

February 1, 2024

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave, Northwest
Washington, District of Columbia 20580

Anisha Dasgupta
General Counsel
Federal Trade Commission
600 Pennsylvania Ave, Northwest
Washington, District of Columbia 20580

Dear Chair Khan and General Counsel Dasgupta:

ACT | The App Association is a trade association representing small business technology companies from across the United States and around the globe. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the value of the ecosystem the App Association represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.

The App Association supports the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) attaining appropriate information and documentary material necessary for an evaluation of potential anticompetitive impacts of a transaction per the Hart-Scott-Rodino (HSR) Act. However, the FTC's proposed changes would immensely widen the scope, and frontload the filing, of documents and data required in filings supporting merger transactions without a clear benefit to the public interest. Unless significantly modified, we continue to hold substantial concern that the changes proposed by FTC to HSR compliance requirements would produce three primary results that run counter to congressional intent:

- (1) Greatly increasing disclosure burdens and expenses for a far greater range of transactions than warrant such disclosure requirements;
- (2) Delaying or preventing pro-competitive transactions, regardless of whether the transaction raises any competition issues; and
- (3) Damaging a primary means of success for the U.S. small business innovator community: being acquired.

Beyond the effects of changes to HSR requirements proposed by FTC, and building on our comments on this proceeding, we write to express specific concern with procedural choices the FTC has made in its development of the rule so far, which have already

harmed the U.S. small business community. The Regulatory Flexibility Act (RFA) requires federal agencies to “conduct an initial and final regulatory analysis of the anticipated economic impact of the proposed amendments on small entities, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.”¹ In undertaking this analysis, it is important that transaction size (which, if under the threshold, is exempt from HSR requirements) is not conflated with the size of the small business being acquired.

Yet in its HSR proposed rule, the FTC dedicates a mere 175 words to this analysis, stating without substantiation that FTC pre-merger notification rules “rarely, if ever, affect small entities” and that “none of the proposed amendments expands the coverage of the premerger notification rules in a way that would affect small entities.”² FTC then concludes that its proposed changes “will not have a significant economic impact on a substantial number of small entities” and notes that its discussion “serves as the required notice of this certification to the Small Business Administration [SBA].”³

As the App Association explained in its comments, the existing HSR rule already applies to some merger transactions involving the small business community we represent and would subject an even further portion of the U.S. small business community to HSR filing requirements under the FTC’s new proposed thresholds. Small businesses innovating and competing across consumer and enterprise verticals often have a small number of employees yet may have high valuations based on their projected customer base and revenue potential, intellectual property, and other factors. Across critical areas of the U.S. economy, small businesses that have incredible ideas and have undertaken initial product development, but that have not yet released that product or scaled up in operations and hiring, will be captured under the FTC’s new proposed HSR reporting requirements. The FTC’s RFA analysis in its proposed rule indicates that it opted to certify that no RFA analysis is required under the proposed rule, but it did so without providing any factual basis to support the decision to make the certification. RFA requires an agency head to provide a “factual basis” for certifying that the proposed rule “will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁴ The FTC should have, for example, provided an estimate on the number of small businesses to which its proposed HSR rule would apply, yet the FTC failed to take even this basic step in justifying its decision to certify under RFA.

¹ 5 U.S.C. 605.

² 88 FR 42208.

³ *Id.*

⁴ 5 U.S.C. 605(b).

The FTC's failure to meet its clear obligations under the RFA is more than a mere procedural flaw. In making its certification to the SBA, FTC has not provided U.S. small businesses with notice of its proposed policy changes that would enable their meaningful engagement in the FTC's regulatory process, creating a notable omission of the experiences and data they could provide to inform the FTC's decision-making process. Simply put, the FTC has failed to meet its requirements for small business engagement, critically flawing subsequent steps in its rulemaking process. And with the comment period on the FTC's HSR proposed rule now closed, the damage to the small business community has already occurred.

The FTC's insufficient RFA analysis and its incorrect certification as to the impact on small businesses is a fatal flaw in the process it has launched for HSR regulation changes. The FTC's HSR proposed rule must therefore be formally withdrawn.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President
ACT | The App Association

cc: The Honorable James Comer, Chairman
House Committee on Oversight and Accountability

The Honorable Jamie Raskin, Ranking Member
House Committee on Oversight and Accountability

The Honorable Roger Williams
House Committee on Small Business

The Honorable Nydia Velázquez, Ranking Member
House Committee on Small Business

The Honorable Jim Jordan, Chairman
House Judiciary Committee

The Honorable Jerrold Nadler, Ranking Member
House Judiciary Committee

The Honorable Jeanne Shaheen, Chair
Senate Committee on Small Business and Entrepreneurship

The Honorable Joni Ernst, Ranking Member
Senate Committee on Small Business and Entrepreneurship

The Honorable Richard Durbin, Chairman
Senate Committee on the Judiciary

The Honorable Lindsey Graham
Senate Committee on the Judiciary

The Honorable Gary Peters, Chairman
Senate Committee on Homeland Security and Governmental Affairs

The Honorable Rand Paul
Senate Committee on Homeland Security and Governmental Affairs