). Yet, contrary to the NPRM's observation, the EC has been on a path of simplifying its merger review process and recently implemented new rules that expand the types of cases eligible for the "simplified" notification procedure and "reduce the amount of information required in *all* types of cases, not just the simplified ones."[43]

Similarly to the United States, a small portion of notified transactions result in a significant investigation in the EU. In 2022, 4.9 percent of notified transactions resulted in a significant investigation and this share dropped to 3.2 percent in 2023.[44] Recognizing "that certain categories of notified concentrations are normally cleared without having raised any substantive doubts,"[45] and in an effort to reduce the administrative burden without impairing effective enforcement, the EC simplified its merger notification procedures in 2013.[46] In its rule revision,

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[40] *Id*.
[41] *Id*.
[42] NPRM, *supra* note 1, at 42180.
[43] These rules went into effect on September 1, 2023. *See* Natalie McNelis, *New EU merger-notification rules aimed at cutting red tape come into force tomorrow*, mLex, Aug. 31, 2023, https://content.mlex.com/#/content/1497121/new-eu-merger-notification-rules-aimed-at-cutting-red-tape-come-into-force-tomorrow.
[44] European Commission, *Merger Cases Statistics*, 21 September 1990 through 31 August 2023, https://competition-policy.ec.europa.eu/system/files/2023-09/Merger_cases_statistics.pdf [hereinafter EC Merger Statistics].
[45] Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No. 4064/89, 2000 O.J. (C 217) 32. *See also* Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004, 2013 O.J. (C 366) 04.
[46] European Commission, DGCOMP, *Simplification of merger control procedures*, European Commission, https://competition-policy.ec.europa.eu/mergers/publications/simplification-merger-control-procedures_en.

the EC chose to simplify the process to ensure that the limited resources of the Directorate-General for Competition ("DG COMP") were expended on the more significant transactions as opposed to spreading their staff thin on sifting through a high volume of information in the initial stages of the process. Only 405 transactions were notified in the EU[47] in the year ending August 31, 2021, while 3,520 transactions were reported under the HSR regime.[48] This shows that there are thousands of deals reported in the US that have little to no competition issues. Instead of turning the focus away from these transactions as the EC is doing through their process changes, the Agencies are instead subjecting these transactions to the unnecessary burden of the new proposed rules.

In light of these concerns, we ask that you reconsider the proposed amendments to the HSR Rules prior to promulgating a burdensome premerger notification regime.

Sincerely,

Michael L. Keeley
Partner and Chair of Axinn's Antitrust Practice

[47] EC Merger Statistics, *supra* note 44.
[48] HSR FY21 Report, *supra* note 20.