



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Fiscal Year 2020 Hart-Scott Rodino Annual Report to Congress

November 8, 2021

Today, the Federal Trade Commission and the Department of Justice released the Hart-Scott Rodino Annual Report for FY2020. We applaud the staff in the Commission's Premerger Notification Office (PNO), the office on the front lines of HSR review, for working diligently through the unprecedented COVID-19 crisis. The pandemic and the agency-wide move to telework in March 2020 prompted the implementation of an electronic HSR filing system; thanks to the diligence and dedication of our PNO team, that new process has been operating smoothly for the past year and a half.

We also applaud then-Chairman Joe Simons and the FTC's Bureau of Competition for their mid-pandemic decision to make more information about HSR filings available to the public. In December 2020, the FTC website began posting the number of HSR transactions filed each month since the last published HSR Annual Report.¹ These updates on the volume of HSR filings provide useful information for the public, policymakers, our congressional appropriators and oversight committees, and other stakeholders. More information about the nature of these transactions will facilitate even greater insight into the true workload of the agency and market trends. Below, we provide ideas about how the FTC could promote yet more transparency.

In their statement, Chair Khan and Commissioner Slaughter describe the surge we are seeing in HSR filings.² They use this trend to justify a number of policy changes, ostensibly to ensure that mergers get more than a " cursory review." ³ And management of the Bureau of Competition has announced other changes, also under the guise of dealing with the surge in mergers, not described

¹ Fed. Trade Comm'n, *Premerger Notification Program*, <https://www.ftc.gov/enforcement/premerger-notification-program>.

² Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress at 1, Commission File No. P110014 (October 28, 2021) (hereinafter "Majority Statement on FY 2020 HSR Report").

³ *Id.* at 2 ("The combination of the merger boom, scant resources, and strict statutory deadlines has resulted in thinly stretched staff and concerning deals getting a more cursory review than they warrant. ... One practice we have implemented is the issuance of pre-consummation warning letters, which the FTC sends in instances where competitive concerns about a deal have not been resolved by the statutory deadline."), *id.* at 4 ("Additional reforms the FTC has recently instituted include returning the agency to its practice of including prior approval provisions in merger settlements...").

in the Chair and Commissioner Slaughter’s statement.⁴ As we explain below, the FTC maintained vigorous merger enforcement under the previous agency leadership through the height of the COVID-19 pandemic and the surge in merger filings. Why then is current FTC leadership suddenly unable to handle the new wave of HSR filings,⁵ which began in October 2020?⁶

There are plausible explanations. We know that the FTC is broadening the scope of Second Requests,⁷ which may include investigating non-competition concerns.⁸ We suspect that the majority is willing to challenge deals at lower levels of concentration because Commission leadership has argued that the agencies should presume a merger resulting in combined 20% market share is illegal.⁹ If the agency is lowering thresholds of concern and broadening theories of harm, this certainly would explain why the FTC is unable to conduct merger reviews in a timely manner while our sister agency remains capable of addressing the same increased filing volumes within statutory timeframes. The agency is also ignoring HSR Act timelines by continuing to investigate transactions post-consummation instead of issuing Second Requests.¹⁰ The FTC is not only failing to make decisions after the initial HSR waiting period, but also failing to act at the end of negotiated timing agreements.¹¹ The Antitrust Division, also facing an increase in merger filings,

⁴ See, e.g., Holly Vedova, Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave (Sep 28, 2021 8:08AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined> (hereinafter “Vedova Blog Post”).

⁵ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), <https://www.ftc.gov/public-statements/2021/08/statement-commissioner-christine-s-wilson-regarding-announcement-pre> (“But one plausibly could wonder if the FTC is struggling to review transactions in a timely manner not only because of filing volume, but also because something else is afoot.”).

⁶ Fed. Trade Comm’n, *Premerger Notification Program*, <https://www.ftc.gov/enforcement/premerger-notification-program> (showing a spike in October 2020 filings).

⁷ Vedova Blog Post, *supra* note 4.

⁸ Bryan Koenig, ‘Nontraditional Questions’ Appearing in FTC Merger Probes, Law360 (Sept. 24, 2021, 9:44 PM EDT), <https://www.law360.com/articles/1425218>; Ben Remaly, *FTC broadens the scope of its merger probes*, Global Competition Rev. (Sept. 29, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/ftcbroadens-the-scope-of-its-mergerprobes?utm_source=FTC%2Bbroadens%2Bthe%2Bscope%2Bof%2Bbits%2Bmerger%2Bprobes&utm_medium=email&utm_campaign=GCR%2BUSAA%2BBriefing.

⁹ Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARVARD LAW & POLICY REVIEW 235, 279-282 (2017), <https://harvardlpr.com/wp-content/uploads/sites/20/2017/02/HLP110.pdf> (arguing that “antitrust enforcers and courts must eschew the open-ended rule of reason and adopt simple presumptions” including “the Supreme Court’s presumption in *United States v. Philadelphia National Bank*” to put firms on notice that “a merger that created an entity with a share greater than twenty percent would have to show credible business justifications to overcome the presumption of illegality”).

¹⁰ Holly Vedova, Adjusting merger review to deal with the surge in merger filings (Aug 3, 2021 12:28PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

¹¹ See, e.g., Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the Closing of the 7-Eleven and Marathon Transaction, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf.

has continued to make enforcement decisions and protect American consumers.¹² The FTC's inability to act is weakening merger enforcement. Compare the agency's enforcement track record today versus before current leadership took the helm. The FTC has brought very few merger enforcement actions in recent months.¹³ Fiscal year 2021, which ended September 30, showed a remarkable drop in enforcement from the vigorous pace of enforcement in fiscal year 2020.¹⁴ Of the enforcement actions brought in fiscal year 2021, the majority were brought under the prior administration.¹⁵

The statement issued by the Chair and Commissioner Slaughter also goes to great lengths to explain how their policies are consistent with the HSR Act. But it also states that what they seek is a different legal regime.¹⁶ For now, the policy changes undertaken by new agency leadership distort almost beyond recognition the merger review framework that Congress legislated.¹⁷ Delaying obviously non-problematic mergers,¹⁸ investigating deals that are unlikely to pose competitive

¹² Josh Cisco, *Lina Khan Gets to Work at the FTC*, THE INFORMATION (Aug. 17, 2021), <https://www.theinformation.com/articles/techs-antitrust-nemesis-girds-for-battle?rc=a3x4bv>.

¹³ FTC Press Release, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis Clinics* (Oct. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following>; FTC Press Release, *Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah* (July 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination>.

¹⁴ See Noah J. Phillips (@FTCPhillips), TWITTER (Sept. 30, 2021, 3:00pm), <https://twitter.com/FTCPhillips/status/1443652046893223938>.

¹⁵ The prior administration maintained vigorous merger enforcement in the face of surging HSR filings and the COVID-19 pandemic. In fiscal year 2020, the FTC filed 28 merger challenges, the highest number since the turn of this century. In FY 2021, which ended September 30, the agency has filed only 15 merger challenges, the majority of which were initiated before President Biden took office.

¹⁶ Majority Statement on FY 2020 HSR Report, *supra* note 1 (calling for legislative updates to the HSR Act).

¹⁷ Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, GLOBAL COMPETITION REV. (Oct. 6, 2021), <https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/the-repeal-of-hart-scott-rodino>.

¹⁸ Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations (February 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf ("Early termination—the program suspension announced today—is reserved for the transactions that raise no apparent competitive concern, for example equity purchases by index funds and small mergers and acquisitions in unconcentrated markets. By definition, transactions terminated early are those in which the agencies are not interested. And there are many.").

problems, declining to make decisions,¹⁹ rescinding guidance without replacement,²⁰ opening the door to wasteful and vindictive litigation and in doing so deterring consents,²¹ creating two diverging standards for antitrust enforcement at the FTC and DOJ,²² and expanding the scope of investigations to include topics orthogonal to competition²³ may very well “minimiz[e] the risk of overlooking unlawful deals,” but they cut directly against the efficient use of scarce resources.²⁴ These changes also increase uncertainty, impose delays, and raise the costs of all mergers, legal and illegal alike. What they do *not* do is make merger enforcement more efficient, effective, or fair. Perhaps that is why most of these policy changes have not been implemented by the Antitrust Division,²⁵ which faces the same situation as we do.

¹⁹ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“For the HSR Act to retain meaning, it cannot be that the FTC will keep merger investigations open indefinitely, as a matter of routine, every time there is a surge in filings. With rare exceptions, businesses that faithfully comply with the HSR process should not be trapped perpetually beneath a Sword of Damocles.”). In addition, the Seven-Eleven-Marathon “mess” was a failure to make an easy decision. Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson in the Matter of Seven & i Holdings Co., Ltd. / Marathon Petroleum Corporation, File No. 201-0108 (May 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1590067/2010108sevenmarathonphillipswilsonstatement.pdf (“Today, the Federal Trade Commission (‘Commission’) is failing to act as Seven & i Holdings Co. consummates its purchase of nearly 4,000 gas stations from Marathon Petroleum Corporation, which transaction includes hundreds of retail gasoline and convenience store overlaps that we have reason to believe violate the antitrust laws. Rather than resolve the issues and order divestitures (or sue to block the transaction), the Acting Chairwoman and Commissioner Chopra have issued a strongly worded statement. Their words do not bind the merging parties, leaving consumers completely unprotected. There is no good reason for the Commission to be in this mess.”).

²⁰ Noah Joshua Phillips & Christine S. Wilson, Comm’rs, Fed. Trade Comm’n, Dissenting Statement Regarding the Commission’s Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf (“The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainty in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities.”).

²¹ Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission’s Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), (“[C]ompanies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement.”).

²² *Id.* at 20 (“Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.”).

²³ Bryan Koenig, ‘Nontraditional Questions’ Appearing in FTC Merger Probes, Law360 (Sept. 24, 2021, 9:44 PM EDT), <https://www.law360.com/articles/1425218>.

²⁴ In fact, the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions, rescinded at the July 21 open Commission meeting on a party line vote, was implemented in response to years of wasteful and vindictive litigation against an abandoned merger. Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on July 21, 2021, at 8-9 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

²⁵ Dep’t of Just. Press Release, *Justice Department Issues Statement on the Vertical Merger Guidelines* (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>; Holly Vedova, FTC Blog Post, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave* (Sept. 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined>; Holly Vedova, FTC Blog Post, *Adjusting merger review to deal with the surge in merger filings* (Aug. 3, 2021), <https://www.ftc.gov/news->

Regardless of whether the reader shares our concerns about the changes to the FTC’s merger review process, surely everyone can agree that it would be helpful for the agency to provide a clearer picture of the nature of these increased filings. The use of HSR filing numbers to justify this, that, and the other policy makes such disclosures even more important. Additional information about the transactions we are seeing will give policymakers and the public the common facts necessary to discuss important policy issues. For example, how many of the transactions in question are actually “mergers”? How many of those are within the same industries, even broadly defined? How many HSR filings represent purchases of minority stock interests, and by what kinds of buyers? How many mergers involve special purpose acquisition companies, which have garnered a great deal of discussion and ebbing – albeit recently flowing – popularity? Prior to the Commission’s suspension of early termination (ET) over seven months ago,²⁶ half of all HSR reportable transactions were granted ET.²⁷ These were transactions that the agencies were not interested in investigating further because they raised *no* apparent competitive concerns, *e.g.*, vesting of voting securities to senior management. Has the percentage of deals that traditionally would have received ET changed?

These are categories of information we can provide to the public, and we should.

[events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings](https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings).

²⁶ FTC Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

²⁷ Fed. Trade Comm’n and U.S. Dep’t. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, available at <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf>.