Statement of Commissioner Noah Joshua Phillips
Hart-Scott-Rodino Act Premerger Notification
Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking
Matter No. P110014

September 18, 2020

Today, the Federal Trade Commission (the "Commission") voted to publish for public comment a Notice of Proposed Rulemaking ("NPRM") and an Advance Notice of Proposed Rulemaking ("ANPRM"), both relating to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act" or "HSR").[1] The NPRM proposes two non-ministerial changes: (1) broadening the filing requirement to include holdings of affiliates of the acquirer, and (2) the creation of a new exemption, discussed below. The ANPRM poses a series of questions around several topics that may inform future efforts to update and refine the rules.

I write today to discuss the proposed exemption for *de minimis* acquisitions of voting securities, and to explain why I voted in favor of seeking comment on this proposal. In brief, the proposed exemption will carve out from the HSR Act's reporting requirements acquisitions of voting securities that leave the acquirer holding 10% or less of the issuer's total voting stock,[2] subject to several limitations.

The HSR Act was enacted to give the Commission and the Antitrust Division of the Department of Justice (the "Division") (collectively, the "Agencies") advance notice of mergers and acquisitions so that the Agencies could challenge anticompetitive transactions before they were consummated. Among other things, the system it established often allows the government and companies to avoid the more difficult process of "unscrambling the eggs"—separating, say, two illegally merged companies.

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[1] The HSR Act established the federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. The parties may not close their deal until the waiting period outlined in the HSR Act has elapsed, or the government has granted early termination of the waiting period. Under this framework, the government may sue to block those deals it determines may violate the antitrust laws before the deals have been consummated.

[2] The 10% threshold applies to the acquirer's *aggregate* holdings of the issuer's voting securities. Therefore, the *de minimis* exemption does not permit those claiming it to avoid HSR review by acquiring control of an entity via a "creeping" series of acquisitions, each involving less than 10% of the firm's voting securities. Once an acquirer comes to own 10% of an issuer's voting securities, it may no longer avail itself the exemption.

That is a good thing; but, like most good things, it comes at a cost. Investors must notify the target of the acquisition, wait as long as a month, and pay a fee of $45,000 to $280,000. That can make simple transactions much more costly, and sometimes not worth doing. The target may publicize the deal, driving up the price. Management may take defensive measures. The waiting period may change the viability of the transaction. The fees are substantial. All of that leads investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial improvement—and, ultimately, competition. The HSR Act provides an exemption for the acquisition of 10% or less of voting securities made "solely for the purpose of investment".[3] But the large grey area between what the investment-only exemption clearly permits shareholders to do (*e.g.*, just hold on to their stock) and what it clearly forbids (*e.g.*, proposing corporate action requiring shareholder approval)[4] encompasses interactions with management that play a critical role in keeping corporations accountable and stoking competition.

Today, in effect, HSR operates as a tax on activities that can often be beneficial. But it is not supposed to be a tax, whether on shareholder input or mergers and acquisitions activity. It also is not supposed to be an early-warning system for tender offers and corporate takeovers—for that we have a number of laws at the federal and state level.[5] And it is not supposed to be a monitoring system for equity investments generally. To the extent possible, it should not be any of those things. It should effectuate its purpose: helping the Agencies spot transactions likely to violate the antitrust laws, so that we can stop or remedy them prophylactically.

That is why Congress gave the Commission, with the concurrence of the Division's Assistant Attorney General, the ability to exempt from premerger notification those "acquisitions, transfers, or transactions which are not likely to violate the antitrust laws".[6] The proposed *de minimis* exemption covers transactions that we know are not likely to do so. The HSR Act was enacted in 1976, and 44 years of experience since then have taught us that acquisitions of 10% or less of a company are extremely unlikely to raise competition concerns. According to the NPRM, the Agencies have reviewed a multitude of 10%-or-less acquisitions that do not qualify for the investment-only exemption over the last four decades; and none have warranted a challenge. For example, from fiscal year 2001 to 2017, the Agencies received

[3] 15 U.S.C. § 18a(c)(9).

[4] According to this definition, "[v]oting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1) (2020).

[5] *See*, *e.g.*, Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f).

[6] 15 U.S.C. § 18a(d)(2)(B).

1,804 10%-or-less filings. What do these real-world data show? Only a handful of 10%-or-less acquisitions required any substantive review whatsoever, and none were challenged by the Agencies. Not one.

Thus, the proposal represents an important step in tailoring the HSR regime to its intended purpose of identifying and addressing competition issues, while simultaneously eliminating unnecessary regulatory burdens on beneficial investment activity that does not harm competition and, indeed, often promotes it.[7]

Four-plus decades of real world experience should go a long way towards allaying concerns that the proposed *de minimis* exemption will allow competitively troubling acquisitions to fly under the Agencies' radar. But scholarship in recent years has raised the question whether common ownership of substantial but non-controlling interests in competing companies (often by large, diversified, asset managers) has an anticompetitive effect. That debate, including its implications for antitrust policy, continues.[8] For now, the proposed *de minimis* exemption errs on the side of caution, excluding from its scope transactions that might implicate this concern. (To the extent that the feared competition harms of common ownership result from the passivity of the largest shareholders, the *de minimis* exemption may help mitigate the concern by facilitating the smaller, more active, voices.[9]) It also does not apply to other transactions where a competitively significant relationship between the issuer of the voting securities and the acquirer claiming the exemption exists. What it does reach are transactions that, in over 40 years, have raised no competition issues.

In 1988, following complaints by investors about the negative impact HSR was having on their small stock purchases and a study that showed the Agencies had never challenged one as violating Section 7 of the Clayton Act, the FTC considered whether to exempt acquisitions of 10% or less of a company's voting securities from HSR reporting. Those problems are still with us, and the data today show the same thing. Transactions of 10% or less are just as

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[7] *See* Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Keynote Address at the Global Antitrust Economics Conference (May 31, 2019), https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf.

[8] *See* Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Taking Stock: Assessing Common Ownership, Keynote Address at the Global Antitrust Economics Conference (June 1, 2018), https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf.

[9] *See* Noah Joshua Phillips, Comm'r, U.S. Fed. Trade Comm'n, Opening Remarks at FTC Hearing #8: Competition and Consumer Protection in the 21st Century: Corporate Governance, Institutional Investors, and Common Ownership (Dec. 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1454690/phillips_-_ftc_hearing_8_opening_remarks_12-6-18.pdf.

unlikely to lessen competition today as they were 30 years ago; and small stock purchases have almost never needed even a second look. Those decades of experience speak volumes, and what they tell us is that, at great cost, the benefits of continuing to tax *de minimis* stock purchases are virtually non-existent. We can change that.