



Office of Commissioner
Noah Joshua Phillips

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases

July 21, 2021

Over two decades ago, a bipartisan Commission announced we would no longer require prior approval for or prior notice of future transactions as a routine matter in merger consents.¹ Today, a partisan majority will rescind that policy, with the minimum notice required by law, virtually no public input, and no analysis or guidance.

It is bad government and bad policy. I dissent.

The remarks issued by Commissioner Wilson ably recount the expensive and pointless litigation and unfair outcomes for businesses that led the Commission to adopt the policy in 1995.² And I share the concerns she raises about exacerbating enforcement disparities with the Department of Justice and—once again, for the second time in a month—leaving the business community without clarity as to how we will exercise our authority.

The Majority's Decision Will Weaken Enforcement by Making Consents More Difficult

Congress enacted the Hart-Scott-Rodino Act of 1976 ("HSR Act") to protect the public from anticompetitive mergers and acquisitions before they occur.³ Giving regulators an early look at transactions and the time to resolve them before asking skeptical courts to unwind them—and businesses the ability to plan in advance—HSR is a "win-win" for regulators and businesses. In the hopes, presumably, of taxing mergers generally, today the majority elects to tax those parties that attempt to resolve matters with the agency. That, and other things we have seen lately, suggest their willingness to abrogate the HSR Act.⁴ That is a mistake.

¹ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995) [hereinafter "1995 Policy"].

² Commissioner Christine S. Wilson, Oral Remarks at the Open Commission Meeting on July 21, 2021, at 8 (July 21, 2021).

³ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

⁴ See e.g., FTC Press Release, *FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

Mergers and acquisitions are a constant feature of American markets, one way that they evolve over time. The Commission reviews transactions for their impact upon competition; and, judged from that perspective, the overwhelming bulk noticed to the agencies are not problematic,⁵ and go unchallenged. Some we block.⁶ Others, consistent with the congressional design of the HSR Act, we resolve through consents, for example by compelling the divestiture of the part of the company that raises the competitive concern.

For six decades before the HSR Act, the Commission challenged mergers and acquisitions that proved to be anticompetitive after the fact. It sought divestitures, but courts were often leery of “unscrambling the eggs”.⁷ The Commission adopted a policy of (when it could) requiring parties to give prior notice and get Commission approval for future acquisitions in the market covered by the consent order.⁸ The HSR Act achieved economy-wide much of what the Commission had been trying to get on an *ad hoc* basis (prior notice and a fighting chance to prevent anticompetitive effects), but in the years following its passage the agency continued its policy of imposing special restrictions on firms that sought to resolve competitive concerns before merging. It fought a long, expensive, unfair, and ultimately pointless battle to make sure that Coca-Cola could not merge without government permission, while Pepsi was free to do so.⁹ That embarrassing episode, and the recognition that the pre-merger notification regime under the HSR Act substantially accomplished prior notice and immeasurably strengthened merger enforcement, led the Commission in 1995 to give companies legal clarity and reduce burdens on those that enter into merger consents.

Today, the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent.¹⁰ While the agency has once again repealed a policy without offering guidance as to what will replace it, this will deter consents. Meaning, companies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement. As consent negotiations become more

⁵ By way of example, approximately 97% of HSR reportable transactions in FY 2019 proceeded without a Second Request. Fed. Trade Comm’n and U.S. Dep’t. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, available at <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf>.

⁶ In FY 2020, for example, the Commission brought a record-setting 27 merger enforcement actions, the highest number in a single year since 2001. *See* FED. TRADE COMM’N, ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2020 AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2021 AND 2022 46 (2021), <https://www.ftc.gov/system/files/documents/reports/fy-2021-22-performance-plan-fy-2020-performance-report/fy22-app-apr.pdf>.

⁷ *See e.g.*, William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act* (Oct. 31, 1996), available at <https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act>.

⁸ Twelve years before Congress passed the HSR Act and established the premerger notification program, the Commission discussed the appropriateness of limiting future acquisitions by a respondent found to have attempted an unlawful acquisition in the past. *See* Ekco Products Co., 65 F.T.C. 1163, 1201 (1964) (The ALJ noted there is “no legal requirement that the Commission be notified of corporate mergers or acquisitions either before or after consummation. Annual Report of the Federal Trade Commission for the fiscal year ended January 30, 1957, p. 22.”).

⁹ Coke is better, obvi; but the government should treat them the same. *See* The Coca-Cola Co., 117 F.T.C. 795 (June 13, 1994), Commissioners Azcuenaga & Starek recused; order modified, 119 F.T.C. 724 (May 17, 1995); appeal dismissed per stipulation, *Coca-Cola Enters. v. FTC*, No. 94-1595 and consolidated case Nos. 94-1596, 95-1086, 95-1087, 1995 U.S. App. LEXIS 15183 (D.C. Cir. May 18, 1995).

¹⁰ *See* 1995 Policy (prior approval provisions in consent orders “usually [have] a duration of 10 years.”).

difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less.¹¹

The Majority’s Decision Will Chill Procompetitive Deals and Hurt Consumers

A blanket policy of routinely requiring prior approval will impose significant costs on companies that enter into merger consents. The government would be competitively handicapping those companies for an undetermined duration,¹² preventing them from competing on a level playing field against rivals. (For example, making Coke unable to do what Pepsi can.) A company under an FTC order may have to bid higher—for instance, diverting resources from research and development, incurring debt, or lowering salaries—to compensate the seller for the uncertainty and the longer lead time required to obtain prior approval. Companies under an FTC order may not even be considered in a bidding process for a company considering a sale. There will be less competition, for companies.¹³

Such costs are defensible under certain circumstances.¹⁴ The point of a consent is to protect the competition that existed before a transaction takes place and permit the non-problematic aspects of the deal to proceed. Parties to consents should not be able to buy back divested assets,¹⁵ or re-attempt the same transaction under similar market conditions. Our current policy protects against this, saving the Commission resources, in time and money, of re-litigating issues in the same market. The Commission retains discretion to include prior approval or prior notice provisions where we determine there is credible risk that the companies may engage in another

¹¹ The Commission routinely cites HSR filings as a justification for additional funding from Congress. Acting Chairwoman Rebecca Kelly Slaughter, *Opening Statement Before the House Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee* (Mar. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1588336/p180101_opening_statement_of_ftc_acting_chairwoman_slaughter.pdf. Where we are deliberately making the HSR process less efficient, Congress should take notice.

¹² The majority has yet to announce the scope and content of their new policy, including the length of prior approval provisions.

¹³ Scholars have long recognized the positive competitive effects of the competition for companies, the “market for corporate control”. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); see also Blanaid Clarke, *The Market for Corporate Control: New Insights from the Financial Crisis in Ireland*, 36 SEATTLE U.L. REV. 577, 578 (“Like much of Manne’s work, *Mergers and the Market for Corporate Control* has been described quite correctly as ‘groundbreaking,’ ‘revolutionary,’ and ‘pioneering.’ Roberta Romano argued that the article marked the ‘intellectual origin of what would become the new paradigm for corporate law.’” (quoting Daniel Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, *Manne, Mergers and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005)).

¹⁴ Special Committee to Study the Role of the Federal Trade Commission, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 92 (1989) (“A firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal practices...Orders in excess of five years can be justified only when there is a significant chance that the firm would otherwise engage in illegal activity not subject to the Hart-Scott-Rodino reporting requirements.”) (internal citations omitted).

¹⁵ This is the limited context for which the Department of Justice Antitrust Division requires prior approval. See Dept. of Justice Antitrust Division, *Merger Remedies Manual*, at 31 (Sept. 2020).

anticompetitive transaction in the same market or fly under the HSR Act radar.¹⁶ We exercise that discretion today and include such provisions, as necessary.

Because the point of the Clayton Act and the HSR Act is to deter anticompetitive mergers, not all mergers. What the majority wants to do today is impose costs on *all* companies that enter into consents. By definition, those are companies seeking to remediate problems with their merger. This is precisely what Congress intended with the passage of the HSR Act. Yes, we might deter some bad deals. Between the HSR Act and the current policy, however, we already have processes in place that alert us to those deals and enable us to stop or remediate them.¹⁷ But attempting to flip the burden of proof for all deals will also deter procompetitive and competitively neutral transactions. Like our (allegedly temporary) suspension of early termination, it amounts to a gratuitous tax on normal market operations. Ultimately, American consumers will have to pick up the cost.

Our agency has nearly half a century of experience enforcing the HSR Act. We should draw upon that experience to stop the bad mergers and, yes, let the good ones through. Failure to do so will hinder normal market operations and weaken our enforcement efforts, both to the detriment of the American public.

¹⁶ 1995 Policy.

¹⁷ Over the past 10 years, the DOJ and FTC have prevailed in almost 80% of litigated merger challenges. See Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 54-56 (2021).