Office of Commissioner
Rebecca Kelly Slaughter

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

CONCURRING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

In the Matter of ExxonMobil Co.
Commission File No. 2410004
May 2, 2024

Today's complaint and consent decree are an important step forward in merger investigations and enforcement. I'm very glad that we are able, through this consent decree, to prevent the substantial lessening of competition that would have occurred from one component of the merger: elevating Scott Sheffield to the board of directors of Exxon.

This complaint and consent decree reflect what I have long believed to be true: the management and business intentions of merging parties should matter to our assessment of the likely effects of a merger on competition. When a company agrees, as a condition of a merger, to elevate one of the industry's notorious public and private advocates of output coordination to its board, we can and should take that seriously as a competitive effect of the merger. This principle applies not just in oil and gas markets like the ones we assess today, but across the American economy.[1]

This is not to say that we should trust everything merging parties say in their effort to get a merger through the review process. The economic incentives of the merged firm continue to play a central role. If we find reason to believe that the merged firm, acting on those incentives, may substantially lessen competition, we should act. Corporate executives may profess that they plan to continue to compete as if those incentives don't exist. In that situation, enforcers must be highly skeptical. The parties have every reason to want to present a pro-competitive strategy to try to get their merger through. That is why we rely on ordinary course documents and business evidence to give us a clearer picture of how parties will behave. And when they openly embrace anticompetitive strategies, that is when we should take notice.

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[1] Indeed, it may be particularly relevant in pharmaceuticals. The FTC has an entire division dedicated to investigating anticompetitive conduct in healthcare markets with a particularly strong enforcement track record in the pharmaceutical space. When pharmaceutical companies that have a history of anticompetitive conduct merge, I have long believed we should consider that history in our assessment of the likely competitive effects of the merger. *See, e.g.*, Dissenting Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Bristol-Myers Squibb and Celgene ("We must carefully consider the facts in each specific merger to understand whether or how it may facilitate anticompetitive conduct, and therefore be more likely to result in a substantial lessening of competition.") Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb and Celgene, (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf. This view has been echoed in the academic literature. *See*, Carrier, Michael A. and Lindsay Cooley, Gwendolyn J., Prior Bad Acts and Merger Review (October 19, 2022). 111 Georgetown Law Journal Online 106 (2023), https://ssrn.com/abstract=4252945.

I agree with my dissenting colleagues that another appropriate response to the concerning statements around coordinated behavior uncovered in this investigation would be to separately scrutinize them as a potential antitrust violation. Today's complaint and consent decree should not be seen as mutually exclusive with such a conduct investigation. Conduct investigations—rightly—are not subject to the strict statutory deadlines of merger investigations, and for a variety of reasons tend to take much longer. The harms to competition identified in the complaint are specific to this merger, and therefore they are appropriate to address now, at the time of the merger.

Lastly, it's important to reiterate here that the FTC does not approve mergers under any circumstances. This consent decree, like any other consent decree, should not be seen as resolving all competitive concerns this merger may present.[2] Enforcers are always faced with tradeoffs to weigh in our decisions. This consent decree will have an important and meaningful impact on the market and competition. It is worth doing now, whether or not further intervention may be warranted.

[2] This is especially true given that the merging parties often have outsized control over the timing and timeline of FTC investigations. To ensure that enforcers can adequately and thoroughly investigate potentially unlawful mergers, lawmakers should amend the HSR Act to extend statutory deadlines.