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

Joint Dissenting Statement of
Commissioner Melissa Holyoak and Commissioner Andrew N. Ferguson

In the Matter of ExxonMobil Corporation
Commission File No. 241-0004

May 2, 2024

The Commission has issued a Complaint and Order against ExxonMobil Corporation ("Exxon") on the ground that the proposed acquisition of Pioneer Natural Resources Company ("Pioneer") would violate Section 7 of the Clayton Act.[1] The principal ground on which the Commission proceeds is that the merger may substantially lessen competition because of the prospect that Exxon's shareholders may elect Scott Sheffield—Pioneer's founder, former CEO, and current board member—to Exxon's board of directors. The Complaint alleges that Mr. Sheffield has made "previous efforts to organize tacit (and potentially express) coordination of capital investment discipline and oil production levels."[2] Mr. Sheffield allegedly used both public statements threatening to punish companies that expand output and private conversations and messages with OPEC representatives where he implemented his "long-running strategy to coordinate output reductions."[3] These accusations are extremely troubling and warrant close scrutiny under the antitrust laws. To its credit, Exxon intends to exclude Mr. Sheffield from serving on the board of directors—a wise decision consistent with sound policy given the severity of the allegations against him.

But Exxon's consent to the entry of this order and its decision to exclude Mr. Sheffield from its board does not answer the ultimate question the Commission must answer before issuing a complaint: Whether the Commission has reason to believe *this transaction* itself violates Section 7. The Commission's Complaint does not provide us reason to believe that it does. The Complaint fails to articulate how the "effect of [the] transaction may be substantially to lessen competition."[4] We fear instead that the Commission is leveraging its merger enforcement authority to extract a consent from Exxon rather than addressing the conduct of one misbehaving executive. We therefore respectfully dissent.

Antitrust enforcers have long recognized that a transaction which increases the risk of coordination also increases the risk of a substantial diminution of competition. Until recently, we considered three factors in assessing the risk of increased coordination: whether the transaction created "(1) a significant increase in concentration, leading to a moderately or highly

[1] 15 U.S.C. § 18.
[2] Compl. ¶ 22.
[3] Compl. ¶ 6.
[4] 15 U.S.C. § 18.

concentrated market"; whether the transaction involved "(2) a market vulnerable to coordinated conduct"; and whether we had "(3) a credible basis for concluding the transaction will enhance that vulnerability."[5] The recently adopted 2023 Guidelines propose three "primary factors" for assessing the increased risk of coordination—(1) the existence of a highly concentrated market, (2) prior actual or attempted attempts to coordinate, and (3) elimination of a maverick.[6] No court to date has endorsed these new factors. Even assuming they accurately summarize the state of the law, they are not satisfied here.

The Complaint is unclear on which of the three factors are present here, but it focuses most on "actual or attempted attempts to coordinate." It alleges that "Mr. Sheffield's history of attempting to coordinate with other oil industry participants suggests that the market here is susceptible to anticompetitive coordination."[7] We do not agree.

The 2023 Guidelines provide that "attempts to coordinate" are relevant to the risk-of-coordination inquiry where "firms representing a substantial share in the relevant market appear to have previously engaged in express or tacit coordination . . . ."[8] The Complaint alleges only that a combined OPEC and OPEC+ "account for over 50% of global crude oil production."[9] Importantly, it does not allege the merging parties' market shares at all. As such, it fails to allege that either Exxon or Pioneer represents part of any "substantial share" of the market, and for good reason: the post-merger firm's share in the alleged market will not be substantial. The concentration in this market, and thus, the likelihood of successful coordination post-merger, are virtually unchanged by the proposed acquisition.[10]

The Complaint also focuses on the fact that the merger would give Mr. Sheffield "a larger platform from which to advocate for greater industry-wide coordination as well as decision-making input."[11] Mr. Sheffield's alleged prior conduct certainly raises serious concern and warrants antitrust scrutiny. But the merger does not place Mr. Sheffield on the board.[12] That decision belongs to Exxon's shareholders. The Commission acts today based only on the risk that the shareholders might elect him to the board, and that his election might give him a "larger platform" to coordinate—if indeed this market is susceptible to coordination. We do not believe

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[5] U.S. Dept. of Just. & Fed. Trade Comm'n, Horizontal Merger Guidelines § 7.1 (2010); *see Fed. Trade Comm'n v. RAG-Stiftung*, 436 F.Supp.3d 278, 313 (2020) (citing and quoting from section 7.1 of the 2010 Horizontal Merger Guidelines); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 234 (S.D.N.Y. 2020) (similar).

[6] 2023 Guidelines § 2.3.A, at 8–9. The Guidelines also propose six "secondary factors," *id.* § 2.3.B, at 9–10, but the Complaint does not appear to rely on them.

[7] Compl. ¶ 19.

[8] 2023 Guidelines § 2.3.A, at 9.

[9] Compl. ¶ 21.

[10] To be clear, we do not contend that every individual oil producer is a meaningful constraint on coordination. The Commission's Complaint is silent, however, on the existence or sufficiency of any other firm to constrain the coordination the consent purports to prevent with this remedy. For us, this omission precludes reason to believe the proposed transaction may substantially lessen competition. *See Fed. Trade Comm'n v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) ("[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."); *see also Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 715 (2001).

[11] Compl. ¶ 44.

[12] The agreement instead requires Exxon to propose Mr. Sheffield for election to its board if he meets certain legal, regulatory, and corporate governance criteria.

this alleged risk presents a Section 7 problem. Further, we are especially concerned with the Complaint's focus on Sheffield's past conduct at Pioneer as an indicator of Exxon's future actions, without any discussion of whether Exxon has incentives to engage in the same behavior. Focusing on individuals' conduct divorced from a firm's incentives could have troubling ramifications for future enforcement actions.

The alleged conduct by Mr. Sheffield warrants scrutiny, but that does not mean we have reason to believe *the transaction* violates Section 7. The Commission should not leverage its merger enforcement authority—or any authority—the way it does today. We respectfully dissent.