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

Office of Commissioner
Rohit Chopra

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Review of the FTC's Pharmaceutical Merger Enforcement Program
May 11, 2021

Drug prices are out of control and life-saving medicine is out of reach for too many Americans. In today's markets, investors heavily reward pharmaceutical companies that can protect and expand their market power. That's one reason why prosecutors have routinely pursued and uncovered antitrust crimes in the pharmaceutical industry, ranging from patent schemes to price-fixing.

Despite a wide range of concerns about anticompetitive abuses, the Federal Trade Commission has primarily pursued a pro-merger policy when it comes to the pharmaceutical industry. When pharmaceutical giants pursue anticompetitive mergers, Commissioners across multiple administrations have been highly permissive. In fact, I have been unable to identify a single instance in recent history where the agency has filed a complaint in federal court seeking to halt a prescription drug company merger.

But this pro-merger approach is not sensible, given the FTC's mandate and the crisis we face when it comes to drug prices. The Commission also lacks a sound empirical basis for assuming that mergers have no impact on innovation. In fact, it is likely the opposite.

Instead of allocating resources to conduct robust investigations covering the full range of anticompetitive effects of mergers, Commissioners have generally been comfortable with superficial analyses of product overlaps resolved by settlements with a narrow set of divestitures. I have also found that Commissioners frequently decline to compel critical information through the law enforcement tools delegated to the agency under law.[1] This is deeply troubling.

Oddly, Commissioners are willing to devote more resources to investigate small-time scams than to pharmaceutical megamergers. The agency has also failed to facilitate meaningful partnerships with state attorneys general in these investigations. Moreover, Commissioners have deprived our merger investigations of staff that understand the on-the-ground realities of how the capital markets incentivize anticompetitive mergers and conduct in the industry.

Today, antitrust agencies around the world have launched a solicitation for public comment on ways to improve the analytical rigor of pharmaceutical merger review. This is a reflection of the severe shortcomings of the FTC's pharmaceutical merger enforcement program. Even by the Commission's own analysis, there is a 25% failure rate in our generic drug merger settlements, where the Commission settles an illegal merger by approving a divestiture to another firm, only

[1] My own review of our "Second Requests" suggests that the Commission does not rigorously assess the impact of a proposed merger on innovation, on entry conditions, and in venture capital markets.

to find that that buyer abandons the market. This figure may actually be a gross underestimate of failure, since it sets an artificially low bar for success.[2]

Some examples of the FTC's recent settlements include the merger between Bristol-Myers Squibb and Celgene, where the analysis released by the Commission reveals that the investigation was extremely narrow.[3] Instead, the Commission relied on its status-quo approach of examining product overlaps. In the recent merger between AbbVie and Allergan, Commissioners agreed to green light the deal by allowing the merged firm to sell off pancreatic cancer drugs to Nestlé, the Swiss chocolate conglomerate. Nestlé was not even a pharmaceutical manufacturer.[4] This risky remedy made little sense. In the recent merger between two generic drug giants, Mylan and Pfizer's Upjohn division, the Commission essentially discarded the fact that the companies and a top executive had been accused of price-fixing.[5] However, this is extremely material to our inquiry. In each of these three matters, Commissioners also granted "early termination" of the statutory waiting period under the Hart-Scott-Rodino Act.[6] These results do not reflect a serious approach grounded in market realities.

In the attached, I reiterate my previous recommendations to increase the rigor of our pharmaceutical merger investigations. I firmly believe that Commissioners should adequately resource investigations and allow staff to deeply probe the full range of harms, rather than relying on the status-quo approach. In particular, I hope that the agency's Inspector General will conduct a programmatic review of the pharmaceutical merger enforcement program so that the public can benefit from an independent perspective on opportunities for reform.

It is critical that FTC Commissioners take responsibility, hold ourselves accountable for failing to properly police anticompetitive mergers in the pharmaceutical industry, and turn the page on the past. Until such time, American patients will continue to suffer.

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[2] The 2017 Remedies Study published by the Federal Trade Commission has been criticized for the criteria it uses for claiming a merger remedy was a "success." *See* John Kwoka, CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA 142 (Boston Competition Policy International, 1st ed. 2020).

[3] Analysis Of Agreement Containing Consent Orders To Aid Public Comment*, In the Matter of Bristol-Myers Squibb Company and Celgene Corporation*, Comm'n File No. 191-0061 (Dec. 6, 2019), https://www.ftc.gov/system/files/documents/cases/bms-celgene_aac.pdf.

[4] Dissenting Statement of Commissioner Rohit Chopra In the Matter of AbbVie Inc. and Allergan plc, Comm'n File No. 191-0169 (May 5, 2020), https://www.ftc.gov/public-statements/2020/05/dissenting-statement-commissioner-rohit-chopra-matter-abbvie-inc-allergan.

[5] Dissenting Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Pfizer Inc./Mylan N.V., Comm'n File No. 191-0182 (Oct. 30, 2020), https://www.ftc.gov/public-statements/2020/10/dissenting-statement-commissioner-rohit-chopra-joined-commissioner-rebecca.

[6] Had these firms certified their full compliance with documents requested in the investigation, the Commission would not even need to entertain a discussion about granting "early termination."

RECOMMENDATIONS FOR COMMISSIONER ACTION REGARDING PHARMACEUTICAL MERGER REVIEW[7]

(1) Dramatically increase rigor and Commission supervision of innovation-merger investigations, especially in industries where new market entrants drive innovation.

I share Commissioner Rebecca Kelly Slaughter's concerns about investigations into innovation effects of mergers. It is difficult to quantify the harms associated with suppressed entry of new life-saving innovations or breakthrough technologies. When pharmaceutical industries assemble multiple dominant products or when technology companies combine multiple sources of data, this affects how those firms can exert bargaining leverage across the supply chain. It also reduces the ability for new firms to raise capital for entry.

However, in my view we do not have a robust approach to assess how a merger can choke off the entry of startups and nascent businesses. I have observed that when we do uncover evidence that a transaction may lead to these effects, we do not give it the appropriate weight.

As Commissioners, we must substantially increase our supervision to ensure we are meeting our obligations to the public to protect competition. Specifically, the Commission should:

- Request that the Inspector General conduct a programmatic review of our merger investigations in biomedical, consumer technology, and other innovation markets.
- Hold formal Commission meetings on large merger investigations in these sectors prior to any proposed remedy negotiated between staff and merging parties.
- Analyze "stealth consolidation" in the pharmaceutical sector, in accordance with Commissioner Christine S. Wilson's statement in February of this year.[8]
- Require the Bureau of Competition to obtain a vote of the Commission before closing investigations or granting early termination of the Hart-Scott-Rodino waiting period for large mergers, particularly in sectors where innovation is critical for the public interest.[9]

(2) Enhance our analytical capabilities when assessing prospective divestiture buyers and when crafting remedies for anticompetitive mergers and conduct.

During the Senate confirmation process, Chairman Simons outlined his desire to reduce the failure rate of remedies in merger settlements.[10] I completely agree with this objective.

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[7] These recommendations were originally published last year. *See* Dissenting Statement of Commissioner Rohit Chopra In the Matter of AbbVie Inc. and Allergan plc., 17 – 20.

[8] Statement of Commissioner Christine S. Wilson joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

[9] For example, shortly after the new Commission took office in 2018, the Bureau of Competition was able to grant unconditional clearance to Takeda's $62 billion takeover of Shire without seeking a Commission vote.

[10] Federal Trade Commissioner Confirmations Before the Senate Commerce, Science and Transportation Committee, 115th Cong. (Feb. 14, 2018).

The FTC Bureau of Competition's Compliance Division is one of the most important offices in the entire agency. The office assesses prospective divestiture buyers, creates remedies, and ensures compliance with Commission orders. The Compliance Division largely consists of attorneys. While the division has strong capabilities when it comes to assessing many of the legal dimensions of a transaction, including the transfer of contracts and intellectual property, the Commission has not augmented the division with other needed skill sets related to the financial and technical dimensions.

For example, in the United Kingdom, the Competition and Markets Authority established a highly respected group focused on remedies. The group is interdisciplinary and includes individuals with backgrounds in law, auditing and accounting, financial analysis, investment banking, management consulting, and other analytically minded skill sets.[11] It is clear that this group is a tremendous asset to the Competition and Markets Authority's competition policymaking.

The Commission would also benefit from those with diverse backgrounds and technical expertise. To increase analytical rigor and reduce risk of divestiture remedy failure, the Commission should:

- Support the Compliance Division with additional professionals with experience in transactional due diligence and other technical skill sets.
- Increase the proportion of financial analysts in the Bureau of Economics and elevate their role in investigations.

(3) Increase coordination and cooperation with state attorneys general in merger review.

When law enforcement agencies do not effectively cooperate and coordinate, companies seeking to consummate unlawful mergers can take advantage of the gaps. Given their concurrent jurisdiction, the state attorneys general are key partners in competition enforcement. Coordination and cooperation can include sharing documentary evidence, conducting joint interviews and investigational hearings, and pooling resources on expert analysis. The FTC should do more to strengthen these partnerships. To advance this goal, the Commission should:

- Ensure that Commission staff verify that merging parties have complied with subpoenas and other reasonable information requests from state regulators prior to finalizing any settlement negotiations.
- Update agreements and policies governing joint investigations with state attorneys general on merger review.[12]

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[11] Adam Land, *Introducing our Remedies, Business and Financial Analysis team*, COMPETITION AND MARKETS AUTHORITY (Aug. 17, 2018), https://competitionandmarkets.blog.gov.uk/2018/08/17/introducing-our-remedies-business-and-financial-analysis-team/.

[12] *Protocol for Coordination in Merger Investigations*, FED. TRADE COMM'N (last visited May 5, 2020), https://www.ftc.gov/tips-advice/competition-guidance/merger-investigations; *see also* Press Release, Fed. Trade Comm'n, Federal Antitrust Agencies and State Attorneys General Announce Protocol for Joint Federal/State Merger Investigations (Mar. 11, 1998), https://www.ftc.gov/news-events/press-releases/1998/03/federal-antitrust-agencies-and-state-attorneys-general-announce.

- Assist state policymakers who are seeking to institute state laws on merger control and pre-merger notification.

(4) Provide greater transparency to the public about the scope of FTC merger reviews.

Under agency rules, the Commission must solicit public comments on its administrative settlements regarding unlawful mergers. The agency publishes an Analysis to Aid Public Comment that describes the investigation. However, the FTC provides sparse information in this document. I previously raised this concern in *Fresenius/NxStage,*[13]

Greater transparency can increase confidence that the Commission was thorough and independent in its investigation, while still respecting laws and regulations governing confidentiality. It can also offer other merging parties clearer expectations of how it can fully cooperate. The Commission should:

- Publish a more detailed discussion of the analyses conducted regarding potential anticompetitive effects when proposing a settlement.
- Disclose the data sets relied upon to justify a remedy (or lack thereof).
- Provide the public with more details about the assessment of any proposed divestiture buyers.
- Outline the Commission's assessment of entry conditions post-transaction.

Today's uncertain times reveal that the mission of the FTC has never been more relevant. The agency must evolve, and the Commission must take concrete actions to improve agency decision-making to ensure the agency is advancing this mission.

[13] Dissenting Statement of Commissioner Rohit Chopra In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., Comm'n File No. 171-0227, 4 (Feb. 19, 2019) https://www.ftc.gov/public-statements/2019/02/statement-commissioner-chopra-matter-fresenius-medical-care-ag-co-kgaa.