U.S. Chamber of Commerce

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The Congress should exercise its CRA authority to repeal the FTC's Rule Regarding "Premerger Notification; Reporting and Waiting Requirements" ("Rule").

Rule Summary

The final Rule issued by the Federal Trade Commission, dramatically increases the information required to be included for **every** merger notification. New information that is required to be submitted include: narrative rationales for the merger, previous documents prepared by the business that are unrelated to the merger but relate to certain market conditions, and drafts of certain transaction documents.

Under the prior rule, this level of information would normally have been provided upon a "second request" for information in the event the DOJ or FTC had initial concerns about the merger. Currently less than 5% of mergers that are notified to the DOJ or FTC undergo a second review.

By requiring **all** initial filers to provide information normally provided in a second request, the rule substantially increases the paperwork burden and cost imposed on routine business transactions.

The agencies estimate that the new requirements will roughly triple the burden imposed by the prior rule resulting in an additional annual paperwork burden of 230,020 hours and an additional annual cost to the private sector of $139.3 million. Research by external experts indicate that the agencies may have significantly under-estimated the cost and that total costs could exceed $250 million.

Negative Effects on Growth & the Economy

The final Rule acts as a tax on merger that makes our economy less competitive.

This includes the direct costs imposed on the private sector described above. These additional burdens will increase the marginal costs of a merger, reducing efficiency and ultimately harming consumers who benefit from the competitive dynamics that mergers can foster.

Further, the agencies do not have the resources to even attempt to make use of the additional information that the Rule would demand from all merger filings. Informational overload will cause the agencies to be resource constraint to examine the handful of mergers that actually require additional review.

Background

The FTC, in consultation with the Department of Justice, is responsible under the Hart-Scott-Rodino (HSR) Act for rulemaking associated with merger filings requirements.

- In the Consolidated Appropriations Act of 2023, Congress directed the FTC to revise the form used for mergers notification to solicit data on foreign subsidies originating from countries of concern.

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- Instead of simply updating the form as Congress directed, the FTC proposed sweeping changes to the rule. Thanks to negotiations by Republican FTC commissioners, the rule did not go quite as far as initially proposed, but the final product still represents a sweeping overhaul of the merger review process and goes far beyond Congress's directive.
- When Congress first established the HSR merger notification process, it set forward a two-stage process. Mergers of a minimum size would need to file an initial form providing information that would allow the antitrust agencies to quickly determine whether the transaction was worth a closer examination.
- If the agencies determine a proposed merger was potentially problematic, the agencies have the power to issue a "second request" and demand reams of documentary material from the merging parties.
- This two-step process was designed to efficiently screen mergers. Upwards of 3,000 mergers are filed in a given year, but only a small fraction raise concerns, triggering a deep dive by the agencies that requires much more information about the merger.

The Rule violates administrative law on many levels, for example:

- At no time during the rulemaking process did the FTC present any justification to support the changes that were made. 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 and cannot identify benefits associated with the additional burden imposed on every merger filing. This is a significant burden because roughly 95% of mergers do not undergo a "second request."
- The FTC never considered alternatives that might keep the existing form for the vast majority of mergers, but subject a subset of filers to a reasonable added initial filing burden.
- The Rule looks nothing like the proposed rule that was available for public comment. Administrative law requires that the FTC re-propose the rule given the dramatic changes made, and seek additional comment.
- Because the public has not had an opportunity to comment on the Rule, the Rule's publication runs afoul of the Administrative Procedure Act, the Paperwork Reduction Act, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act.

Although both Republican commissioners ultimately voted to issue the final Rule, in their concurrences, both stated that they did so in part to avoid the issuance of an even worse rule, and to restart the process of expedited review for mergers that raise no competitive concerns. Commissioner Holyoak wrote that the final Rule did not align with her preferences, while Commissioner Ferguson wrote that he would have written a different rule.

Recommend CRA Disapproval

A repeal of this Rule would allow the FTC to narrow its scope and to issue a new NPRM consistent with the original directive of Congress. The business community has no objections to the Congressionally-mandated changes to the form related to the collection of foreign subsidies.