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

Office of Commissioner
Rohit Chopra

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

In the Matter of Bristol-Myers Squibb/Celgene
Commission File No. 1910061
November 15, 2019

Summary

- Today's troubles in the pharmaceutical industry are well known. Drug pricing is out-of-control and innovation is too slow. Given the consequences for human life, the FTC must ensure fierce competition in this market through close scrutiny of mergers and conduct.
- The agency has scored big victories in court to combat anticompetitive conduct in the industry. But, when it comes to mergers, Commissioners have typically voted to steer clear of the courtroom, instead focusing on settlements that address product overlaps.
- Given the size and potential impact of this massive merger, I am skeptical that the status quo approach will uncover the range of potential harms to American patients.

When it comes to life-saving pharmaceuticals, the Federal Trade Commission should never ignore serious warning signs that most Americans see clearly. Many of us depend on prescription drugs to survive, but too many cannot afford the high costs. The argument that sky-high prices are necessary for innovation has been falling apart, as more evidence reveals that many new drugs seem to be designed to extend exclusivity, rather than providing meaningful therapeutic benefits.[1]

Predicting the anticompetitive effects of massive mergers in any industry is difficult. This is especially true in pharmaceuticals, where research and discovery are core to competition. Some evidence shows that these mergers have choked off innovation,[2] creating harms that are immeasurable for those waiting for a cure.

Routine vs. Rigor

Over the years, the agency has worked to combat abuse of intellectual property and other anticompetitive conduct by pharmaceutical companies, achieving major victories in courts across the country. Our approach to pharmaceutical mergers, however, has focused primarily on reaching

[1] Donald W. Light & Joel R. Lexchin, *Pharmaceutical R&D: What do we get for all that money?*, 345 British Med. J. 22, 24 (2012), https://www.bmj.com/bmj/section-pdf/187604?path=/bmj/345/7869/Analysis full.pdf.
[2] *See generally*, Justus Haucap & Joel Stiebale, *How Mergers Affect Innovation: Theory and Evidence from the Pharmaceutical Industry* (Düsseldorf Inst. for Competition Economics, Discussion Paper No. 218, 2016), http://www.dice hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/218_Haucap_Stiebale.pdf.

settlements, rather than litigation or in-depth merger studies. The agency has focused on seeking divestitures of individual products, usually to another major pharmaceutical player.

There have been longstanding, bipartisan concerns about whether this strategy is truly working. For example, in 2005, as he reflected on his six years of service as Commissioner, Thomas Leary lamented that the agency's approach to these investigations mostly stayed the same, despite overarching concerns about other anticompetitive harms.[3]

During my time as a Commissioner, I have pushed for the agency to be more rigorous across all of our work by opening our eyes to new types of analysis and sources of evidence,[4] while avoiding assumptions that may be outdated. Given some of the clear warning signs in the industry, we must approach our investigations of pharmaceutical mergers with careful scrutiny and great humility about our longstanding practices.

This massive $74 billion merger between Bristol-Myers Squibb (NYSE: BMY) and Celgene (NASDAQ: CELG) may have significant implications for patients and inventors, so we must be especially vigilant. In my view, this transaction appears to be heavily motivated by financial engineering[5] and tax considerations[6] (as opposed to a genuine drive for greater discovery of life-saving medications), without clear benefits to patients or the public. The buyer's incentives might also be distorted, given overlaps in ownership.[7] In addition, there are also concerns about a history of anticompetitive conduct.[8] Expansive investigation for mergers like these is time well spent.

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[3] Interview with Commissioner Thomas B. Leary, 19 (3) A.B.A. ANTITRUST HEALTH CARE CHRONICLE 1, 5 (2005), https://www.ftc.gov/public-statements/2005/09/health-care-interview-commissioner-thomas-b-leary.

[4] I have previously noted that the agency can enhance its assessments of the likelihood of entry by new innovators, as well as its approach to vetting the financial condition of divestiture buyers. Statement of Commissioner Rohit Chopra, In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc. (Feb. 19, 2019), https://www ftc.gov/public-statements/2019/02/statement-commissioner-chopra-matter-fresenius-medical-care-ag-co-kgaa; Statement of Commissioner Rohit Chopra, In the Matter of Linde AG, Praxair, Inc., and Linde PLC (Oct. 22, 2018), https://www.ftc.gov/public-statements/2018/10/statement-commissioner-chopra-matter-linde-ag-praxair-inc-linde-plc.

[5] This transaction will lead to changes in the merged firm's capital structure, as well as an acceleration of share buybacks. I fear that these changes will alter the firm's incentives in ways that might increase the likelihood of anticompetitive conduct. *See* Bristol-Myers Squibb, Press Release, Bristol-Myers Squibb Announces Agreement Between Celgene and Amgen to Divest OTEZLA® for $13.4 Billion (Aug. 26, 2019, 6:30 AM), https://news.bms.com/press-release/corporatefinancial-news/bristol-myers-squibb-announces-agreement-between-celgene-and-a.

[6] Tax avoidance appears to be one of the primary motivations of the deal, rather than a meaningful increase in the firms' ability to innovate or operate effectively. *See, e.g.*, Siri Bulusu, *Celgene Holders May See Tax Benefit From Bristol-Myers Deal (1)*, BLOOMBERG TAX (Jan. 4, 2019, 4:43 PM), https://news.bloombergtax.com/daily-tax-report/celgene-holders-may-see-tax-benefit-from-bristol-myers-deal-1 (noting that the buyer went out of its way to make sure the stock component of the merger will be taxable and describing how that tax would be deductible by Celgene shareholders). Tax considerations were also relevant to Amgen, the Commission's approved buyer of a divested asset. Amgen publicly disclosed that it would recognize $2.2 billion in tax benefits, on a present value basis. *See* Michael Erman & Manas Mishra, *Amgen to buy Celgene psoriasis drug Otezla for $13.4 billion*, REUTERS (Aug. 26, 2019), https://www reuters.com/article/us-bristol-myers-divestiture-amgen/amgen-to-buy-celgene-psoriasis-drug-otezla-for-13-4-billion-idUSKCN1VG102.

[7] For example, I noted with great interest that two-thirds of Bristol-Myers Squibb's 100 largest shareholders also have stakes in Celgene, according to data assembled by Refinitiv. *See, e.g.*, Svea Herbst-Bayliss & Michael Erman, *Starboard joins opposition to Bristol-Myers' $74 billion Celgene deal*, REUTERS (Feb. 28, 2019, 6:59 AM), https://www reuters.com/article/us-celgene-m-a-bristol-myers-wellington/starboard-joins-opposition-to-bristol-myers-74-billion-celgene-deal-idUSKCN1QH1K7.

[8] For example, last year, the Food & Drug Administration published a list of drug makers that were the subject of complaints that they had restricted generic drug companies from accessing drug samples, which enable generic firms to develop viable alternatives. Celgene was a top recipient of these complaints. Alison Kodjak, *How a Drugmaker Gamed The System To Keep Generic Competition Away*, NPR (May 17, 2018; 5:00 AM), https://www.npr.org/sections/health-shots/2018/05/17/571986468/how-a-drugmaker-gamed-the-system-to-keep-generic-competition-away.

Again, with a few exceptions,[9] many FTC Commissioners have primarily scrutinized pharmaceutical mergers based on an examination of whether there are any product overlaps between the merging corporations, or where there may be clear-cut incentives to foreclose rivals with the ability to compete.[10] When there are no obvious overlaps or foreclosure possibilities, the Commission typically does not challenge any aspect of the transaction.[11]

I am deeply skeptical that this approach can unearth the complete set of harms to patients and innovation, based on the history of anticompetitive conduct of the firms seeking to merge and the characteristics of today's pharmaceutical industry when it comes to innovation. Will the merger facilitate a capital structure that magnifies incentives to engage in anticompetitive conduct or abuse of intellectual property? Will the merger deter formation of biotechnology firms that fuel much of the industry's innovation? How can we know the effects on competition if we do not rigorously study or investigate these and other critical questions? Given our approach, I am not confident that the Commission has sufficient information to determine the full scope of potential harms to competition of this massive merger.

Conclusion

The financial crisis and the Great Recession taught our country a tough lesson: when watchdogs wear blindfolds or fail to evolve with the marketplace, millions of American families can suffer the consequences. The regulators and enforcers of the mortgage industry failed to stop the widespread abuses that plagued the marketplace. And there are many more examples every year, from the opioid crisis to the failures of the Boeing 737 Max, where blindfolded regulators and the absence of rigorous investigation proved to be catastrophic to human life, despite so many warning signs.

When enforcers conduct wide-ranging, intensive inquiries that do not uncover unlawful conduct, then, of course, they cannot take action. However, when they wear blindfolds or cling to the status quo, they cannot assume that the public is protected.

For these reasons, I respectfully dissent.

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[9] *See, e.g.*, Statement of the Federal Trade Commission, In the Matter of Teva Pharmaceuticals Industries Ltd. and Allergan plc (July 27, 2016), https://www.ftc.gov/public-statements/2016/07/statement-federal-trade-commission-matter-teva-pharmaceuticals-industries; *cf.* Concurring Statement of Commissioner J. Thomas Rosch, Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008), https://www.ftc.gov/public-statements/2008/12/concurring-statement-commissioner-j-thomas-rosch-federal-trade-commission.

[10] In this matter, the Analysis of Agreement Containing Consent Orders to Aid Public Comment focuses primarily on a specific product market overlap. This is similar to many past analyses contained in public notices seeking comment on proposed consent orders in the FTC's pharmaceutical merger actions. *See, e.g.*, Analysis Of Agreement Containing Consent Orders To Aid Public Comment, *In the Matter of Boston Scientific Corporation*, File No. 191-0039, https://www.ftc.gov/system/files/documents/cases/191_0039_boston_scientific_aapc.pdf; Analysis Of Agreement Containing Consent Orders To Aid Public Comment, *In the Matter of Amneal Holdings, LLC, Amneal Pharmaceuticals LLC, Impax Laboratories, Inc., and Impax Laboratories, LLC*, File No. 181-0017, https://www.ftc.gov/system/files/documents/cases/1810017_amneal_impax_analysis_4-27-18.pdf. *See also* Markus Meier et al., FED. TRADE COMM'N, OVERVIEW OF FTC ACTIONS IN PHARMACEUTICAL PRODUCTS AND DISTRIBUTION (2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overview_pharma_june_2019.pdf.

[11] For example, in January 2015 the Commission granted early termination of the Hart-Scott-Rodino waiting period and took no enforcement action against the proposed $66 billion merger between Actavis plc and Allergan, Inc. *See* Fed. Trade Comm'n, Early Termination Notices, *20150313: Actavis plc; Allergan, Inc.* (Jan. 9, 2015), https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20150313.