



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

**CONCURRING STATEMENT OF
COMMISSIONER REBECCA KELLY SLAUGHTER
JOINED BY CHAIR LINA M. KHAN**
Regarding the 2022 Revised Clayton Act Thresholds

Commission File No. P859910
January 24, 2022

Every year, as mandated by the Hart Scott Rodino Act, the Federal Trade Commission adjusts the merger-reporting thresholds according to the annual change in the level of gross national product.¹ Yet, despite the historic merger wave, the DOJ and FTC will continue to collect filing fees under the exact same fee scale that was enacted in 2001 because annual adjustment of fees is not included in the statute. This means that even as the largest mergers and merger investigations have increased in size and complexity, the per-transaction filing fees have remained stagnant.

When mapping the adjusted thresholds to this outdated fee schedule, the statutory filing fee this year for a transaction over \$1 billion is the same as what it was for a \$500 million merger in 2002—\$280,000.² Yet very large mergers make up a significant part of our resource-intensive work. In FY 2020, 234 transactions reported to the FTC and DOJ exceeded one billion dollars and these transactions represented nearly 31% of the Second Requests issued by the agencies. In total, the FTC and DOJ received 400 transactions valued between \$500 million and \$1 billion, representing another 31% of the Second Requests issued.³

We continue to strongly support efforts in Congress, led by Senators Klobuchar and Grassley, to increase merger filing fees for large transactions and to require annual adjustments to ensure that they keep pace with the ongoing merger wave and growth of the U.S. economy more broadly.⁴ Last year, this legislation passed the full Senate and the House version of the bill, introduced by Representatives Neguse and Spartz, passed the Judiciary Committee with broad bipartisan

¹ Hart-Scott-Rodino Antitrust Improvements Act of 1976. In 2000, Congress set the filing thresholds at \$50 million and required that the amount be adjusted annually. Every year the FTC make these adjustments, with this year's increasing to \$101 million from last year's \$92 million.

² Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541, *available at* <https://www.federalregister.gov/documents/2022/01/24/2022-01214/revised-jurisdictional-thresholds-for-section-7a-of-the-clayton-act>.

³ FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2020 Exh. A, Tbl. 1, Tbl IV (2021), https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf.

⁴ Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Concurring Statement Joined by Commissioner Rohit Chopra, Regarding the Revised Clayton Act Thresholds, File No. P859910 (Feb. 5, 2021). https://www.ftc.gov/system/files/documents/public_statements/1587163/p859910_concurring_statement_of_ac_slaughter_and_c_chopra_re_revised_hsr_thresholds.pdf; *see also* Merger Filing Fee Modernization Act of 2021, S. 228, 117th Cong. (1st Sess. 2021), <https://www.congress.gov/bill/117th-congress/senate-bill/228/text>.

support.⁵ We hope that this technical and common-sense change can be quickly approved and enacted.

A statutory increase in merger filing fees should be coupled with an increase in funding.⁶ We are extremely grateful for the funding increases Congress has provided to the FTC over the past two fiscal years and proposed in the FY 2023 spending bills. However, even with these increases, it has been a challenge to fully resource the FTC's competition mission, especially merger review.⁷ In fiscal year 2021, an astounding 3,644 transactions were reported to the FTC and DOJ. That's about 87% more than the average number of transactions reported over the past five years.⁸ Our staff has worked tirelessly to meet the enormous demand of our merger review mandate and we are all indebted to them for this extraordinary effort. Yet, our FTE count remains well below what is needed to meet this challenge.⁹

In addition, facets of the HSR Act are ripe for revisiting. The short 30-day window the agencies are given to determine whether a deal warrants close investigation and the 30-day timeline imposed on the agencies after parties certify they have "substantially complied" with the inquiry have not kept pace with the increased volume and complexity of transactions and their related data and documents since passage of the HSR Act in 1976. This misalignment, coupled with the agency's resource limitations, imposes further strain on the agency's ability to scrutinize potentially anticompetitive transactions.¹⁰

We look forward to working with Congress on addressing the FTC's funding needs and updating the merger filing fee schedule and other elements of the HSR process.

⁵ United States Innovation and Competition Act of 2021, S. 1260, 117th Congress (1st Sess. 2021) <https://www.congress.gov/117/bills/s1260/BILLS-117s1260es.pdf>; Merger Filing Fee Modernization Act of 2021, H.R. 3842, 117th Congress (1st Sess. 2021) <https://www.congress.gov/bill/117th-congress/house-bill/3843/text?r=61&s=1>.

⁶ See Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 15 (1st Sess. 2021) (increasing Congressional appropriations to the FTC by \$300 million).

⁷ Nearly 70 percent of full-time employees in the Bureau of Competition, as well as many competition attorneys in the regional offices and elsewhere at the agency, focused on mergers in FY 2021.

⁸ FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2020, *supra* note 3; FTC Premerger Notification Program, HSR Transactions by Month <https://www.ftc.gov/enforcement/premerger-notification-program>.

⁹ Chair Lina M. Khan, Federal Trade Commission, Concurring Statement Joined by Comm'r Slaughter, Regarding FY 2020 HSR Report, File No. P110014 (November 8, 2021). https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf

¹⁰ *Id.*