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

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Hart-Scott-Rodino Act Premerger Notification Rulemaking Notices
Commission File No. P110014
September 21, 2020

Summary

- Premerger notification is a critical data source, but the Commission faces enormous information gaps when seeking to detect and halt anticompetitive transactions.
- While the proposed rule closes a loophole when it comes to investment manager holdings, the proposed approach to exempt a wide swath of minority stakes is concerning and adds to existing information gaps.
- The Commission needs to update the treatment of certain debt transactions when determining deal size for the purpose of premerger notification. The current approach allows dealmakers to structure anticompetitive transactions in ways that can go unreported.

In September 1976, Congress gave the Federal Trade Commission an important tool enabling it to block harmful mergers. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") requires prior notification to the antitrust agencies in advance of closing certain mergers and acquisitions.[1]

Prior to the HSR Act's enactment, companies could quickly "scramble the eggs" of assets and operations, or even shut down functions. This made it extremely difficult for the antitrust agencies to remedy competitive harms through divestitures of assets. Years of protracted litigation to stop further damage and distortions were often the result.[2]

The HSR Act fundamentally changed the process of merger review by giving the antitrust agencies time to halt anticompetitive transactions before these deals closed. Today, the FTC focuses a substantial portion of its competition mission on investigating and challenging mergers reported under the HSR Act. Importantly, only a small set of transactions – the ones with the highest valuations – are subject to premerger notification. The HSR Act specifies the valuation threshold, currently set at $94 million, which is typically adjusted upward each year. Since there are many ways to determine a deal's valuation, Congress gave the FTC broad authority to implement rules so that buyers know if they need to report their transactions and what they are

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[1] Clayton Act § 7A, 15 U.S.C. § 18a.
[2] For example, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), it took seventeen years of litigation before a divestiture finally took place.

required to submit with their filing. The Commission can also exempt classes of transactions and tailor filing requirements.

While premerger notification filings provide the Commission with certain nonpublic information,[3] gathering and analyzing market intelligence on transaction activity and competitive dynamics is a major challenge. We need to continuously assess how we can enhance our market monitoring techniques and evolve our analytical approaches.

Today, the Commission is soliciting comment on two rulemaking notices regarding our policies to implement the HSR Act's premerger notification protocols. The first publication, a Notice of Proposed Rulemaking, proposes specific rules and exemptions. While some of the proposals are helpful improvements, I respectfully disagree with our approach to exempting a broad swath of transactions from reporting. The second publication, an Advance Notice of Proposed Rulemaking, requests comment on a broad range of topics to set the stage for modernizing the premerger notification program to align with market realities. I support soliciting input to rethink our approach. I discuss each of these notices below.

Notice of Proposed Rulemaking

The Notice of Proposed Rulemaking outlines specific amendments that the Commission is proposing to the HSR rules. The aggregation and exemption provisions are particularly noteworthy. The aggregation provisions are worthwhile, since they close a loophole and align with market realities. However, I am concerned about the exemption provisions, since we will completely lose visibility into a large set of transactions involving non-controlling stakes.

Aggregation Provisions. The financial services industry is well known for using an alphabet soup of small entities, like shell companies, partnerships, and other investment vehicles, to structure deals. Even though they may be under common management by the same person or group, like a private equity fund or a hedge fund, these smaller legal entities are all treated separately under the existing rules.

The proposed aggregation provisions will help to prevent acquirers from splitting up transactions into small slices across multiple investment vehicles under their control to avoid reporting. The proposal would require investors and other buyers to add together their stakes across commonly managed funds to determine whether they need to report a transaction.

Exemption provisions. By creating a reporting threshold based on the value of a transaction, the law already exempts most transactions from agency review. Because of this, it is difficult to systematically track these transactions, and even harder to detect and deter those that are anticompetitive.

Now, the FTC is proposing to widen that information gap by creating a new exemption for minority stakes of 10% or less, subject to certain conditions. Importantly, the proposal is not exempting specific aspects of the reporting requirements – it is a total exemption, so the agency

[3] I agree with Commissioner Slaughter that current filing requirements, including for minority stakes, can have the beneficial effect of deterring certain anticompetitive transactions.

will receive no information whatsoever from the buyer or the seller that the transaction even occurred. This adds to the burdens and information asymmetries that the agency already faces when it comes to detecting potentially harmful transactions.[4]

Companies and investors purchase minority, non-controlling stakes in a firm for a number of reasons. Sometimes, buyers might start with a minority stake, with the goal – or even with a contractual option – of an outright takeover as they learn more about the company's operations. Even though they might have a small stake, they can exert outsized control. In other cases, buyers might look for minority stakes in multiple, competing firms within a sector or industry, and some or all of these acquisitions may fall below the reporting thresholds. Of course, if they are able to obtain seats on boards of directors of competing companies, this can be illegal.

Investors and buyers can only use the proposed exemption if they do not currently own stakes in firms that compete or do business with the company they plan to acquire. Since many investors might not know about the specific business dealings across companies, this may be difficult to enforce and puts more burden on the agency.

Even if one believes that transactions involving a minority stake are less likely to be illegal, there are many potential alternatives to outright elimination of reporting. Unfortunately, the rulemaking notice does not outline alternative approaches (such as tailored, simplified filing requirements or shortened waiting periods) for minority stakes.

Advance Notice of Proposed Rulemaking

As markets evolve, it is important that the HSR Act and its implementing rules reflect those developments. The Advance Notice of Proposed Rulemaking seeks input on a wide array of market-based issues that may affect the Commission's merger oversight. One topic of particular interest is whether to include debt as part of the valuation of a transaction. Since the HSR Act's passage, corporate debt markets have grown in importance for companies competing in developed economies. Many major deals involve vast sums of borrowed money.

However, the Commission has not formally codified a view on the treatment of certain debt transactions. Instead, existing staff guidance excludes many debt transactions from the deal's overall value. This is worrisome, since it means that many potentially anticompetitive transactions can go unreported, since they may fall below the size threshold. In addition, this view has been provided informally, communicated through unofficial interpretations outside of formal rules or guidance. It will be important to take steps to collect input and codify the Commission's policies on valuation, particularly with respect to the treatment of debt, since formal guidance or rules will offer clarity and will be easier to enforce.

The Advance Notice of Proposed Rulemaking also seeks information that will lay groundwork for broader reforms to our premerger notification program. I look forward to the data and written submissions to this notice.

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[4] The FTC may not be able to rely on other sources of robust data required by other agencies. For example, the Securities and Exchange Commission has proposed eliminating reporting for thousands of registered investment funds that previously detailed their holdings to the public. *See* Statement of SEC Comm'r Allison Herren Lee Regarding Proposal to Substantially Reduce 13F Reporting (July 10, 2020), https://www.sec.gov/news/public-statement/lee-13f-reporting-2020-07-10.

Conclusion

Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.[5] The FTC ends up missing a large number of anticompetitive mergers every year. In addition, since amendments to the HSR Act in 2000 raised the size thresholds on an annual basis, the number of HSR-reportable transactions has *decreased*.

I want to commend agency staff for their work in identifying potential blind spots in the premerger reporting regime. I also want to thank state legislatures and state attorneys general for enacting and implementing their own premerger notification laws to fill in some of these gaps. For example, a new law in State of Washington has taken effect, which requires advance notice of any transactions in the health care sector, where many problematic mergers fall below the radar.[6]

As we conduct this examination of the HSR Act, we should identify areas where laws may need to be changed or updated, especially when we cannot fill those gaps through amendments to our rules. For example, we may need to pursue reforms to ensure that "roll ups" are reported, where a buyer might acquire a large number of small companies that may not be individually reportable. We may also need to look carefully at the length of the waiting period, to determine if it is long enough to conduct a thorough investigation. I look forward to reviewing the input to these two rulemaking notices, so that our approach reflects market realities.

[5] Small transactions can be just as harmful to competition as large transactions notified under the HSR Act. For example, "catch and kill" acquisitions of an upstart competitor in fast-moving markets can be particularly destructive. In addition, "roll-ups," an acquisition strategy involving a series of acquisitions of small players to combine into a larger one, can have very significant negative effects on competition. *See* Statement of Fed. Trade Comm'r Rohit Chopra Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress, Comm'n File No. P110014 (July 8, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

[6] *See Healthcare Transaction Notification Requirement,* WASH. STATE OFF. OF THE ATT'Y GEN. (last visited Sept. 16, 2020), https://www.atg.wa.gov/healthcare-transactions-notification-requirement; *see also* S.H.B. 1607, 66th Leg., Reg. Sess. (Wash 2019).