September 27, 2023

April Tabor, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

VIA ONLINE SUBMISSION

Comments of Engine re: 16 CFR Parts 801–803—Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P2393001

Secretary Tabor:

Engine is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups. Engine works with government and a community of thousands of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. Capital access and the ability to successfully exit—most frequently through a merger or acquisition by a larger firm, are critical to the promotion of technology entrepreneurship and the success of the U.S. startup ecosystem. We appreciate the opportunity to share these comments on the proposed changes to the premerger notification rules which will negatively impact startup capital access, exit opportunities for startups, and the benefits that arise from startup acquisitions.

I. Startups are important stakeholders in competition policy.

Startups are major drivers of innovation, growth, dynamism, and competition in the U.S. economy. They play a critical role in developing emerging technologies and routinely set out to improve the everyday lives and operations of people and businesses across the country. As relentless problem solvers, startups develop innovative products and services in industries ranging from agriculture to artificial intelligence to healthcare, education, transportation, clean energy, and so many others.

Emerging tech companies are not only essential to advancing technology, but they make outsized contributions to economic progress and net job creation.[1] Across the U.S., firms in their first year of

[1] *The Economic Impact Of High-Growth Startups*, Kauffman Foundation (June 7, 2016), https://www.kauffman.org/wp-content/uploads/2019/12/PD_ HighGrowth060716.pdf.

existence create an average of three million new jobs per year,[2] and that positive trend is especially true for high-tech, information, and communications tech companies.[3]

The U.S. continues to be a world leader when it comes to startup growth and success and has seen tremendous growth across all sizes of startup funding rounds over the past decade.[4] While Silicon Valley is still the most developed startup ecosystem in the country (and world), startups operate in every state.[5] And the volume of venture capital funding has been growing and becoming less concentrated in the nation's largest startup ecosystems over the last fifteen years.[6]

Startups make impressive contributions to the economy but also operate on tight budgets as they seek to grow. Policies that increase compliance costs or litigation risks consume startups' limited resources and can distract from their core startup activities—like hiring, product development, or customer acquisition.[7] That means for startups, all policy is competition policy.

But competition policy itself is rarely raised at all by startups in our network and never as a primary concern. In surveys of our network of startups (which are located in virtually every congressional district, across nearly every industry, with a variety of business models), access to capital and access to talent consistently rank as the top issues they encounter. These concerns have been echoed by startups and small businesses before Congress and in non-Engine surveys of small businesses.[8] Businesses rank myriad issues—including labor/talent issues, regulation, and inflation—as the most important issue facing their business.[9] Competition from large businesses (zero percent) is at the bottom of the list.[10]

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[2] Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, Kauffman Foundation 2 (July 2010), https://www.kauffman.org/wp-content/uploads/2019/12/firm_formation_importance_of_ startups.pdf

[3] Ian Hathaway, *Tech Starts: High-Technology Business Foundation and Job Creation in the United States,* Kauffman Foundation 4-5 (2013), https://www.kauffman.org/wp-content/uploads/2019/12/bdstechstartsreport.pdf

[4] *The State of the Startup Ecosystem*, Engine 6-9 (2021), https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf.

[5] *See, e.g., #StartupsEverywhere*, Engine, https://www.engine. is/startupseverywhere (campaign celebrating entrepreneurial ecosystems in every state); *The United States of Startups: The Most Well-Funded Tech Startup in Every U.S. State*, CB Insights (Feb. 17, 2021), https://www.cbinsights.com/research/well-funded-startups-us-map/; *Silicon Valley - Bay Area,* Startup Genome, https://startupgenome.com/ecosystems/silicon-valley.

[6] *Startup Ecosystem, supra* note 4, at 8.

[7] *See e.g.*, *Privacy Patchwork Problem: Costs, Burdens, and Barriers Encountered by Startups*, Engine (Mar. 2023), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6414a45f5001941e519492ff/1679074400513/Privacy+Patchwork+Problem+Report.pdf; *Startups, Content Moderation & Section 230*, Engine, (Dec. 2021), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/61b26e51cdb21375a31d312f/1639083602320/Startups%2C+Content+Moderation%2C+and+Section+230+2021.pdf.

[8] *See Competition and the Small Business Landscape: Fair Competition and a Level Playing Field: Hearing before the Committee on Small Business,* 117th Congress (2022) (Testimony of Douglas Holtz-Eakin), https://smallbusiness.house.gov/uploadedfiles/03-01-22_dr._holtz-eakin_testimony.pdf; *and see also, e.g., Competition and the Small Business Landscape: Fair Competition and a Level Playing Field: Hearing before the Committee on Small Business,* 117th Congress (2022) (Remarks of Rep. Young Kim), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=114436.

[9] *See, e.g.*, William C. Dunkelberg and Holly Wade*, Small Business Economic Trends Monthly Report,* NFIB, (Jan. 2022) at 18, https://assets.nfib.com/nfibcom/SBET-Jan-2022-Final.pdf

[10] *Id.*

Each of those issues highlighted by startups are underscored by the need for robust capital access to overcome them and ensure they are able to continue to innovate. And startup funding is inextricably linked to a robust M&A market, because exits, most often facilitated by an acquisition, provide liquidity and enable capital flows through the startup ecosystem.[11]

As the Commission considers changes to the premerger notification rules, it must recognize the critical role that mergers and acquisitions play in the startup ecosystem. Unfortunately, the proposed changes fail to account for pro-competitive, pro-innovation benefits that can arise from acquisitions, and instead increase burdens for many non-problematic transactions. The Commission should promulgate rules that facilitate a vibrant, competitive merger and acquisition market that produces the best outcomes for startups.

II. Successful startup exits promote investment and a vibrant, competitive startup ecosystem.

Startup exits are an important moment in the lifecycle of a startup—after an exit, startups are generally no longer considered startups. In successful exits, investors earn a return on their investment, and founders and early employees are rewarded for the blood, sweat, and tears they have put into building the company. Often, these resources are reinvested in the startup ecosystem and new startups. And even unprofitable exits (for example, where a startup is acquired for less than a previous valuation) can provide a soft landing for investors, founders, and employees. Investors are able to recoup some of the original investment, and founders and employees might be given a job at the acquiring firm, allowing them to build their resumes ahead of their next venture.

Broadly, there are three types of startup exits: going public via an initial public offering (IPO), being acquired by another company, or failure and shutdown. An analysis of the approximately 12,000 startup exits from Aug 2002 to March 2020 revealed that 35 percent of startups failed and shutdown, 61 percent were acquired, and four percent underwent an IPO.[12] Startup founders recognize these dynamics when they consider goals for their company. In a 2020 survey, 58 percent of startup founders said acquisition was "the realistic long goal" for their company.[13] The ability to be acquired, then, is a critical part of the startup ecosystem.

All successful exits—by either IPO or acquisition—provide incentives to innovate, create a return on investment, and promote investment in new startups as capital and talent tend to remain in the

[11] *Infra* at II.
[12] Susan Woodward, *Irreplaceable Acquisitions,* Sand Hill Econometrics 5 (Nov. 2021), http://www.sandhillecon.com/pdf/Woodward_Irreplaceable_Acquisitions.pdf, (of those that were acquired, Woodward notes that 42% of acquisitions were unprofitable, comprising 26% of all exits).
[13] *2020 Startup Outlook Report,* Silicon Valley Bank 5 (2020), https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf, (meanwhile, 17% said IPO, and the remaining ¼ gave other responses).

ecosystem.[14] However, acquisitions are more accessible for startups at all stages of development, and startup acquisitions share a stronger, more positive relationship with startup investment.[15]

Furthermore, startup acquisitions are important to the growth of the startup ecosystem in places outside of the major U.S. technology hubs like Silicon Valley, Seattle, New York, Los Angeles, or Boston, where large exits via IPO are typically out of reach.[16] Successful exits, almost always via acquisition, inject momentum and help attract more investment capital and talent into these smaller ecosystems.[17] And startup founders often remain in the ecosystem, becoming startup investors and mentors, or beginning new companies there.[18]

The biggest transactions create the most winners—widely delivering the associated dynamic benefits to the startup ecosystem. Though the proposed rules changes likely impact a wide range of startup acquisitions (either directly or through changed incentives),[19] acquisitions over the HSR reporting threshold are clearly impacted. That group of acquisitions provides more cognizable benefits to startups, their investors and employees, and the broader ecosystem.[20] The proposed changes burden those transactions and threaten to lessen their frequency, undermining a vital component of the startup ecosystem. The Commission should rethink the proposed changes to avoid adverse impacts on the ability of startups to be acquired.

III. Startup founders say acquisitions are a good thing, and policymakers shouldn't make it harder to be acquired.

Acquisitions are the most common form of successful startup exit, and it's important to understand their role in the ecosystem and the acquisition experience from those who've lived it. We've attached a pair of Engine reports as appendices to these comments that include both important empirics on startups and acquisitions and a compendium of startup founders, serial entrepreneurs, startup investors, and startup accelerators discussing the critical role of acquisitions in the startup ecosystem.[21] These stakeholders emphasize that acquisitions are a good thing which fund innovation, build ecosystems, democratize wealth, disperse knowledge, cut against discrimination, and are necessary for startups.

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[14] *Startup Ecosystem, supra* note 4, at 11-12.
[15] *Id.*
[16] *Id.*
[17] *Id., see also, Global Startup Ecosystem Report,* Startup Genome (2021), https://startupgenome.com/report/gser2021.
[18] *See Startup Ecosystem, supra* note 4, at 11-12, *see also, Global Report supra* note 17.
[19] *Infra* at V.
[20] *See* Appendix B.
[21] *Exits, Investment, and the Startup Experience: the Startup Voice on Acquisitions*, Engine (Sept. 2023), https://www.engine.is/s/2023-Startup-Voice-on-Acquisitions.pdf, (Attached as Appendix A);
Exits, Investment, and the Startup Experience: the role of acquisitions in the startup ecosystem, Engine (Oct. 2022), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/6356f5ccf33a6d5962bc7fd8/1666643406527/Exits_Investment_Startup_Experience_role_of_acquisitions_Report_Engine_Startup_Genome.pdf, (Attached as Appendix B).

Jean Anne Booth, a serial entrepreneur and the current founder and CEO of UnaliWear who has had previous companies acquired by Apple and Texas Instruments, stresses that acquisitions are critical for startups and help to fund what comes next, saying that they shouldn't be limited because that will limit capital flowing to startups and slow innovation. She adds that having a competitive acquisition process is necessary to facilitate fair, positive outcomes for startups, and merger policy should avoid limiting competition for companies:

> "Most startup exits are through acquisitions and they are absolutely necessary because exits are the way that we fund what comes next. The normal lifecycle of companies and entrepreneurs is to start something, hope you at least hit a single, get some money, and plow that capital and knowledge into your next business or into someone else's business as an angel investor. That's my story. If I hadn't sold the earlier companies, UnaliWear wouldn't exist, and the thousands of Americans we give dignity, independence, and safety to would be without our technology. Limiting acquisitions without understanding their role could inadvertently hinder the flow of capital and stunt the progress of groundbreaking technologies.
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> In the acquisition process it's critical to have competition for companies. A competitive process is what enables founders to negotiate deal terms and close at reasonable valuations. For example, with my semiconductor companies there were only so many potential corporate buyers. If you take any of them away, then you have a less competitive process or you're left with private equity buyers that have other motivations besides innovation. So, if policymakers or enforcement agencies limit who can acquire or what they can acquire, then you'll see worse outcomes for startups, less capital going to funding innovation, and fewer entrepreneurs able to plow money from their exit into the next thing."

Elizabeth Yin, a startup founder turned venture capital firm cofounder and general partner (following the acquisition of her startup) underscores that startup acquisitions build ecosystems through enabling flow of capital and dissemination of knowledge. Limiting acquisitions through bad policy could threaten these positive impacts and opportunities for everyday Americans to build wealth through entrepreneurship:

> "Acquisitions help the startup ecosystem on multiple levels. It helps entrepreneurs build generational wealth and become angel investors to pour back into startup ecosystems. These founders and early employees go on to angel invest in the next generation of founders. VCs generate wealth for their LPs who can reinvest into more funds and thereby more startups. I believe in democratization of wealth through entrepreneurship, and this is really only possible through acquisitions. Many of these founders whose companies are acquired typically don't come from loads of money, so this really is the American dream. If you start limiting who can acquire or what they can acquire, you're actually limiting opportunities for generational wealth for everyday people.

> Acquisitions are not just about the money. They are also an integral part of the knowledge transfer that makes a successful startup ecosystem. Founders that have been through a full cycle from launch to exit know what good looks like and also what mistakes they've made that they won't make again. Having experienced people on your team or experienced people coaching you, is the crux of what makes Silicon Valley successful, and perhaps why in other cities throughout the country, founders have a higher hill to climb without the institutional knowledge that is passed around as often in the San Francisco Bay Area. Acquisitions are good for startup ecosystems everywhere and reducing them would be a real detriment to the U.S."

Tyler Griffin, another startup founder turned investor following the acquisition of his startup, emphasizes acquisitions are a necessary part of the investment model that powers innovation because IPOs are very rare. He additionally emphasizes that acquisitions are good outcomes for startup employees:

> "[W]e've had several portfolio companies exit, almost entirely through acquisitions. We approach every investment believing that the company could one day IPO, but understand that a successful exit probably is going to be an acquisition. IPOs are very hard, don't happen that often, and take many years. If the options for companies or for investors were IPO or total loss you wouldn't be able to sustain startups or an innovation-focused investment model.
>
> Acquisitions are a good thing and they're good for employees, too. Rarely do startup acquisitions involve people losing their jobs. Instead, they result in employees getting higher salaries. If you're an early stage company, you're almost always paying below-market salaries and you're making the difference up with equity. In an acquisition, employees will usually get equity in the acquiring firm and a raise to a market-based salary."

Parag Shah, a serial entrepreneur currently the founder of Vēmos, highlights how he used capital from previous exits to build his company and the important role of acquisitions in helping him attract the investment needed to grow it. He points out that limiting acquisitions will work against these benefits, instead halting innovation and company formation:

> "The initial capital to start Vēmos came from personal funds from the Foodsby exit, but we need investment to grow. The reality of any sort of investment is that investors need a return, or the likelihood of a return—and in the startup ecosystem, that's usually through an acquisition. Exits are such an important part of how innovation is enabled. Taking that away and not allowing people to be acquired would just halt innovation and new companies from forming.

I know policymakers are concerned about a few large tech companies' acquisitions, but those are a small number of overall transactions, and that focus really clouds the overall importance of acquisitions to startups. The reality is that we're open to being acquired by anyone, and policymakers shouldn't make that harder for founders and everyone else that benefits from an exit. Most startups' compensation includes stock options and so an acquisition means liquidity for our employees and their families. An eventual successful exit is sort of their retirement plan because as a startup we aren't able to provide the same benefits as other corporations. At the end of the day, it's not about me, or even our investors, it's about everyone else that believes in what we're building."

Preston L. James II, the CEO and cofounder of DivInc., a startup accelerator focused on removing barriers to entrepreneurship for underrepresented founders, says that policymakers should actually be working to facilitate, rather than restrict M&A in order to help more communities realize the benefits of mergers and acquisitions:

> "Ultimately, anything policymakers can do to help facilitate successful exits for founders—especially underrepresented founders—is really important to the ecosystem. These exits, which lean heavily on M&A, are a critical step in the path of building wealth and creating new opportunities in diverse communities. With the capital from selling their company, as an example, a Black founder can become an investor that then invests in more Black founders. They can share their expertise to help those founders build to their own exit and the cycle repeats. Over time, this ripple effect builds generational wealth and fosters an ecosystem that helps diverse communities to prosper."

Steven Cox, the Founder and CEO of TakeLessons—acquired by Microsoft in 2021—spotlights the risks of limiting acquisitions in response to perceived policy issues in the technology sector:

> "I've been asked recently about big tech acquisitions that are made just to kill off new technologies. Personally, I haven't seen these 'killer acquisitions' where a large company tries to stamp out a small one. It's possible, I suppose, but I find that larger companies are more interested in playing offense than defense. …[P]olicymakers should be thoughtful about limiting mergers and acquisitions by big tech as a way of reigning in the major players. Being acquired is a desirable startup exit path, and restricting it will lead to less capital and less startup competition."

And in an oped warning against curtailing startup acquisitions, Steven highlighted their broad benefits, writing that "[t]hey promote the building of knowledge, recycling of talent, and flowing of capital through the startup ecosystem, creating jobs and economic growth. They fuel investment in startups that are solving problems and helping people lead better lives."[22]

[22] Steven Cox, *Policymakers Are Threatening Startup Success Stories*, Inside Sources (Aug. 6, 2023), https://dcjournal.com/policymakers-are-threatening-startup-success-stories/.

Shani Shoham, the CEO of software testing startup 21Labs summed it up well, saying "the acquisition of 21 by Perforce was a success and the right move for us, and I hope policymakers don't make these sorts of transactions more difficult." The Commission should heed his advice and that of others in the startup ecosystem. The proposed changes threaten to make startup success more difficult by burdening and changing incentives around sought-after startup exit opportunities.

IV. Initial Public Offering (IPO) is not an interchangeable alternative to exit via acquisition and a robust M&A market.

Going public through the IPO process is another form of exit, but it is not an interchangeable alternative or replacement to exit via acquisition. Critics of startup acquisitions have suggested that acquisitions of startups should be reduced by changes in the law or merger enforcement, and that startups will just be able to IPO instead.[23] This is a false and dangerous assertion. There are myriad relevant differences in size, frequency, accessibility, and company type that distinguish startup exits via IPO versus acquisition.

The characteristics of IPOs make them unique and not interchangeable with acquisitions. IPOs are rare—just four percent of all exits.[24] Companies that IPO tend to be much older, located in a large, preeminent tech hub, more profitable, and more sophisticated.[25] Exits via IPO tend to be much (25 times) larger than exits via acquisition.[26] This means IPOs are not right for every company, and going public too soon or without the proper resources can spell failure.[27]

Institutional backing is likewise important for helping the company to succeed once public.[28] IPO underwriters typically perform sales-functions to sell the shares to investors. And once public, investment banks analyze and recommend (as appropriate) the stock to their clients. For small IPOs—the kind you might imagine would "replace" acquisitions near the HSR filing threshold—there tend to be fewer underwriters (which are unlikely to be top-tier firms), and the stock is unlikely to be tracked by analysts (or by as many) at investment banks. Both of these diminish the likelihood of success as a public company in terms of share price. And it is important to note the differences in proximity of such key institutions—there are fewer in smaller ecosystems—which is an important factor for both the frequency of IPOs there and the success of the companies that do go public.

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[23] *See, e.g., The Impact of Consolidation and Monopoly Power on American Innovation: Hearing before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights of the Committee on the Judiciary,* 117th Congress (2021) (Especially remarks of Sens. Durbin and Klobuchar).
[24] *Irreplaceable Acquisitions, supra* note 12.
[25] *Id., See also Startup Ecosystem, supra* note 4, at 9-12.
[26] *Irreplaceable Acquisitions, supra* note 12, at 7-8.
[27] *Id., See also* Appendix B.
[28] Appendix B at 10-11, 15-16.

IPOs are accordingly out of reach of many startups and are only weakly associated with investment in new startups.[29] Limiting exit opportunities to the public markets will drastically reduce the number of successful startups, restrict the ability of investors to earn a return on their investment, and increase the risk for startup founders of walking away with nothing. The consequences would spell a less vibrant startup ecosystem, where a few large companies dominate and are rarely challenged by competitive startups.

The regulatory framework around being a public company, the Sarbanes-Oxley Act (SOX), creates burdens that push an IPO out of reach for many startups. But the law and its consequences for the startup ecosystem forewarn against undue burdens on legal startup acquisitions that are presented by the proposed changes to the premerger notification requirements.

Sarbanes-Oxley was legislated in response to a series of high-profile accounting scandals. Similar to today, where no policymaker or member of the startup ecosystem is in favor of illegal anticompetitive conduct, no member of Congress or the public is or was in favor of corporate fraud in their consideration of Sarbanes-Oxley. Also like today, where many are warning of consequences of burdening startups through poorly crafted competition policies,[30] several members of Congress did warn of the consequences of burdening capital formation for small companies like startups through SOX. Then-Rep. Jeff Flake (R-Ariz.) cautioned against proceeding without knowing "what cost we're going to impose, particularly on small businesses."[31] Sens. Phil Gramm (R-Texas) and Kit Bond (R-Miss.) respectively voiced concern that the law would "use up the resources" of small companies, and "damag[e] the economic framework for small companies to reach our capital markets."[32] These concerns have borne out. The burdens of being a public company now easily exceed $1 million annually, resulting in fewer companies deciding to go public, and, as previously discussed, those that do are larger and older.[33]

Startup founders have warned policymakers to avoid the same mistakes by enacting competition policy that burdens startups' ability to exit and "risks similar unintended consequences."[34] The FTC must revisit the proposed changes to not unduly burden the ability of startups to undergo exit via

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[29] *Startup Ecosystem, supra* note 4, at 11-12.

[30] *See, e.g.*, *supra* §III. The volume of voices expressing these concerns would be difficult to capture in one footnote, and the Commision has received several comments and earlier RFI responses to the same. Also, *see generally, e.g., Startup Ecosystem, supra* note 4, *see also, e.g., Evaluating Competition Proposals with the Startup Perspective,* Engine (Jun. 17, 2021), https://www.engine.is/news/category/evaluating-competition-proposals-through-the-startup-perspective.

[31] *Partial Transcript: Your World with Neil Cavuto*, Fox News (Jul. 30, 2002), https://www.foxnews.com/story/sen-paul-sarbanes-d-md-rep-jeff-flake-r-ariz.

[32] *See* 148 Cong. Rec. S7353 (2002) (Remarks of Sen. Gramm) https://www.congress.gov/crec/2002/07/25/CREC-2002-07-25-pt1-PgS7350-4.pdf, *and id.* at S7361 (remarks of Sen. Bond).

[33] *See, e.g, Startup Ecosystem, supra* at note 4, at 9-12; Appendix B; *and, e.g.*, *The Cost of Being a Public Company in Light of Sarbanes-Oxley and the Federalization of Corporate Governance: Hearing before the Subcommittee on Investor Protection, Entrepreneurship and Capital Markets* 115th Congress (2017) (Remarks of Chairman Huizenga), https://www.govinfo.gov/content/pkg/CHRG-115hhrg28750/html/CHRG-115hhrg28750.htm

[34] *The Impact of Consolidation and Monopoly Power on American Innovation: Hearing before the Subcommittee on Competition Policy, Antitrust, and Consumer Rights of the Committee on the Judiciary,* 117th Congress (2021) (Testimony of Bettina Hein).

acquisition, and must not presume burdens on acquisitions to be immaterial by reasoning an IPO to be an interchangeable form of startup exit.

V. **The proposed changes significantly add to burdens, imperil startup exits.**

We appreciate the Commission identifying and removing information that is not useful for merger enforcement in an effort to promote efficiency, however, the proposed form requires much more information from filers, drastically increasing burdens on net, undermining the Commission's claims of efficiency, and threatening startup exits by acquisition. The premerger clearance process is already highly successful, producing exceedingly few false negatives where anticompetitive mergers are allowed to proceed, meaning most of the transactions captured by the HSR form are not problematic.[35] This would suggest that most non-problematic transactions are unjustifiably burdened and the Commission should therefore dramatically reduce the scope of the proposed updated form in line with this reality to avoid undue, unjustifiable burdens on acquisitions and startup success.

The breadth of the proposed new filing itself is a primary concern and source of burden. HSR filings for some transactions already can take hundreds of hours to prepare under the current system, and the proposed changes add to that—fourfold, by the Commission's estimate, an estimate that many other commenters who regularly prepare and file HSR forms believe to be quite low.[36] The Commission's estimate of cost also appears low—below what startup attorneys in top ecosystems charge hourly, and below the nationwide average hourly rate for M&A attorneys.[37]

The changes could imperil deals by greatly prolonging the time to prepare the filings, and burden startups in particular by requiring more from filing parties like startups with few spare resources. Startups can be at a negotiating disadvantage in the acquisition process, and further stretching their resources could put them in a worse position or the overall transaction risk—and a failed acquisition is usually a death knell for a startup.[38]

Expanding requirements to enumerate all past transactions regardless of any threshold is itself burdensome and could discourage acquisitions of startups. Many potential acquirers of startups are likely to have made several "small" acquisitions in the technology sector, regardless of whether the would-be acquirer is a strategic or private equity buyer.[39] These transactions are arguably more important to the startup (and the broader startup ecosystem) than the acquiring firm because many

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[35] *See generally Hart-Scott-Rodino Annual Report: Fiscal Year 2021,* F.T.C. & DOJ (Feb. 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p110014fy2021hsrannualreport.pdf; *see also infra* note 36.
[36] *See, e.g.*, Comments of Foley & Lardner LLP; Sean Heather, *Antitrust Experts Reject FTC/DOJ Changes to Merger Process*, U.S. Chamber of Commerce (Sept. 19, 2023), https://www.uschamber.com/finance/antitrust/antitrust-experts-reject-ftc-doj-changes-to-mergerprocess; et al.
[37] *See, e.g.*, *supra* note 7; Andrew Maloney, *Where Are Partner Billing Rates Surging the Most in Big Law?*, American Lawyer (May 24, 2023), https://www.law.com/americanlawyer/2023/05/24/where-are-partner-billing-rates-surging-the-most-in-big-law/.
[38] *See generally* Appendix B.
[39] *Id.*

such small transactions represent an exit opportunity or even a lifeline.[40] Greatly increasing the burdens associated with such acquisitions and increasing the risk associated with them (say, for example, by threatening a [future] deal of greater importance to the acquiring firm) will reduce the demand for startup acquisitions. Fewer opportunities to be acquired is a materially worse outcome for startups and the overall ecosystem, and it is unclear how removing the disclosure threshold for prior acquisitions will benefit startups.

Finally, the proposed changes—and the burdens they create—distort incentives about when, or at what valuation a startup will be acquired. Given the expanded documentation and costs under the proposed form, it is not hard to imagine parties desiring to avoid needing to make a filing at all and thereby reducing transaction value. As such it isn't hard to imagine a startup fairly valued at $125 million being acquired for $110 million in order to avoid filing requirements. That maneuver of itself would likely not violate HSR because the transaction would not be reportable under current thresholds,[41] but $15 million in startup value is destroyed. Related, it is not hard to imagine startups being acquired earlier in their lifecycle (when they are less valuable) in order to avoid the increased burdens of the proposed changes. By increasing avoidance incentives, the proposed changes can artificially divorce startups from the fundamentals of their growth patterns and valuations, and it is hard to imagine this is the outcome the Commission seeks.

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Engine appreciates the opportunity to submit these comments on the role acquisitions have in the startup ecosystem and hope that the Commission appreciates their importance as they pursue rulemaking that will increase burdens on acquisitions. We are available to be a resource and look forward to engaging with the Commission on these issues in the future.

Respectfully,

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[40] *Id.*; *See also, Irreplaceable Acquisitions*, *supra* note 12.

[41] 16 CFR 801.90 proscribes use of devices to avoid making an otherwise required filing, and wouldn't apply to a transaction below the threshold amount, even if the intent of setting the transaction amount was to avoid filing requirements.