February 12, 2025

The Honorable Jim Jordan
Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Scott Fitzgerald
Chair
Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Jamie Raskin
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

The Honorable Jerrold Nadler
Ranking Member, Subcommittee on the Administrative State, Regulatory Reform, and Antitrust
United States House of Representatives
Washington, D.C. 20515

Dear Chairman Jordan, Subcommittee Chair Fitzgerald, Ranking Member Raskin, and Ranking Member Nadler:

The undersigned organizations write to express our support for the use of the Congressional Review Act (CRA) to overturn the Federal Trade Commission's (FTC) recent premerger notification rules ("Rules"). The Rules have also been challenged in court for violating the Administrative Procedures Act as being unnecessary and overly burdensome. Overturning the Rule would efficiently allow the FTC to restart the rulemaking process and promulgate rules that are less burdensome and more narrowly targeted.

As a general matter, mergers and acquisitions (M&A) often promote efficiency and competition by allowing companies of all sizes to put assets to their highest and best use. M&A activity can also spur innovation: smaller companies, entrepreneurs, and early-stage investors benefit from opportunities for capital formation, liquidity, and growth, as well as the possibility of a future exit. Larger businesses utilize M&A to unlock efficiencies, enhance research and development, and expand operations.

When Congress passed the Hart-Scott-Rodino Act ("HSR Act") it explicitly wanted to avoid "deter[ring] . . . the vast majority of mergers and acquisitions." Congress recognized that M&A activity usually improves competition by "generat[ing]

significant efficiencies and thus enhanc[ing] the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[1]Thus, the Rules should be geared toward identifying the small percentage of mergers that may harm competition and avoid unduly burdening the vast majority of mergers that either help competition or are neutral.

To accomplish this, the HSR Act establishes a two-stage process. An initial filing stage that applies to all HSR mergers above a certain size and provides the agencies high-level information about the transaction, and a "second request" stage that grants the FTC and the Department of Justice enormous power to request additional information for any merger that they wish to further scrutinize.[2] More recently, the Consolidated Appropriations Act of 2023, directed the FTC to revise the form used for merger notifications for one specific purpose: to solicit data on foreign subsidies originating from countries of concern.

But rather than simply updating the form as Congress directed, the FTC proposed sweeping changes. The Republican FTC commissioners, who were powerless to stop the rule, were successful in paring back the final Rule in exchange for their support, but both Republican Commissioners made clear in their statements that this was not a rule they would have written.[3]

According to the government's own data, 98% of mergers do not raise competitive concerns. But the new Rule assumes that almost all M&A activity is inherently problematic, and subjects businesses from small to large – and reportable transactions from simple to complex – to what is effectively the burdensome "second request" process normally reserved for M&A activity that the FTC or DOJ have determined could violate the antitrust laws.

The increased burden the final Rule imposes is unjustifiable: increased bureaucracy that has the effect of deterring mergers will stifle innovation, reduce market efficiencies, and ultimately harm consumers who benefit from the competitive dynamics that mergers can and do foster.[4] Further, the agencies do not have the resources to make use of the additional information the Rule would demand from all merger filings. Informational overload will force the agencies to divert resources away

[1] S. Rep. No. 94-803, at 66 (emphasis added)
[2] The agencies also frequently use voluntary access letter to gather additional information from the merging parties before issuing a second request.
[3] *See.* Concurring Statement of Commissioner Andrew N. Ferguson in the Matter of Amendments to the Premerger Notification and Report Form and Instructions, and the Hart-Scott-Rodino Rule 16 C.F.R. Parts 801 and 803, U.S. Federal Trade Comm., October 10, 2024, at 5, "[t]he Final Rule is not perfect, nor is it the rule I would have written if the decision were mine alone." *See also.* Statement of Commissioner Melissa Holyoak Regarding Final Premerger Notification Form and the Hart-Scott-Rodino Rules. Federal Trade Comm., October 10, 2024, at 1, "[t]o be clear, this Final Rule does not align exactly with my preferences."
[4] Evidence of Efficiencies in Consummated Mergers, Maureen K. Ohlhausen & Taylor M. Owings (June 2023), available at https://www.uschamber.com/assets/documents/20230601-Merger-Efficiencies-White-Paper.pdf (A survey of research on consummated mergers demonstrates mergers "can and do advance procompetitive business objectives.")

from the handful of mergers that require closer scrutiny. Moreover, having digested the final Rule's 460 pages, merger filing experts agree that it provides little benefit for the overwhelming number of reportable transactions, fails to consider less burdensome alternatives, and affords the government too much discretion to reject filings based on political criteria.

Moreover, the FTC made changes that are in direct violation of administrative law. For example:

- At no time during the rulemaking process did the FTC present any justification to support its finalized changes. The FTC cannot point to a single merger that was not thoroughly reviewed because information at the initial filing stage was lacking.
- The FTC dramatically underestimates the costs of and cannot identify benefits associated with the additional burden imposed on every merger filing. This is a significant burden because roughly 98% of mergers do not currently undergo a "second request."
- The FTC failed to appropriately consider alternatives that might keep the existing form for the vast majority of mergers, and subject only a subset of transactions to a reasonable additional initial filing burden.
- The Rule was significantly changed from the proposed rule that was available for public comment. Administrative law requires that the FTC restart the rulemaking process and seek additional comment, given the dramatic changes made between the proposed and final Rule.
- Because the public has not had an opportunity to comment on the Rule, the Rule's publication also runs afoul of the Administrative Procedure Act, the Paperwork Reduction Act, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act.

To be clear, the business community has no objections to the Congressionally mandated changes to the HSR form related to the collection of information about foreign subsidies. Nor does the business community object to reasonable updates to the form beyond what Congress recently directed. However, additional changes must be justifiable and targeted to identify anticompetitive mergers, not to add sweeping and unnecessary requirements.

A Congressional repeal of this Rule would allow the FTC to issue a new NPRM consistent with Congress's two-tier approach to merger review. With a new NPRM,

the FTC could gather public comments on the Rule's costs and benefits, as well as options for less burdensome alternatives.

Invoking Congress's prerogative as provided in the CRA will help clear the way toward re-establishing a predictable, efficient process for agency review of M&A activity. Repeal also would save taxpayer money by mooting the legal challenges brought against the FTC by concerned plaintiffs. We therefore urge Congress to enact a resolution of disapproval to vitiate the FTC's Rule.

Sincerely,

ACT | The App Association
AdvaMed
Alternative Investment Management Association
American Investment Council
American Coatings Association
American Hospital Association
Business Roundtable
Biotechnology Innovation Organization (BIO)
Center for American Entrepreneurship
Computer & Communications Industry Association (CCIA)
Connected Commerce Council
Connected Health Initiative
Consumer Technology Association
Energy Equipment & Infrastructure Alliance
Engine
Federation of American Hospitals
Global Business Alliance
Information Technology Industry Council (ITI)
International Franchise Association
Managed Funds Association
Metals Service Center Institute
National Association of Manufacturers
National Industrial Transportation League
National Parking Association
National Pest Management Association
National Retail Federation
National Venture Capital Association (NVCA)
NetChoice

Partnership for the U.S. Life Science Ecosystem (PULSE)
Pharmaceutical Research and Manufacturers of America (PhRMA)
Retail Industry Leaders Association
Silicon Valley Leadership Group
Small Business & Entrepreneurship Council
Software Information Industry Association (SIIA)
TechNet
United States Hispanic Business Council
U.S. Chamber of Commerce
Western States Trucking Association

CC: Members of the House Judiciary Committee