Federal Trade Commission
Proposed Changes to HSR Premerger Notification Form
Comments of NetChoice

September 27, 2023

NetChoice, a national trade association of tech businesses committed to defending free expression and free enterprise online, submits the following comments in response to the Federal Trade Commission's Proposed Changes to the Hart-Scott-Rodino Antitrust Improvements Act Premerger Notification and Report Form and its associated instructions ("proposed form").[1] As a national trade association of online businesses, NetChoice works to promote free enterprise and free expression online through advocacy, litigation, and regulatory filings.

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The Agencies' proposed changes are neither good policy nor consistent with statutory law or this country's tradition of depoliticized antitrust enforcement.

- *First*, the proposed form would damage the U.S. tech innovation system—by far the most dynamic in the world—by raising compliance costs, delaying capital flows, and discouraging investment;
- *Second*, by imposing European-style informational requirements for every transaction, the proposed form would improperly politicize the review process and give the antitrust agencies too much discretion to block mergers via endless delays; and
- *Third*, the proposed form would chill pro-competitive vertical mergers by requiring companies to submit detailed information about vertical matters,

[1] *See FTC and DOJ Propose Changes to MSR Form for More Effective. Efficient Merger Review* (Jun. 27, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review.

even though the case law and economic studies find that such mergers promote competition.

For these reasons, we encourage the agencies to narrow the proposed form to only those topics that are legally required by statute.

I. The Proposed Form Would Damage the U.S. Technology Innovation Ecosystem

A. The U.S. Innovation Ecosystem Leads the World

By any metric, the U.S. technology ecosystem leads the world in innovation. A significant percentage of global startups reside in the United States and the list of "unicorns"—those worth $1 billion or more—is heavily populated by American firms. America also leads the world in venture capital investment. The United States has nearly five times the level of investment of second-ranked China and more than eight times the investment of third-ranked United Kingdom.[2]

The private sector funds this investment and innovation. In 2019, private investments represented 71% of total research and development ("R&D") spending. Much of this investment comes from larger companies, which have the scale and resources to invest heavily in research and emerging technologies. In Artificial Intelligence, for instance, Microsoft, Google, and IBM rank in the top ten in papers published in AI conferences, and AT&T, Meta, and Adobe are in the top fifty. No foreign firms are on the list.[3] Private equity also funds significant investment as "[f]irms backed by venture capital play a crucial role in driving innovation in the

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[2] *See* AMERICAN EDGE PROJECT, *Economic Policy Agenda to Accelerate American Innovation* (May 2022), https://americanedgeproject.org/wp-content/uploads/2022/05/AEP-Economic-Policy-Framework-2022.pdf.

[3] *Id.*

U.S. economy."[4] Academic studies have found that private venture capital promotes competition and investment, particularly during economic downturns.[5]

Mergers and acquisitions ("M&A") play a vital role in this ecosystem. Empirical research demonstrates that M&A increases efficiency and capital flows, as well as improves products and services for consumers. According to one recent study, mergers result in more patent applications and investment: "Over a three- to four-year cycle, a given merger is associated with an average increase in industry-level R&D expenditure of between $299 million and $436 million in R&D intensive industries."[6] Extrapolating industry-wide, "on average, mergers are associated with an increase in R&D expenditure of between $9.27 billion and $13.52 billion per year in R&D intensive industries and an increase of between 1,430 and 3,035 utility patent applications per year."[7]

The technology industry exemplifies the importance of M&A. Not only does tech-sector M&A lead to increased R&D investment, it also results in innovative developments that provide consumers with new products, tools, and opportunities while often simultaneously providing these benefits for free.

For example, Google has a long track record of investing in companies and, through M&A, helping them grow and succeed:

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[4] Ravi Sinha, Brendan J. Rudolph & Alexander Vasaly, *Merger Enforcement Considerations: Implications for Venture Capital Markets and Innovation*, ANTITRUST MAGAZINE ONLINE (June 2023), https://www.cornerstone.com/insights/articles/merger-enforcement-considerations-implications-for-venture-capital-markets-and-innovation/.

[5] Makan Delrahim, *Antitrust Attacks on Private Equity Hurt Consumers*, WALL STREET J. (July 31, 2022), https://www.wsj.com/articles/antitrust-attacks-on-private-equity-hurt-consumers-lina-khan-ftc-recession-competition-management-expertise-capital-11659271442.

[6] U.S. Chamber, *Mergers, Industries, and Innovation: Evidence from R&D Expenditures and Patent Applications* (Feb. 2023), https://www.uschamber.com/finance/antitrust/mergers-industries-and-innovation-evidence-from-r-d-expenditure-and-patent-applications.

[7] U.S. Chamber, *A Shift in Merger Enforcement Risks Damaging Our Economy* (Feb. 2023), https://www.uschamber.com/finance/antitrust/a-shift-in-merger-enforcement-risks-damaging-our-economy.

1. **Android** was an idea with eight people behind it when Google acquired it in 2005.[8] Through Google's acquisition, it was able to devote resources to the development and scaling of the Android operating system. Today, Android is the most widely used mobile operating system—offered for free—and competes as an open-source rival to Apple's iOS. The Android system increases choice for consumers and provides app developers an opportunity to build their own business through the Android ecosystem. In 2020, the Android app ecosystem helped create 1.98 million American jobs.[9]
2. **Keyhole** was a 3D mapping company that offered paid access to its software.[10] When Google acquired Keyhole in 2004, it integrated the software to improve Google Maps and build its Google Earth service—both of which are enjoyed by over a billion consumers *for free*.[11]
3. **YouTube** was acquired by Google in 2006. At the time of acquisition, YouTube struggled with a plan for licensed content and lacked a strategy to maintain profitability in its video-sharing services. Google invested heavily in the technology and improved the business model to provide a *free* video-sharing platform. YouTube is now enjoyed by billions across the globe and has unlocked business opportunities for content creators and provides a means for businesses to improve their reach through innovative ad formats.[12]

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[8] Akhilesh Shetty, *Story of how Google acquired Android*, LINKEDIN PULSE (Nov. 21, 2018), https://www.linkedin.com/pulse/story-how-google-acquired-android-akhilesh-shetty/.
[9] Wilson White, *A lawsuit that ignores choice on Android and Google Play*, GOOGLE PUBLIC POLICY BLOG (Jul. 7, 2021).
[10] *Google Acquires Keyhole*, THE WALL STREET JOURNAL (Oct. 27, 2004), https://www.wsj.com/articles/SB109888284313557107.
[11] *9 things to know about Google's maps data: Beyond the Map*, GOOGLE MAPS BLOG (Sep. 30, 2019), https://cloud.google.com/blog/products/maps-platform/9-things-know-about-googles-maps-data-beyond-map.
[12] *History of Monetization at YouTube*, YOUTUBE5YEAR, https://sites.google.com/a/pressatgoogle.com/youtube5year/home/history-of-monetization-at-youtube (last visited Sep. 20, 2023).

And while Google is just one company, the pro-innovation, pro-consumer benefits of M&A are consistent throughout the tech sector. Two other companies worth highlighting are Meta and Amazon.

In 2012, Meta (formerly Facebook) paid one billion dollars to acquire Instagram—the photo-editing and photo-sharing app. In many ways, this acquisition mirrors Google's acquisition of YouTube. A promising startup with roughly 30 million users, Instagram struggled to generate revenue. This inability to generate revenue threatened Instagram's long-term viability. Fortunately, after Meta acquired the company, the Facebook leadership team was able to increase output, scale the user base from 30 million to over 1 billion. Additionally, Instagram's revenue skyrocketed from zero to $20 billion. Instagram's quality improved too, upgrading from a photo editing and photo-sharing app to a social media platform.[13] In short, Instagram transformed from a promising upstart to a permanent fixture in the social media market—affording consumers *more* choice, not less.

In 2014, Meta acquired Oculus. At the time, Oculus was a small shop of just 100 employees. It had secured an initial round of funding through kickstarter and managed to distribute 65,000 units of its prototype.[14] But the prototype was clunky, and the graphics were slow. In short, it was a passion project. But since Meta's acquisition, virtual reality has skyrocketed in popularity. Mets has been able to invest significant resources to improve the functionality, quality, and variety of these products. Indeed, Meta sold 1.1 million Oculus units in Q4 of 2022 alone.[15] Meta's acquisition and investment brought a new form of gaming and entertainment to prominence. Meta's success with Oculus spurred competition in

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[13] Chris Marchese, *Debunking the 'Big is Bad' Bogeyman: How Facebook Benefits Consumers*, 28 GEO. MASON L.REV, 1, 37-39 (2020).
[14] Greg Kumparak, *A Brief History of Oculus*, TECHCRUNCH (Mar. 26, 2014), https://techcrunch.com/2014/03/26/a-brief-history-of-oculus/.
[15] Mike Boland, *How Many VR Headsets Did Meta Sell in Q4*, AR INSIDER (Feb. 6, 2023), https://arinsider.co/2023/02/06/how-many-vr-headsets-did-meta-sell-in-q4/.

virtual reality as Google, Samsung, Microsoft, and numerous startups strive to compete and offer new products and tools.[16]

Like virtual reality, personal assistants like Siri and Alexa were unimaginable just a few years ago. But in 2014, Amazon acquired Ivona, a speech synthesis software company.[17] This acquisition enabled the creation of Amazon's Alexa product line. Alexa has not only benefited consumers by giving them an easy way to control aspects of their home, listen to music, or receive information but it has also spurred additional competition between Amazon, Apple, and Google.

As these examples underscore, acquisitions in the tech sector help create a virtuous ecosystem where innovation is encouraged and rewarded while consumers reap the benefits. This ecosystem allows startups to attract investments, scale up, or seek acquisition. Investors who fund these startups are similarly rewarded through acquisition or an IPO. The ease at which companies and investors can "exit" is crucial because it allows investors and entrepreneurs to devote their time and resources to new projects and endeavors.

Businesses of all sizes want this successful ecosystem to continue. M&A allows larger companies to allocate innovation resources to acquired companies[18] and, sometimes, to "outsource R&D through acquisitions."[19] Not only are mergers beneficial to existing, large companies, they are crucial for startups. For many startups and newer companies, acquisition is the primary path to exit. In other words, the ability to easily become acquired by a large company is a key driver behind the innovation that happens at startups. In fact, in the U.S., 58% of startup

[16] Bryan Wirtz, *Top 30 Virtual Reality Companies*, GAME DESIGN (Sep. 21, 2023), https://www.gamedesigning.org/gaming/virtual-reality-companies/.
[17] *Amazon.com Announces Acquisition of IVONA Software*, AMAZON PRESS CENTER (Jan. 24, 2013), https://press.aboutamazon.com/2013/1/amazon-com-announces-acquisition-of-ivona-software.
[18] Shuxun Wang et al, *Acquisition for innovations? M&A intensity and intra-firm innovation reallocations*, 62 RSCH. IN INT'L BUS. (2022)
[19] Matthew John Higgins & Dan Rodriguez, *The outsourcing of R&D through acquisitions in the pharmaceutical industry*, 80 J. OF FIN. ECON., 352-383 (2006), https://www.sciencedirect.com/science/article/abs/pii/S0304405X05001807.

founders aim to get acquired by a larger company, but only 17% want to go public via an initial public offering.

B. The Proposed Form Would Reduce Investment and Innovation

The proposed form will hurt this ecosystem by reducing investment and innovation. Basic economics teaches that when the price of something rises, supply decreases—and the proposed form would more than *quadruple* the costs of submitting a transaction for review. According to the FTC itself, the proposed form would increase the average required time to fill out the form from 37 hours to 144 hours.[20] The FTC also estimates 220 hours of additional attorney time for complex deals, which excludes the additional time and expense that the companies themselves will have to devote to more paperwork, as well as the time of non-attorney consultants such as economists and information technology experts. The FTC estimates that the form would add $350 million in filing costs, but outside the FTC, many others place much higher estimates on all these figures.[21] All prospective mergers would be required to shoulder these costs even though only 2% of reportable transactions receive secondary review—and only 1% of the companies reviewed have their merger requests modified or challenged.

These new costs flow from vast new informational requirements, many untethered from the antitrust statutes, historical precedent, or even economic theory. Indeed, these new requirements are highly invasive and would require employees to disclose affiliations unrelated to the business or the merger transaction. For instance, the proposal would create a "Worker and Workplace Safety Information" section that would require companies to identify labor penalties from the preceding five years, and an "Officers, Directors, and Board Observers" section that would require disclosure of other boards—not just boards of other businesses but political and religious organizations as well—on which these

[20] *Id.*

[21] *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.

individuals serve. Neither topic bears any relation to Section 7 of the Clayton Act. The proposed form would also require companies to provide all drafts of deal documents, identify potential business overlaps and acquisitions in the past ten years (including non-reportable deals), and list their creditors, minority shareholders, and certain non-controlling entities. And that's just a start.

Regardless of whether they are acquiring a company or being acquired, startups and small businesses would suffer disproportionately from the exorbitant costs of pulling together all this material. Under the proposed rules, both the acquirer and the acquired company would have to prepare their own sets of documents as part of the revised review process. Unlike larger companies, however, small businesses may not have compliance lawyers on staff (or, indeed, more than one lawyer) or the ability to incur hundreds of thousands of dollars (or more) in legal fees. As a result, smaller companies easily could become more hesitant to negotiate deals to acquire firms that would further facilitate growth, expansion, and innovation. When being acquired, small companies could have their deal price lowered by the larger company to compensate for the increased cost of the acquisition, or the smaller company could insist that the larger company reimburse their costs thereby making the merger less appealing. Any of these would impose a de facto tax on innovation and discourage pro-competitive transactions.

Similarly, the proposed form would likely reduce the amount of private venture capital flowing to startups and smaller companies. The proposed form demands substantial amounts of information on minority investors, including information on minority holders of all entities that directly or indirectly control, or are controlled directly or indirectly by, the acquiring entity. The transacting parties would have to disclose all stakeholders that may "exert influence" over them, such as creditors, board observers, and non-voting security holders. The proposed form does not limit the requirement to times when there are or may be competitive overlaps between the transacting parties. As a result, these onerous paperwork

demands directly raise the price of investment for private equity investors (and institutional investors), which typically finance multiple companies to diversify risk.

On top of these direct costs, the proposed form also would discourage investment via the sheer cost of delay. The extra paperwork could add several months to the timeline for reviewing deals, as the companies would need more time to pull together the required information and the agencies would need more time to review the submissions.[22] These delays impose real costs on the economy. An asset management company estimated that a thirty-day delay in closing deals could cost companies $12 billion.[23] A delay of several months would multiply those costs.

Many policymakers have hesitated to chill the M&A innovation ecosystem. In drafting the Hart-Scott-Rodino Act, Congress itself wanted to ensure that the premerger notification process would not "unduly burden . . . business with unnecessary paperwork and delays," instead aiming to develop a system that would "neither deter nor impede consummation of the vast majority of mergers and acquisitions."[24] More recently, a paper presented to the American Bar Association concluded that "Foreclosing or reducing the likelihood of certain M&A exits, all else equal, would disincentivize VCs and other early-stage investors from backing future startups. This would make it more difficult for future startups to gain necessary early-stage funding, which in turn could lower employment at (and the number of) startup firms, thereby generally stifling future innovation."[25] In short, the proposed form's onerous requirements "read as a denunciation of growth."[26]

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[22] Leah Nylen, *US Merger Review Revamp Set to Delay Deals by Months (2)*, BLOOMBERG NEWS (Jun. 27, 2023),
https://news.bloomberglaw.com/antitrust/merger-review-revamp-by-us-agencies-set-to-delay-deals-by-months.
[23] Capital Group Cos., Comment to FTC (Feb. 2, 2021),
https://www.regulations.gov/comment/FTC-2020-0085-0024.
[24] S. REP. No. 94-803, pt. 1, at 65-66 (1976).
[25] Ravi Sinha, Brendan Rudolph & Alex Vasaly, "Merger Enforcement Considerations: Implications for Venture Capital Markets and Innovation," American Bar Association, Antitrust Law Section, (June 30, 2023),
https://www.americanbar.org/groups/antitrust_law/resources/magazine/2023-june/merger-enforcement-considerations/.
[26] *See* The Editorial Board, *Lina Khan's FTC wants to transform antitrust. Is there a better way?*, WASHINGTON POST (Aug. 14, 2023),

America's dynamic free market economy turns on investment and the free flow of capital. If adopted, however, the proposed form would seriously damage our nation's innovation ecosystem.

II. By Imposing European-style Informational Requirements, the Proposed Form Would Improperly Politicize and Delay the Review Process

The proposed form also threatens to politicize the merger review process in ways that would harm U.S. tech companies. By soliciting voluminous new information, the proposed form would afford the antitrust agencies too much discretion to block mergers via endless delays, on grounds unrelated to competition and perhaps in violation of due process. In other words, the proposed form would transform the U.S. merger review process into one used in many parts of Europe and other foreign jurisdictions—to the detriment of transparency, innovation, and the rule of law.

Some foreign merger control regimes require substantial upfront information, but those regimes differ substantially from, and do not justify changes to, the longstanding process for reviewing mergers in the United States. Although the FTC argues 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,"[27] the agency ignores crucial differences. For one thing, the United States sees far more merger submissions (and attendant investment) than other countries. In 2018, for instance, the United States saw almost 5,000 mergers, the U.K. almost 800, and all other countries less than 400 each.[28] In 2021, the United States accounted for nearly half of the $5.8 trillion in deals globally.[29]

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https://www.washingtonpost.com/opinions/2023/08/14/lina-khan-antitrust-digital-ftc/ (discussing proposed merger guidelines).

[27] NPRM at 42180.

[28] *See Largest acquiring countries for merges and acquisitions (M&A) worldwide in 2018, by number of deals*, STATISTA, https://www.statista.com/statistics/961276/leading-acquirer-countries-worldwide-for-mergers-and-acquisitions/ (last visited Sep. 21, 2023).

[29] U.S. Chamber, *5 Facts to Understand Mergers: The Benefits, Review Process, and Proposed Changes* (Mar. 20, 2022),

Another difference: many foreign regimes, including the European Union, allow a simplified merger notification form for transactions that raise few competitive risks.[30] The U.S. agencies, however, have not proposed a short form for such mergers, meaning that every reportable transaction would require a cumbersome filing even if it raises no conceivable competitive concern. For both these reasons, the costs and burdens of the current proposal would far outstrip the costs of anything abroad.

Most importantly, many foreign competition agencies have more authority than their American counterparts and thus arguably more cause to seek additional upfront information.[31] In many parts of the world, foreign competition authorities have the authority to approve or disapprove transactions, subject to judicial review after the fact,[32] whereas in the United States, of course, the antitrust agencies must sue in federal court if they want to block a merger. Given that these foreign agencies are charged, by their laws, with the responsibility to decide first whether to approve or block a deal, those agencies may well have stronger bases to demand more upfront information as compared to their U.S. counterparts.

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https://www.uschamber.com/finance/antitrust/5-facts-to-understand-mergers-the-benefits-review-process-and-proposed-changes.

[30] *See* Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R0914&qid=1683710227250. It is worth noting that while the NPRM seeks to expand the information required in an HSR filing, the EC's simplification measure, passed in 2023, aims to *reduce* the burdens on filing-parties for unproblematic transactions. *See also*, Alex Bagley, *Lawyers welcome "major reform" of EU's simplified merger regime*, GLOB. COMPETITION REV. (Apr. 20, 2023), https://globalcompetitionreview.com/article/lawyers-welcome-major-reform-of-eus-simplified-merger-regime.

[31] *See* U.S. Chamber of Commerce, *International Competition Policy Expert Group Report and Recommendations* (March 2017) https://www.uschamber.com/regulations/international-competition-policy-expert-group-report-and-recommendations, *see also* Prepared Statement of the Federal Trade Commission Before the United States House of Representatives Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law, on "International Antitrust Enforcement: China and Beyond" (June 7, 2016),

[32] *See* Council Regulation No. 1/2023, 2003 O.J. (L 1). In the EU, EC decisions and procedural determinations are subject to judicial review by the General Court and by the Court of Justice if the parties choose to appeal. *See* Eur. Comm'n, *Competition: Merger control procedures*, https://competition-policy.ec.europa.eu/system/files/2021-02/merger_control_procedures_en.pdf.

The United States should not seek to emulate those processes. The existing agency tools foster robust competition by enabling a quick approval process while still empowering the agency to review potentially troublesome transactions through a second request for additional information.[33] By contrast, China and the European Union have months-long pre-approval systems that give agencies lots of discretion to review mergers for a slew of issues, often unrelated to the preservation of competition.[34] China is "holding back its required green light for mergers that involve American companies as a technology war with Washington intensifies." Europe and the U.K. have been holding up mergers to further protectionist interests, rather than to protect their consumers.[35] In the United States, on the other hand, the antitrust agencies have a short statutory deadline, thirty days in most cases, to terminate review or to seek more information. In addition, for decades the U.S. agencies' lodestar has been straightforward—the protection of competition, rather than industrial policy or other social goals.

The proposed form, however, would move the U.S. closer to the Chinese and European model in which agencies and merging parties engage in long negotiations on a range of issues. Because the new form requests substantial new information, the agencies could indefinitely postpone the thirty-day clock, and obviate the need to prove their cases in court, simply by claiming that the merging parties failed to provide enough information to begin the review process.[36] Indeed, in proposing the new form, the FTC offers no guidance as to what constitutes an adequate or

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[33] Indeed, the FTC has seen roughly 20 deal abandonments after facing investigations or litigation threats. *See* Dan Papscun (@papscun), X (Sep. 26, 2023, 3:22 PM), https://twitter.com/papscun/status/1706751172034674840?s=42&t=WacviFYBTivQK6lMhQJvsA.

[34] *E.g.,* Lingling Wei and Asa Fitch, *China's New Tech Weapon: Dragging Its Feet on Global Merger Approvals*, WALL STREET JOURNAL (April 4, 2023), https://www.wsj.com/articles/chinas-new-tech-weapon-dragging-its-feet-on-global-merger-approvals-d653ca4a.

[35] *See* U.S. Chamber, *EU Expansion of Merger Control Regime Threatens Harm to Governments, Consumers, and Businesses* (Feb. 10, 2023), https://www.uschamber.com/international/eu-expansion-of-merger-control-regime-threatens-harm-to-governments-consumers-and-businesses; *See also* Asheesh Agarwal, *What Would Hamilton Do…About GIPHY and Grail?*, AMERICAN EDGE PROJECT (Dec. 6, 2021), https://americanedgeproject.org/what-would-hamilton-do-about-giphy-and-grail/.

[36] *See* Comments of Jack Sidorov.

deficient filing or what updates the merging parties must provide about changes that may occur after filing.

The ambiguities, lack of guidance, and the potential for political gamesmanship all have practical implications for existing business practices. For example, the proposed form would require companies to share each "draft" of a merger agreement. Yet, many businesses are using Google Docs—a document sharing service that allows multiple users to edit a document together in real time. These changes are often made separately by individuals working independently. For companies that utilize Google Docs, what counts as a "draft" for purposes of the proposed form? Documents created in Google Docs are automatically saved every few minutes. Does each newly saved version count as a "draft"? Or does a new draft only come into existence when it has been unchanged for a designated period of time? Does it matter whether there has been official sign off on a draft version? The proposed form offers no hint as to the answer.

Relatedly, the proposed form requires that all M&A documents be produced by "supervisory deal team leads." That requirement alone may hamper a business's ability to engage in M&A—especially smaller businesses who are less likely to have designated M&A teams and instead rely on individuals across the business to pitch in on preparing for a merger. Requiring that documents be prepared by a new category of "supervisory deal team leads," instead of officers and directors, which are well understood under corporate law, would open the door to political gamesmanship whereby a proposed merger, disfavored by the FTC, could be unilaterally put on hold because the FTC argued that documents were not produced by the correct people. This would also unnecessarily hamstring smaller businesses and subject all businesses to undue scrutiny or confusion over who constitutes a "supervisory deal team lead" for the purposes of the initial filing.

Even more troubling, the agencies could delay mergers indefinitely based on ideological criteria, rather than legitimate concerns about competition. Citing such

political topics as "workers' share of national income," the proposed form requests information on a slew of topics that traditionally have been outside the scope of merger review, including workplace safety and decade-old non-reportable transactions. Particularly given the concerns swirling around today's FTC—alleging ethical lapses, document destruction, leaks, and improper collusion with foreign competition agencies—the proposed form appears ripe for abuse.[37] These politicization concerns are especially acute given the agencies' heavy focus on technology companies, which has resulted in a series of court losses and multiple requests for recusals.[38]

Aside from these issues, the empirical evidence provides another reason to avoid these types of foreign merger review schemes: they hamper economic dynamism. Europe imposes far more burdens on merging parties and allows competition agencies to block deals based on a range of public policy concerns—and enjoys a much less dynamic economy.[39] Europe lags well behind the United States in innovation and investment in research and development.[40] According to a McKinsey study, from 2017 to 2019, there were roughly twice as many venture capitalists in the United States as there were in Europe.[41] Over this same time, total venture

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[37] *E.g.,* Sean Heather, *Can Congress Get Answers About the FTC's Agenda?*, U.S. CHAMBER (July, 12, 2023), https://www.uschamber.com/finance/antitrust/getting-answers-on-the-ftcs-agenda.

[38] *See* Leah Nylen, *Lina Khan Rejected FTC Ethics Recommendation to Recuse in Meta Case*, BLOOMBERG (Jun. 16, 2023), https://www.bloomberg.com/news/articles/2023-06-16/ftc-rejected-ethics-advice-for-khan-recusal-on-meta-case; *See also* Leah Nylen, *Google Alleges 'Deep-Seated Bias' by DOJ Top Antitrust Official*, BLOOMBERG (Aug. 31, 2023), https://www.bloomberg.com/news/articles/2023-08-31/google-alleges-deep-seated-bias-by-doj-top-antitrust-official.

[39] *E.g.,* Jordan Heiber and Zach Helzer, *How Europe Paus A High Price for Its Overregulation of the Digital Economy*, U.S. CHAMBER (Jul. 27, 2023), https://www.uschamber.com/international/how-europe-pays-a-high-price-for-its-overregulation-of-the-digital-economy.

[40] Iliyana Tsanova and Roger Havenith, *Europe is no longer an innovation leader. Here's how it can get ahead*, WORLD ECONOMIC FORUM (Mar. 14, 2019), https://www.weforum.org/agenda/2019/03/europe-is-no-longer-an-innovation-leader-heres-how-it-can-get-ahead/

[41] Koren W. Wong-Ervin, Reform or Regress? An Assessment of Proposed Antitrust Regulation, AMERICAN EDGE PROJECT (July 2022), https://americanedgeproject.org/wp-content/uploads/2022/07/Reform-or-Regress-An-Assessment-of-Proposed-Antitrust-Legislation-July-2022_FINAL.pdf.

capital in Europe increased from $18 billion to $36 billion, while in the U.S., venture capital increased from $86 billion to $132 billion. According to the McKinsey survey, European startup founders mention the burden of regulation and administration as among their biggest woes. If imported here, European-style regulation would beget European-style stagnation.

Other economies confirm the centrality of robust M&A to innovation and growth.[42] According to a recent paper, both the South Korean and Australian economies rely on "early" public offerings, rather than M&A, for capital and investment, but the evidence shows that those offerings tend to perform poorly. These countries' experiences "highlight the importance of acquisitions to dynamic, healthy startup ecosystems, and the folly of standing up early IPO regimes as a perfect alternative to healthy acquisition activity."[43]

The current merger submission form and review process has helped the U.S. economy become the most dynamic and innovative in the world, to the benefit of consumers across the country. The agencies should not politicize it.

III. The Proposed Form Would Chill Pro-Competitive Vertical Mergers

As a final concern, the proposed form would chill pro-competitive vertical mergers by requiring companies to submit detailed information about supply chains, even though the case law and economic studies find that vertical mergers promote competition. In particular, the proposed form requires a "Supply Relationships Narrative that would require each filing person to provide information about existing or potential vertical, or supply, relationships between the filing persons." Each filing party would have to provide, in a narrative response, "information for related sales and purchases between the filing persons or with

[42] Engine and Startup Genome, *Exits, Investment and the Startup Experience: the role of acquisitions in the startup experience* (last visited Sep. 21, 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6356f5ccf33a6d5962bc7fd8/1666643406527/Exits_Investment_Startup_Experience_role_of_acquisitions_Report_Engine_Startup_Genome.pdf.
[43] *Id.*

other companies that use the filing person's products, services, or assets to compete with the other filing person."

For an initial filing, this requirement would needlessly raise the price of vertical transactions and deter them from happening at all. Merging parties would have to involve lawyers and economists to evaluate and describe their business relationships, an exercise irrelevant to most transactions. At most, and if need be, such requests could be appropriate for a Second Request after an initial review.

Most importantly, both the case law and economic studies show that the vertical additions to the proposed form are completely unnecessary. Most vertical mergers promote competition and, as such, the proposed form need not ask detailed questions about vertical relationships that unduly increase the burden of pursuing vertical transactions. There is widespread "recognition among academics, courts, and antitrust enforcement authorities alike that many vertical mergers create vertical integration efficiencies between purchasers and sellers."[44] Indeed, in the past few years, the government has lost multiple cases challenging vertical arrangements, including those between Meta and Within (virtual reality), Microsoft and Activision (cloud gaming), Booz Allen Hamilton and EverWatch (cybersecurity), UnitedHealth Group and Change Healthcare (insurance reimbursement), and, of course, AT&T and Time Warner (content).[45] In the recent *Microsoft-Activision* decision, the court agreed that "[f]or a vertical merger, such as the Microsoft/Activision merger, 'there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers.' . . . This is in part because 'many vertical mergers create vertical integration efficiencies between purchasers and sellers.'"[46] Likewise, in the *Booz Allen Hamilton-EverWatch* case, the court found

[44] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 193 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (2019) (internal citation and quotation omitted). *See also United States v. Enova*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[V]ertical mergers often promote efficiencies by consolidating input and output operations under one umbrella.").

[45] *See generally*, WSJ, Biden's Antitrust Batters Strike Out (Oct. 18, 2022), 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.

[46] *Microsoft*, 2023 WL 4443412, at *11 (citations omitted); *see also Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("[V]ertical integration creates efficiencies for consumers").

that the challenged merger "could arguably increase competition in some areas" by placing the combined company in a "stronger position to challenge entrenched incumbents."

The economic evidence confirms that vertical mergers promote competition.[47] Several months ago, former Acting Chair 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."[48] In a recent case study on the effects of vertical integration between cable distributors and regional sports networks, the authors concluded that there would be a statistically significant positive effect on consumer welfare from vertical integration."[49] The most prominent antitrust treatise agrees that "most vertical mergers are procompetitive."[50]

In fact, until very recently, most antitrust enforcers also agreed that most vertical mergers promote competition. In a policy statement from just a few years ago, the agencies themselves recognized that mergers "are one means by which firms can improve their ability to compete. It would be illogical, then, to prohibit mergers because they facilitate efficiency or innovation in production."[51]

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[47] Areeda & Hovenkamp, *supra* note 44; James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005); *see also Daniel P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in* REPORT: THE PROS AND CONS OF VERTICAL RESTRAINTS 76 (2008).
[48] *See* Maureen K. Ohlhausen and Taylor M. Owings, *Evidence of Efficiencies in Consummated Mergers*, U.S. CHAMBER (Jun. 1, 2023), https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf.
[49] Gregory S. Crawford, et al., *AT&T/Time Warner and Antitrust Policy Toward Vertical Mergers*, CPI ANTITRUST CHRON 1, 3 (July 2019) (discussing G.S. Crawford, R.S. Lee, M.D. Whinston & A. Yurukoglu, *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86 ECONOMETRICA 891 (2018)). *See also* Daniel Hosken & Christopher Taylor, *Vertical Disintegration: The Effect of Refiner Exit From Gasoline Retailing on Retail Gasoline Pricing*, FTC Working Paper No. 344 (July 2020) (finding the same effects when refiners voluntarily exited gasoline retail).
[50] Areeda & Hovenkamp ¶ 10A-1; *id.* ¶ 1020 ("Most instances of vertical integration, including those that result from mergers, are economically beneficial. As a result, the presumptions in favor of vertical mergers should be stronger than the presumptions favoring horizontal mergers."); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 755c (online ed. May 2023) ("Vertical integration is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets.").
[51] OECD, Conglomerate Effects of Mergers – Note by the United States to the Organisation for Economic Co-operation and Development (June 4, 2020),

Then-Commissioner Christine Wilson noted, "[e]conomists have conducted a number of retrospective studies of vertical mergers. Most suggest that consumers benefit. For example, LaFontaine and Slade found in a 2007 survey that 'efficiency considerations overwhelm anticompetitive motives in most contexts.' A 2005 survey by four FTC economists found similar results. So did a 2018 survey by economists at the Global Antitrust Institute."[52]

Finally, vertical integration can improve incentives for innovation,[53] such as by improving information flows and coordination.[54] In the computer industry, for example, vertical integration has enhanced efficiency for decades.[55] Beginning in the 1950s, IBM "was highly vertically integrated in invention and production."[56] Besides a personal computer, IBM helped to invent complementary hardware and software components that could be used for data processing.[57] More recently, of course, courts found that vertical integration promoted competition in *Meta-Within* and *Microsoft-Activision*.

By demanding extensive information about vertical relationships, the proposed form would raise the cost of pro-competitive vertical mergers, create uncertainty as to their legality (in contravention of the case law), and perhaps discourage such transactions altogether. In short, the proposed form attempts to fix what isn't broken: vertical mergers. Vertical mergers are pro-competitive. And where the agencies have sought to challenge these mergers as anti-competitive, the courts rebuffed those challenges.

Imposing additional costs on vertical mergers will only serve to hinder competition. There is nothing to be gained by attempting to fix what isn't broken. Innovation will suffer and businesses and consumers will suffer as a result.

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https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf.

[52] Wilson, *supra* note.

[53] *See, e.g.*, Timothy F. Bresnahan & Manuel Trajtenberg, *General Purpose Technologies: 'Engines of Growth'?*, 65 J. ECONOMETRICS 83 (1995).

[54] *Id.* Henry Ogden Armour & David J. Teece, *Vertical Integration and Technological Innovation*, 62 REV. ECON. & STAT. 470, 470 (1980).

[55] Bresnahan & Levin at 38.

[56] *Id.*

[57] *Id.*

Conclusion

For these reasons, we encourage the FTC to withdraw the proposed rulemaking. As always, NetChoice stands ready to work with agencies and other stakeholders to protect competition.

* * *

Sincerely,

Carl Szabo
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