



Office of the Chair

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

**Statement of Chair Lina M. Khan  
Joined by Commissioner Rebecca Kelly Slaughter  
Regarding the FY 2020 Hart-Scott-Rodino  
Annual Report for Transmittal to Congress  
Commission File No. P110014**

**November 8, 2021**

The Federal Trade Commission recently submitted to Congress an annual report on our administration of the Hart-Scott-Rodino (HSR) Act. Despite the challenges of navigating a global pandemic, the agency in FY 2020 brought 28 merger enforcement challenges—the highest number of FTC merger enforcement actions in a single year since 2001. We are very grateful to the staff for their hard work and deep commitment to our agency’s mission.

As we consider how to build on this success, we are faced with a continued explosion in deal volume coupled with serious resource constraints that are overburdening our ability to investigate carefully mergers that may prove unlawful. Grappling with this reality, the FTC has been reviewing its processes to consider how we can faithfully discharge our statutory obligation despite these serious challenges and constraints.

Over the past year, firms have been proposing transactions at a rapid pace.<sup>1</sup> By September 2021, the number of HSR filings received this year had already exceeded the *total* number of filings received in any of the last ten years—with about a third of the year still left to go.<sup>2</sup> Assuming deal-making for the rest of the year continues at this same rate, the FTC could receive over 3,500 merger filings in 2021, marking roughly a 70% increase over the average number of filings received in recent years. Examining transaction dollar volume reveals a similar pattern: on the current trajectory, announced transaction volume for U.S. firms is on track to be the highest in 20 years.<sup>3</sup>

Agency resources, however, have not kept up. Between 2010 and 2016, FTC and DOJ funding in nominal terms stagnated and, in real terms, effectively declined.<sup>4</sup> The FTC’s full-time

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<sup>1</sup> James Fontanella-Khan, *Global dealmaking set to break records after frenzied summer*, FIN. TIMES (Sept. 5, 2021), <https://www.ft.com/content/4b955a75-55a4-4e13-b785-638b88bbfb0b>.

<sup>2</sup> The Bureau of Competition publishes the number of HSR filings on a monthly basis. *FTC Premerger Notification Program*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/premerger-notification-program>.

<sup>3</sup> *Id.* (adjusted for inflation).

<sup>4</sup> See *FTC Appropriation and Full-Time Equivalent (FTE) History*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>; *Appropriation Figures for the Antitrust Division*, DEP’T OF JUST., <https://www.justice.gov/atr/appropriation-figures-antitrust-division> (last visited Oct. 18, 2021); Michael Kades, Director of Markets and Competition Policy, Washington Center for Equitable Growth, Presentation to

employee headcount fell in 2017 and 2018, and the total headcount today remains about two-thirds of what it was at the beginning of 1980.<sup>5</sup> Meanwhile, the scope of investigation and litigation discovery has expanded exponentially over recent decades, with voluminous electronic submissions demanding substantial staff resources.<sup>6</sup> Similarly, merger-filing fees have not kept pace with the exponential increases in dollar volume of each filing. Instead, per-transaction filing fees have stagnated for 20 years even as the economy and the size of the deals have ballooned.<sup>7</sup>

The statutory timelines laid out in the HSR Act add a further strain. The HSR Act—which was originally conceived to address a drastically different economy—gives the agency 30 days to determine whether a deal warrants close investigation, and then another 30 days after parties certify they have “substantially complied” with the inquiry.<sup>8</sup> Even in ordinary times, these timelines prove challenging given our tight resources; during a decades-high boom in merger filings, the 30-day window is crippling.

The combination of the merger boom, scant resources, and strict statutory deadlines has resulted in thinly stretched staff and concerning deals getting a more cursory review than they warrant. The agency is considering how it can discharge faithfully its statutory obligations in light of this challenge. While we endeavor to investigate fully deals that may be unlawful, current circumstances are forcing difficult choices about how to handle situations where a proposed merger appears to raise legal concerns but we lack the resources to fully investigate it within the statutory timeframe.

One practice we have implemented is the issuance of pre-consummation warning letters, which the FTC sends in instances where competitive concerns about a deal have not been resolved by the statutory deadline. These letters notify merging parties that the agency’s investigation will remain open even though the waiting period will soon expire, and remind the parties that the agency retains the authority under the Clayton Act to challenge transactions even after their consummation.<sup>9</sup> The goal of these letters is to be transparent with market participants

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Congressional Antitrust Caucus on Merger Enforcement Statistics (Jan. 19, 2018), <https://equitablegrowth.org/presentation-merger-enforcement-statistics/>; *see also* Opening Statement of Acting Chairwoman Rebecca Kelly Slaughter Before the U.S. Senate Committee on Commerce, Sci., and Transp., Hearing on Strengthening the FTC’s Authority to Protect Consumers, at 2-3 (Apr. 20, 2021), <https://www.ftc.gov/public-statements/2021/04/prepared-statement-acting-chairwoman-rebecca-kelly-slaughter-strengthening>.

<sup>5</sup> *Id.*

<sup>6</sup> Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter on Actions to Expedite Staff Investigations, Matter No. P859900, at 2, n. 6 (Sept. 14, 2021), <https://www.ftc.gov/public-statements/2021/09/statement-chair-lina-m-khan-joined-commissioner-rebecca-kelly-slaughter>.

<sup>7</sup> Concurring Statement of Acting Chairwoman Rebecca Kelly Slaughter Joined by Commissioner Rohit Chopra regarding the Revised Clayton Act Thresholds, Comm’n File No. P859910, at 1 (Feb. 5, 2021), <https://www.ftc.gov/public-statements/2021/02/concurring-statement-acting-chairwoman-rebecca-kelly-slaughter-joined>.

<sup>8</sup> As part of negotiations, merging parties often enter a timing agreement that gives the agency more time after the parties have certified substantial compliance, but these agreements are not guaranteed—and sometimes even the additional period only gives the agency a total of a few months to fully review a deal, determine whether it is unlawful, and prepare a legal challenge.

<sup>9</sup> Holly Vedova, *Adjusting Merger Review to Deal With the Surge in Merger Filings*, FED. TRADE COMM’N (Aug. 3, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.

about our capacity constraints and to ensure that a lack of action ahead of the statutory deadline is not construed as a determination that the deal is lawful.<sup>10</sup> The issuance of pre-consummation warning letters also reflects the fluidity of our resource allocation decisions, whereby we are able to reshuffle resources based on new filings that come in and need attention as well as any proposed deals that have been abandoned. Given that resources for completing our review of a deal may become available after the initial 30-day period, the letters notify merging parties of this possibility.

The issuance of these letters is consistent with the merger enforcement regime Congress created in passing the HSR Act. For example, the statute expressly states that any *lack* of agency action during HSR review does not preclude any subsequent proceeding, establishing the HSR process as an opportunity for *premerger* review rather than the basis for a final determination on the legality of a merger.<sup>11</sup> Legislative history also establishes that the primary goal of the HSR Act was to give the antitrust agencies advance notice of a transaction, given that it was easier to prevent harm by stopping the merger before it happened rather than through requiring divestitures after companies had already combined.<sup>12</sup>

Neither the text nor history of the statute suggests that the law was designed instead to give merging parties finality in exchange for providing advance notice. The text makes it clear that the failure of the FTC or DOJ to act at the end of any HSR deadline does not bar the agencies from taking enforcement action later.<sup>13</sup> Congress also made it clear that the HSR Act was a procedural statute that did not impact the substantive length and breadth of Section 7 of the Clayton Act.<sup>14</sup> Indeed, the bulk of the business opposition to the premerger notification program was directed at the Senate's initial version, which gave the antitrust agencies an automatic injunction should they file a challenge to the deal in federal court. Once that automatic injunction aspect of the program was removed by its sponsors, business opposition to the premerger notification program dissipated.<sup>15</sup>

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<sup>10</sup> Of course, the fact that a pre-consummation warning letter is not issued does not preclude the agencies from initiating an enforcement action after the expiration of any HSR deadline.

<sup>11</sup> 15 U.S.C. § 18(a)(i)(1) (“Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.”).

<sup>12</sup> Lawmakers noted that the average post-acquisition merger case took five to six years to resolve during which time “the acquiring firm retain[ed] the illegal profits and other fruits of the acquisition, and its anticompetitive effects pervade[d] the marketplace, injuring competitors and consumers alike.” H.R. Rep. No. 1373, 94th Cong., 2d Sess., at 9 (1976) (“House Report”); S. Rep. No. 803, 94th Cong. 2d Sess., at 61 (1976) (“Senate Report”). One major problem was the “midnight merger” that took place before the agencies found out about it. House Report at 10; Senate Report at 64-65.

<sup>13</sup> 15 U.S.C. § 18(a)(i)(1).

<sup>14</sup> House Report at 5 (“The bill in no way alters the substantive legal standard of Section 7”).

<sup>15</sup> Irving Scher, *Emerging Issues under the Antitrust Improvements Act of 1976*, 77 COL. L. REV. 679, 694. Additionally, most of the ongoing opposition to the entire HSR Act was not with the premerger notification program itself, but rather the wholly unrelated *parens patrie* provisions in another title of the Act, which gave States the ability to file suit in federal court to challenge violations of the Sherman and Clayton Acts that harmed their citizenry. The papers of President Gerald R. Ford, who signed the HSR Act into law, confirm that Title III of the HSR Act, which authorized State attorneys general to file “*parens patrie*” suits in Federal courts to recover damages

When crafting the HSR Act, Congress could not have foreseen the exponential increase in the number of deals the agencies would be reviewing. The House Report for the HSR Act estimated that the statute would “require[e] advance notice” for approximately “the largest 150 mergers annually.”<sup>16</sup> Today, the agencies routinely receive 150 filings every two weeks. While the FTC is seeking to adjust its procedures accordingly, legislative updates that reflect these new market realities would also help ensure that the core purpose of premerger review—to equip antitrust enforcers to identify and challenge unlawful mergers prior to consummation—is still being realized. Congressional action to increase merger-filing fees for larger transactions and annually adjust them, as the law requires for filing thresholds, would also help ensure that our merger processes are keeping pace with the growth of the U.S. economy and that our resources increase alongside booms in large deal-making.

The Commission continues to review its merger processes to ensure we are making efficient use of scarce resources and minimizing the risk of overlooking unlawful deals. Additional reforms the FTC has recently instituted include returning the agency to its practice of including prior approval provisions in merger settlements, which may help deter unlawful transactions while also conserving agency resources.<sup>17</sup> Lastly, we are assessing whether procedures previously adopted may unduly constrain staff’s ability to obtain information during merger inquiries and how we can best empower staff to pursue comprehensive investigations.<sup>18</sup>

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incurred by the State’s residents as a result of federal antitrust provisions of the Sherman Act, was the source of most of the controversy. *See* Memorandum from Jim Cannon to President Gerald R. Ford Regarding the Enrolled Bill H.R. 8532 – Hart-Scott-Rodino Antitrust Improvements Act of 1976, at 1 (Sept. 29, 1976) (on file with the Gerald R. Ford Presidential Library). President Ford did “not object[.]” to the premerger notification title “since Congress dropped a provision for an automatic injunction against the consummation of mergers and acquisitions.” *Id.* at 2. *See also* Memorandum from Paul H. O’Neill, Acting Dir. Off. Budget Mgmt. to President Gerald R. Ford Regarding Enrolled Bill H.R. 8532 – Hart-Scott-Rodino Antitrust Improvements Act of 1976, at 4 (Sept. 23, 1976) (on file with the Gerald R. Ford Presidential Library) (“Due to strong opposition by the Administration and others, a provision in earlier versions of the legislation that would have provided for an automatic injunction against the consummation of mergers and acquisitions by Federal enforcement authorities was deleted. The Administration has not objected to this title of the bill since that provision was dropped.”). *See also* Letter from John J. Rhodes, Senator, Minority Leader to President Gerald R. Ford, at 1 (Sept. 27, 1976) (on file with the Gerald R. Ford Presidential Library) (“The premerger notification and civil investigative demand titles are not in controversy”).

<sup>16</sup> House Report at 11.

<sup>17</sup> Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions, FTC File No. P859910 (July 21, 2021), <https://www.ftc.gov/public-statements/2021/07/remarks-chair-lina-m-khan-regarding-proposed-rescission-1995-policy>; *see also* Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders, 60 Fed. Reg. 39746-47 (Aug. 3, 1995) (noting that the prior approval requirement is a “simple, direct and limited remedy to prevent recurrence of unlawful acquisitions” and that it “benefits the Commission by conserving public law enforcement dollars” and “may deter unlawful acquisitions.”).

<sup>18</sup> *See, e.g.,* Holly Vedova, *Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave*, FED. TRADE COMM’N (Sept. 28, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined> (noting the FTC will as a general matter no longer permit partial privilege logs); Reforms to the Merger Review Process, Announcement by Deborah Platt Majoras, FTC Chairwoman (Feb. 16, 2006), <https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf> (instituting cap of no more than 35 top management officials whose documents could be obtained by staff).

Our dissenting colleagues’ suggestion that these changes place the FTC wildly out of sync with the Justice Department’s practices is belied by the facts.<sup>19</sup> Indeed, several of our recent changes have brought the FTC in *closer* alignment with DOJ’s existing practices. For example, the Department of Justice routinely has barred merging parties from reacquiring assets ordered to be divested.<sup>20</sup> The FTC, by contrast, used no such bar as a general matter; our recent action to return the FTC to its practice of requiring prior approval provisions for these assets now brings the FTC and DOJ in closer alignment. Other changes to our investigative process—including requirements that companies under investigation provide information on their use of e-discovery tools and submit full privilege logs—similarly track practices DOJ has already had in place.<sup>21</sup> Moreover, construing any recent inaction or lack of policy change at the Antitrust Division as evidence of disagreement with reforms we have instituted at the FTC seems shortsighted, given that the Division is still awaiting the appointment of its new leadership.

Amid growing public recognition<sup>22</sup> that significant consolidation has undermined open and competitive markets, significantly harming Americans, including through raising prices, lowering wages, exacerbating racial disparities, and sapping investment,<sup>23</sup> it is incumbent on antitrust enforcers to redouble our commitment to policing mergers and fulfilling our statutory mandate to halt unlawful deals—whether prior to consummation or after the fact as resources allow. Despite significant constraints and challenges, the FTC will continue to review and reform its processes to ensure we are best positioned to meet these goals.

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<sup>19</sup> It’s also worth recalling that the FTC and DOJ have overlapping but not identical legal authorities and areas of institutional expertise.

<sup>20</sup> *See, e.g.*, Proposed Final Judgment, *United States v. Zen-Noth Grain Corp. et al.*, No. 1:21-cv-01482 § XII (Limitations on Reacquisitions) (D.D.C. filed June 1, 2021).

<sup>21</sup> Vedova, *supra* note 18.

<sup>22</sup> *See, e.g.*, Exec. Order No. 14,036, Promoting Competition in the American Economy § 1 (July 9, 2021) (“Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.”).

<sup>23</sup> *See, e.g.*, José A. Azar et al., *Concentration in US Labor Markets* 13 (Nat’l Bureau of Econ. Res., Working Paper No. 24395, 2018); Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. Fin. 2421, 2422 - 45, 48 (2020); Jan De Loecker et al., *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. ECON. 561, 644 (2020); Germán Gutiérrez & Thomas Philippon, *Investmentless Growth: An Empirical Investigation*, BROOKINGS PAPER ON ECON. ACTIVITY 89, 95–97 (2017); Darrick Hamilton & Madeline Neighly, *The Racial Rules of Corporate Power: How Extractive Corporate Power Harms Black and Brown Communities and How Race-Conscious Solutions Can Create an Inclusive Economy*, ROOSEVELT INST. (Nov. 2019); Ted Tatos & Hal Singer, *Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard*, ANTITRUST BULL. (Oct. 2021).