ITIF | INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
SCHUMPETER PROJECT ON COMPETITION POLICY

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COMMENTS OF ITIF

Before the

Department of Justice and Federal Trade Commission

United States

In the Matter of Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form	)	FTC-2026-0298-0001

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INTRODUCTION AND SUMMARY

Pursuant to the Hart-Scott-Rodino (HSR) Act of 1976, parties whose acquisitions satisfy certain thresholds are required to notify the Department of Justice (DOJ) and Federal Trade Commission (FTC) (the Agencies) of their intention to merge. Typically, the parties may close the deal only after the 30-day waiting period allotted to the Agencies to review the transaction has expired, provided the Agencies do not issue a Second Request. On February 10, 2025, the Agencies implemented a new version of the HSR form (the Updated Form) following a rulemaking initiated by the Biden administration. The rule was challenged and vacated this past February, with the Court of Appeals for the Fifth Circuit denying the FTC's motion for a stay pending appeal and thus bringing the prior HSR form back into effect.[1] Consequently, the Agencies issued this request for public comment to assess and ultimately amend the Updated Form (Request for Public Comment).[2]

The Information Technology and Innovation Foundation (ITIF) welcomes the opportunity to respond to the Agencies' Request for Public Comment to provide "feedback on the implementation, effects, and potential areas for further refinement of the Updated Form and its accompanying instructions."[3] While ITIF does not oppose revision of the HSR form in principle, it is concerned that many of the changes potentially contemplated by the Request for Public Comment would fail any rigorous cost-benefit analysis.

ITIF's comment responds directly to several of the questions contained in the Request for Public Comment. First, ITIF highlights select key deficiencies in the Updated Form; second, ITIF considers the relation between the HSR process and national security concerns; third, ITIF explains why changes to the HSR form to address speculative concerns associated with "acquihires" are ill-founded; fourth, ITIF makes clear that structural transaction modifications do not require additional HSR scrutiny; and fifth, ITIF underscores the unintended harms that may result from curtailing the real estate exemptions—especially as it concerns the treatment of data centers at a time of buildout to support American leadership in artificial intelligence (AI).

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[1] Order, Dkt. 44, *Chamber of Commerce v. FTC*, No. 26-40094 (5th Cir. Mar. 19, 2026).

[2] Dep't of Justice and Fed. Trade Comm'n, Request for Public Comment Regarding Making Improvements to the Premerger Notification and Report Form [hereinafter Request for Public Comment].

[3] *Id.* at 3.

QUESTION 3

Please identify any requirements of the Updated Form that, in your view, may impose burdens on filers that outweigh their probative value to the Agencies' analysis of whether the underlying transaction, if consummated, may violate the antitrust laws.

a. *Please identify any requirements that seek information or documents that generally are not compiled when evaluating the acquisition or sale of a company.*

b. *Please identify any requirements that seek information or documents that generally are not compiled when evaluating the competitive impact of the acquisition or sale of a company.*

c. *Describe what makes any such requirement burdensome, including identifying and quantifying the incremental time, labor, and financial costs associated with providing the information, along with any clarifications or revisions that could mitigate that burden.*

The purpose of the HSR process is to allow the Agencies to identify anticompetitive transactions before they occur to avoid having to "unscramble the eggs." Of the myriad mergers and acquisitions, only a subset must be filed before the Agencies, and only a tiny subset of these receives a Second Request. Transactions in this latter subset are almost always—in whole or in part—horizontal in that they involve a merger between competitors, either actual or potential, in a relevant market, for either an existing or developing product.

As such, the benefits associated with the changes in the Updated Form requiring filing parties to provide an extensive amount of information about supply (vertical) relationships were thus unlikely to be justified given the costs associated with the Updated Form. Indeed, using the FTC's (low) estimate that the Updated Form would take basically three times as long to complete, the Office of Management and Budget calculated its additional annual burden to be $139.3 million.[4] As such, in the absence of evidence that the Updated Form meaningfully increased the Agencies' issuance of Second Requests for purely non-horizontal transactions—it is standard for the Agencies to review horizontal transactions for non-horizontal anticompetitive effects—there seems to be little basis for the Updated Form's treatment of supply relationships.

QUESTION 11

Describe the estimated incremental time, labor, and financial costs associated with requiring filers to provide information regarding their current or recent contracts with or sales (direct and indirect) to any departments, agencies, or other organizations within DOW.

a. *Explain whether there are particular instructions, examples, or guidance that would be useful in complying with such a requirement.*

b. *Describe the impact to filers, if any, of requesting voluntary waivers of the HSR disclosure exemption to permit the Agencies to disclose to DOW, upon DOW's request, information about the underlying transaction.*

[4] Memorandum Opinion and Order, Dkt. 75, *Chamber of Commerce v. FTC*, No. 6:25-cv-00009-JDK, at 20 (E.D. Tex. Feb. 12, 2026).

Given the importance of ensuring that the Agencies minimize the expense of valuable resources investigating transactions which could admit of a clear compelling national interest justification, ITIF does not object in principle to leveraging the HSR process to help identify which transactions may pose national security issues, as the Agencies are not always in the best position to make this determination. Indeed, Section 857 of the National Defense Authorization Act for Fiscal Year 2024 already provides that parties who are required to make HSR filings to the Agencies must also share those filings with DOW in cases where the deal involves either a defense directed business, one of six critical technologies vital to U.S. national security—applied artificial intelligence, biomanufacturing, contested logistics technologies, quantum and battlefield information dominance, scaled hypersonics, and scaled directed energy—aspects of the defense industrial base critical infrastructure, or intellectual property in critical technologies or infrastructure.[5] Accordingly, requiring merging parties to provide additional information regarding their involvement with DOW on the HSR form would be superfluous and needlessly burdensome.

QUESTION 13

Please identify investment strategies that enable investors to evade HSR filing requirements for transactions that should be subject to premerger review.

a. *What revisions, if any, should the Agencies make to clarify the HSR filing requirements and address such investment strategies that are exempt and should not be?*

b. *Do the current HSR rules adequately capture licensing agreements, acquihires, reverse acquihires, and other potential transactions structures? If yes, how so?*

ITIF does not believe that the Agencies' concerns about licensing agreements or so-called "acquihires" (as well as "reverse acquihires") justify changes to the HSR form. The licensing of technology does not ordinarily entail any reduction of horizontal competition or foreclosure. Likewise, employee acquisitions are also extremely unlikely to create competition concerns given the robust and global competition in modern labor markets—especially in the technology sector. Indeed, there are significant competitive benefits from both licensing agreements and acquihires toward incentivizing innovation. For example, reverse acquihires enable firms to monetize their investments in both intellectual and human capital, often to safeguard innovation.

Moreover, even where licensing agreements and "acquihires" may be anticompetitive, they can not only be challenged under the antitrust laws but there is no general problem of "unscrambling the eggs" post-transaction that requires modifying the HSR regime. Indeed, certain exclusive patent license agreements have long triggered HSR filings under the old form. What's more, the Agencies' HSR form must be consistent with their statutory authority, which by its text is limited to transactions that affect control or ownership in a way that implicates "voting securities or assets."[6] However, this is not the case with respect to acquihires, which only involve the transfer of labor.

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[5] National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, div. A, tit. VIII, § 857, 137 Stat. 136 (2023) (codified at 15 U.S.C. § 18a note); *see also* Mergers & Acquisitions, U.S. Dep't of War, Off. of Indus. Base Pol'y, https://www.businessdefense.gov/ibr/gies/ma/index.html (last visited May 20, 2026).

[6] 15 U.S.C. § 18a (Hart-Scott-Rodino Act).

QUESTION 15

Under what circumstances should a new or supplemental HSR filing be required for filing parties that propose a divestiture or some other structural modification on their proposed transaction? For example, when should such a new or supplemental HSR filing be required (e.g., if the proposal is made after certifying substantial compliance or during an enforcement action)?

a. *What additional information, if any, should the new or supplemental HSR filing require (e.g., detailed description of divested and retained assets, standalone viability analysis, transition services and supply arrangements, intellectual property licenses, identification and vetting of proposed divestiture buyer(s))? To the extent additional information should be required, describe the estimated incremental time, labor, and financial costs that it may impose.*

b. *What impact would a new filing requirement have on parties' incentives to propose remedies and the timing with which they do so? To what extent might this requirement deter efficient or procompetitive divestitures? How might the Agencies mitigate any such impact on parties' incentives to propose remedies?*

c. *Are there alternatives to a new or supplemental HSR filing—such as supplemental submissions, timing agreements, revised HSR rules, or guidance—that could achieve similar objectives?*

d. *Should any new requirements be implemented through rulemaking, policy, guidance, or case-by-case discretion to address gaps in the HSR merger review process caused by merging party agreements to structural modifications or their filed transactions during an FTC or DOJ investigation and/or enforcement action?*

e. *What clarifications to the current HSR rules are needed to ensure that contested divestiture remedies cannot circumvent HSR Act review? Should 16 C.F.R. Sec. 802.70(a), which exempts reportable transactions from pre-consummation review if they are completed pursuant to and in accordance with a federal court order in an action brought by the FTC or DOJ, be changed to clarify that the exemption applies only to transactions that have been evaluated by one of the Agencies?*

The purpose of HSR—notifying the Agencies of anticompetitive transactions before they occur—has already been served in the context of "structural transaction modifications" where, for example, the merging parties propose divestitures to satisfy the competitive concerns raised by the Agencies. And nor do there seem to be any meaningful constraints on the Agencies to adequately analyze and address such proposals: If the fix is proposed before a Second Request is issued, the Agencies may simply issue a Second Request with specifications that ensure they receive sufficient information to assess its competitive implications. Moreover, while it is true that, for divestitures proposed during a Second Request, "the Agencies do not presently have a mechanism for extending the waiting period in order to obtain documents and information sufficient to evaluate the altered transaction," including additional time provisions in the timing agreement associated with the Second Request to enable review in these circumstances, or issuing guidance making clear that substantial compliance will not be found to exist unless sufficient information about the fix is provided, are far more cost-effective ways to address this issue than requiring an additional HSR filing.[7]

[7] Request for Public Comment at 3.

Finally, with respect to divestitures proposed during litigation, it is just not obviously true that these (rare) circumstances put "federal courts in the position of having to adjudicate a 'litigate the fix' scenario that was not subject to the HSR Act's reporting requirements."[8] Rather, courts are obligated to assess the merits of the transaction that is articulated in the complaint, with the Agencies being free to reject any settlement during litigation that does not address their competitive concerns.

QUESTION 16

Sections 802.2 and 802.5 (the "real estate exemptions") of the HSR rules exempt certain acquisitions of real estate from filing under the HSR Act because historically these transactions were considered unlikely to violate the antitrust laws.

a. *Explain the potential impact of removing the real estate exemptions. What would be the benefits of doing so, and how would they weigh against the costs of filing?*

b. *Would removal of the real estate exemptions better facilitate antitrust review of acquisitions of single-family homes in local single-family housing markets?*

While acquisitions of real estate can under certain circumstances fall within the scope of the HSR Act, the real estate exemptions are consistent with the reality that real estate is in many ways broadly fungible and widely available, such that acquisitions of real property are highly unlikely to result in horizontal or vertical competitive concerns. Indeed, while the benefits of removing the real estate exemptions are unclear, the potential costs could be substantial. This is especially true in a time of rapid data center buildouts throughout the country to help drive continued American innovation and leadership in AI. Specifically, while the administration is rightly focused on scaling back red tape to expedite AI deployment, removing the real estate exemptions would reflect the exact opposite approach—increasing regulatory burdens on AI vis-à-vis the HSR review process in a way that only adds unnecessary costs to hyperscalers and other AI firms.[9]

RECOMMENDATIONS

For these reasons, ITIF offers the following considerations to the Agencies for the purpose of evaluating how to improve the HSR form:

- **The information requested by the Updated Form was considerably overbroad:** While there is no doubt room to improve the Agencies' longstanding and recently reinstated HSR form, it is clear that in certain areas the Updated Form imposed costs that far exceeded any benefits—including with respect to the information requested to identify supply relationships that, on their own, will only very rarely translate to a Second Request.
- **Including DOW information on the HSR form is superfluous:** There is already a system in place for ensuring that the DOW is properly informed early in the merger review process of transactions that have national security implications.

[8] *Id.*

[9] *See, e.g.*, The White House, Fact Sheet: President Donald J. Trump Ensures a National Policy Framework for Artificial Intelligence (Dec. 11, 2025)

- **"Structural transaction modifications" appear to be a non-issue:** Regardless of the stage of the merger review process at which the parties propose a fix, the Agencies' current toolkit appears to be more than adequate to ensure that they are able to engage in a thorough and comprehensive review of a restructured transaction's competitive effects without an additional HSR filing.
- **Land, labor, and licensing do not require additional HSR scrutiny:** There is no need for the HSR form to be expanded so as to require new filings for real estate transactions, so-called "acquihires," and licensing agreements that will almost never result in anticompetitive harms and can be crucial in driving innovation, especially in a world where the administration must continue to ensure U.S. leadership in AI.

CONCLUSION

Without question, there are many ways in which the current and longstanding HSR form may be improved. Indeed, some of the changes in the Updated Form may be justified if they resulted in demonstrable benefits that outweighed any costs during the period when the Updated Form was in use. However, the Updated Form's defeats in court should encourage the Agencies to more generally rethink their approach to amending the HSR form. Specifically, they should look to implement an amended form that has far more narrowly tailored and less restrictive HSR information obligations than those imposed by the Updated Form put forward by the Biden administration, which was but one of a number of actions undertaken by then FTC Chair Lina Khan that was consistent with a broad hostility to mergers and acquisitions, especially in the technology sector.

While ITIF therefore applauds the Agencies' Request for Public Comment as a step toward creating a better HSR form, it remains concerned that the Agencies are continuing to seriously examine several means of expanding the scope of HSR review that would result in costs that far outweigh any benefits. These concerns are particularly acute at a time when the administration should be focused on ensuring that the merger process is fine-tuned to promote innovation—rather than impose unnecessary costs on transactions that pose little to no real risk of harm to competition but may instead be critical to driving innovation and American leadership in areas like AI.

Very truly yours,

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