UNITED STATES OF AMERICA

Federal Trade Commission

Prepared Remarks

DISPARATE IMPACT: WINNERS AND LOSERS FROM THE NEW M&A POLICY

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Federal Trade Commission

Eighth Annual Berkeley Spring Forum on M&A and the Boardroom
San Francisco, CA
Wednesday, April 27, 2022

Thanks, Jan, for the kind introduction, and our hosts, Berkeley Law's Center for Law and Business and Freshfields, for the invitation to be here. My last work trip before the pandemic was to the Bay Area, and it's good to be back.

This year's Berkeley Forum comes at a critical time, just over one year into an administration as hostile to mergers and acquisitions (M&A) as any in my lifetime. This is perhaps a good place to remind all of you that my remarks are my own and do not necessarily reflect the view of the Federal Trade Commission (FTC) or my fellow commissioners.

But back to M&A policy. The traditional view of M&A (to which I subscribe) is that it is part of the way that companies grow (or shrink) and evolve, as assets move to the users that value them most highly. This market, which Henry Manne dubbed the "market for corporate control", also disciplines management and encourages competition.[1] Under this framework, the role of the antitrust enforcer is to determine which deals present threats to

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[1] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Opening Keynote 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.

competition, block or remedy them, and—in keeping with Ronald Coase[2]—otherwise reduce transaction costs and minimize distortions to the market.

But to the new leadership at the antitrust agencies and their fellow travelers, that view is anathema. Their view of M&A boils down to three ideas. *First*, M&A generally produces little social value and a great deal of social cost.[3] *Second*, the costs include a wide swath of ills including lessened competition but also disadvantaged labor,[4] inflation,[5] and undermined democracy.[6] You name the problem, and there's a good chance some prominent

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[2] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[3] *See*, *e.g.*, Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks Regarding the Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("While the current merger boom has delivered massive fees for investment banks, evidence suggests that many Americans historically have lost out, with diminished opportunity, higher prices, lower wages, and lagging innovation."); U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement 2 (Jan. 18, 2022), https://www.regulations.gov/document/FTC-2022-0003-0001 ("Finally, the agencies seek specific examples of mergers that have harmed competition, with descriptions of how the merger harmed competition, including how those mergers made it more difficult for customers, workers, or suppliers to work with the merged firm or competitors of the merged firm or made it more difficult for rivals to compete with the merged firm."); Sandeep Vaheesan, *Merger Policy for a Fair Economy*, LPE PROJECT BLOG (Apr. 5, 2022), https://lpeproject.org/blog/merger-policy-for-a-fair-economy/; Sanjukta Paul, *A Democratic Vision for Antitrust*, DISSENT (Winter 2022), https://www.dissentmagazine.org/article/a-democratic-vision-for-antitrust.

[4] *See*, *e.g.*, Marshall Steinbaum, *A Missing Link: The Role of Antitrust Law in Rectifying Employer Power in Our High-Profit, Low-Wage Economy*, ROOSEVELT INST. (Apr. 16, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Missing-Link-Monopsony-brief-201804.pdf; BARRY C. LYNN, ANTITRUST: A MISSING KEY TO PROSPERITY, OPPORTUNITY, AND DEMOCRACY 13 (New Am. Oct. 2, 2013), https://d1y8sb8igg2f8e.cloudfront.net/documents/Antitrust.pdf.

[5] *See*, *e.g.*, Elizabeth Warren (@SenWarren), TWITTER (Mar. 1, 2022, 9:47 PM), https://twitter.com/senwarren/status/1498852508487331850; Elizabeth Warren (@SenWarren), TWITTER (Jan. 3, 2022, 12:13 PM), https://twitter.com/SenWarren/status/1478051819255382022; *CNBC Transcript: Federal Trade Commission Chair Lina Khan Speaks Exclusively with Andrew Ross Sorkin and Kara Swisher Live from Washington, D.C. Today*, CNBC (Jan. 19, 2022, 12:30 PM), https://www.cnbc.com/2022/01/19/cnbc-transcript-federal-trade-commission-chair-lina-khan-speaks-exclusively-with-andrew-ross-sorkin-and-kara-swisher-live-from-washington-dc-today.html.

[6] *See*, *e.g.*, Zephyr Teachout, *Mega-mergers like AT&T and Time Warner crush American democracy*, GUARDIAN (Jun. 13, 2018, 6:00 AM EDT), https://www.theguardian.com/commentisfree/2018/jun/13/mega-mergers-att-time-warner-crush-american-democracy.

antitrust-reform Progressive has blamed it on M&A.[7] *Third*, M&A is a privilege granted to companies by the government, rather than a natural part of commerce.[8]

Much of the change to merger policy over the last fifteen months is taking place in the context of merger review under the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976. If you share the hostile view of mergers to which antitrust reformers subscribe, then HSR—a process Congress designed to help agencies spot and address ahead of time deals that lessen competition—looks more like an opportunity to slow or stop M&A activity in general. And the latter, what I've called elsewhere the "repeal of Hart-Scott-Rodino,"[9] is exactly what we are seeing. Using HSR this way has several benefits:

> *First*, it allows you to talk about it, broadcasting hostility to M&A that has a positive branding effect for enforcers and may also have some deterrent effect for M&A;
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> *Second*, you can sow uncertainty and run up the cost of getting deals done, taxing M&A and making the market for corporate control less efficient;
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> *Third*, these strategies can be accomplished without courts; and
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> *Fourth*, it shields enforcers from political accountability for enabling M&A.

These "features" explain the merger control policies adopted over the last fifteen months that together constitute the only real novelty thus far in the Biden Administration's approach to M&A. The changes are not particularly well-calibrated to make antitrust enforcement more efficient or effective, and indeed—as Jan's faithful reporting on Twitter of actual merger enforcement statistics shows—it has not been.[10]

Like all policy, the new M&A policies being deployed by the agencies include tradeoffs. And one such tradeoff, I think, deserves particular notice. *Contra* the professed

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[7] *See*, *e.g.*, Tim Wu, Opinion, *A Corporate Merger Cost Us Ventilators*, N.Y. TIMES, Apr. 12, 2020, at A23.

[8] *See*, *e.g.*, Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HARV. L. SCH. ANTITRUST ASSOC. BLOG (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/.

[9] Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, GLOB. COMPETITION REV. (Oct. 6, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/the-repeal-of-hart-scott-rodino.

[10] *See* Jan Rybnicek (@jmrybnicek), TWITTER (Apr. 22, 2022, 10:25 AM), https://twitter.com/jmrybnicek/status/1517509986787672065 (showing that the rate of merger challenges under the Biden Administration is the same as or lower than the rate under the Trump Administration); *see also* Noah J. Phillips (@FTCPhillips), TWITTER (Sep. 30, 2021, 3:00 PM), https://twitter.com/FTCPhillips/status/1443652046893223938 (showing the dramatic drop in merger enforcement after Biden Administration came into office).

goals of Progressive antitrust reformers, to rein in the biggest companies, the gratuitous taxes on M&A being imposed by the antitrust agencies are regressive, hitting smaller companies the hardest. Policies designed in the name of "anti-monopoly" are disproportionately taxing companies that few would consider monopolies, making it harder for them to compete.

Taxing M&A

How are the agencies taxing M&A? Antitrust enforcement over the last fifteen months has been anything but vigorous—indeed, it has been sclerotic. By that I mean not just fewer cases being brought, but a longer process with fewer decisions being made.[11]

The merger review process is already expensive. Merging parties typically end up paying hefty sums in attorney and consultant fees, not to mention the time spent internally to comply with agencies demands. One study estimated the median cost of Second Request compliance at $4.3 million.[12] That is separate and apart from the up-front expense of negotiating deals and conducting due diligence. Full-phase merger investigations can last from several months to a year or more. Unanticipated delays can impose costs beyond fees and distraction, like having to extend deal financing or losing key employees and customers—or even losing out on the deal.

While supporters of agency leadership cheer what they hope will be a deterrent to merging generally, these kinds of costs are felt more heavily by smaller firms. And that disadvantages them relative to larger ones, to whom the costs look more like a rounding error. The fact is that mergers are a way for smaller firms to join forces to compete more effectively and efficiently against larger rivals. Combining can put financially struggling firms on firmer footing, or improve the terms on which they can borrow to grow their business. Advisers to traditional retail grocers on M&A made a recent submission detailing how competition from the Amazons and Wal-Marts of the world was leading investors to

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[11] *Compare* DECHERT LLP, DAMITT Q1 2022: SIGNIFICANT MERGER INVESTIGATIONS FACE STEEPER HURDLES TO SETTLEMENT (Apr. 21, 2022), https://www.dechert.com/knowledge/publication/2022/4/damitt-q1-2022--significant-merger-investigations-face-steeper-h.html (reporting the average duration of significant U.S. antitrust merger investigations as 12.9 months in Q1 2022), *with* DECHERT LLP, DAMITT Q1 2020: NO COVID-19 IMPACT ON MERGER INVESTIGATIONS . . . YET (Apr. 21, 2020), https://www.dechert.com/knowledge/publication/2020/4/damitt-q1-2020--no-impact-from-covid-19---yet.html (average duration of 11.1 months in Q1 2020).

[12] Peter Boberg & Andrew Dick, *Findings From the Second Request Compliance Burden Survey*, THRESHOLD: NEWSLETTER OF THE MERGERS & ACQUISITIONS COMM. (Am. Bar Assoc. Section on Antitrust L.), Summer 2014, at 26, 33, https://media.crai.com/wp-content/uploads/2020/09/16164357/Threshold-Summer-2014-Issue.pdf. Granted, some of the deals in the sample were quite large, but even half the median—$2 million—is a big outlay for a small-to-medium-sized business. And the smaller you are, the harder it is to spend that kind of money.

flee traditional grocers, resulting in lessened investment, store closing, and bankruptcy.[13] While those hostile to M&A might discount this narrative, antitrust reformers have not been shy about basing their criticism of Amazon and Wal-Mart on the challenges faced by precisely these smaller kinds of companies.[14] If growth by M&A is deterred substantially, why would anyone believe that the giants would be the most hamstrung?

Beyond the drawn-out process, the Commission has adopted several policies openly taxing M&A in a way that does nothing for competition and also disparately impacts smaller players.

Early Termination

In the early days of the Biden Administration, FTC leadership suspended early termination ("ET") of the initial HSR waiting period. ET is reserved for transactions that raise no apparent competitive concerns. The FTC told the public that it expected the suspension to be "temporary" and "brief", and justified it by citing the change in administrations and an "unprecedented volume of HSR filings for the start of a fiscal year".[15] That didn't make sense then. The uptick in filings had started long before, and the agency had not only managed it but prosecuted—under Chair Joe Simons—the most prolific merger enforcement in decades.[16] And presidential transition was nothing new. The justifications make even less sense now, over a year since the "temporary" and "brief" termination began. The number of HSR filings had *already dropped* 70% from the 2020

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[13] Letter from Scott Moses, Head of Grocery, Pharmacy & Rest. Inv. Banking, Solomon Partners, and Scott Sher, Member, Wilson Sonsini Goodrich & Rosati PC, to U.S. Dep't of Justice and Fed. Trade Comm'n 6-22 (Apr. 19, 2022) (on file with author).

[14] *See*, *e.g.*, Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 773-74, 780 (2017); Luke Gannon & Stacy Mitchell, *On Pitchfork Economics: How Walmart Gutted Communities*, INST. FOR LOCAL SELF-RELIANCE (Oct. 28, 2021), https://ilsr.org/monopolies-and-the-policies-that-favor-them-have-gutted-rural-and-urban-communities/.

[15] Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

[16] *Reviving Competition Part 3: Strengthening the Laws to Address Monopoly Power Before the H. Subcomm. on Antitrust, Com., and Admin L.*, 117th Cong. 1 (Mar. 18, 2021) (prepared statement of Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1588324/final_formatted_prepared_statement_of_ftc_commissioner_noah_joshua_phillips_march_18_2021_hearing.pdf.

peak when the suspension went into effect,[17] and the Administration came into office more than a year ago.

The suspension of ET continues to delay what are, *by definition*, competitively innocuous deals. It is using the HSR process not to protect competition but rather just to tax M&A. These deals can help Americans, even save lives. The day before announcing the suspension, the Commission granted ET to Thermo Fisher's acquisition of Mesa Biotech.[18] The small biotech company had developed an innovative rapid-PCR-testing platform for the novel coronavirus, and combining it with Thermo Fisher's resources, scale, and distribution would better meet then-exploding demand for testing.[19] With America and the world struggling through the pandemic, the grant of ET just 24 hours before the suspension took effect was good for the public—and awfully convenient for the FTC when one considers the negative PR from holding up a deal that stood to improve COVID screening. This incident not only belies the misguided assumption that M&A offers nothing of value, it demonstrates that those impacted by anti-M&A policies are not just giant monopolies, but often small companies . . . and people who need help.

Ending ET accomplishes nothing for competition and nothing good for M&A. But there is another thing worth noting. By never granting ET, we, as enforcers, cannot be accused of "permitting" the deal. More on that soon.

Prior Approval

Another example of gratuitously taxing M&A is the new Commission policy on prior approvals, adopted in October with the zombie vote of former Commissioner Rohit Chopra.[20] Under this policy, all consents require Commission prior approval for future

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[17] Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Indefinite Suspension of Early Terminations 1 (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[18] Fed. Trade Comm'n, Notice of Early Termination, 20210958: Thermo Fisher Scientific Inc.; Mesa Biotech, Inc. (Feb. 3, 2021), https://www.ftc.gov/legal-library/browse/early-termination-notices/20210958.

[19] Bruce Japsen, *Thermo Fisher To Buy Covid-19 Test Maker Mesa Biotech For $450 Million*, FORBES (Jan. 19, 2021, 8:52 AM), https://www.forbes.com/sites/brucejapsen/2021/01/19/thermo-fisher-to-buy-covid-19-test-maker-mesa-biotech-for-450-million/?sh=556735535d82; Joe C. Matthew, *COVID-19: Thermo Fisher to introduce point-of-care RT-PCR test in India*, BUSINESS TODAY (Jun. 15, 2021, 7:34 PM), https://www.businesstoday.in/latest/economy-politics/story/covid-19-thermo-fisher-to-introduce-point-of-care-rtpcr-test-in-india-298757-2021-06-15.

[20] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders 1 (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf.

transactions both by merging parties and divestiture buyers for 10 years. The Commission also threatens to impose restrictions for markets not at issue in the transaction.[21] The new policy warns merging parties that they are more likely to be slapped with prior approval provisions if they substantially comply with the FTC's compulsory requests in a full phase investigation. In marginally less ominous language, the Commission is saying: give up and don't make us investigate your merger, or we'll make you pay.[22] The Commission also holds out the prospect of pursuing prior approval remedies even after parties drop the offending deal, the precise embarrassing and wasteful conduct that led the agency to adopt a policy limiting prior approval requests in 1995.[23]

Giving the Commission a veto over future M&A and all the time it wants to render it imposes significant obligations on merging parties, and innocent divestiture buyers. It slows and chills future M&A activity whether it lessens competition or not. Perhaps those hostile to M&A rest easier now that Hikma Pharmaceuticals, a $2 billion generic drug manufacturer, cannot buy another injectable skin steroid without permission.[24] They are surely relieved that 30-employee XCL Energy cannot buy more land to drill in Utah without government approval.[25] But these two are hardly Pfizer and ExxonMobil. And say what you will, but requiring Price Chopper and Tops to obtain the FTC's permission before acquiring a supermarket in Vermont or upstate New York for the next 10 years is probably not keeping Amazon executives up at night.[26]

Meanwhile, after years of rhetoric claiming that antitrust enforcers are falling down on the job by insinuating that every large pharmaceutical deal or purchase by a large tech company must, somehow, be anticompetitive and unresolvable, are we not supposed to notice AstraZeneca's $39 billion acquisition of Alexion Pharmaceuticals,[27] Merck's $11.5

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[21] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[22] *Id.* at 2 ("This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.")

[23] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 4 n. 14.

[24] Decision & Order at 6, Hikma Pharmaceuticals/Custopharm, File No. 221-0001, Docket No. C-4762 (F.T.C. Apr. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/2210002C4762HikmaCustopharmOrder.pdf.

[25] Decision & Order at 19, EnCap/EP Energy, File No. 211-0158, Docket No. C-4760 (F.T.C. Mar. 25, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110158-encapep-energy-matter.

[26] Decision & Order at 19, Price Chopper/Tops Markets, File No. 211-0002, Docket No. C-4753 (F.T.C. Jan. 24, 2022), https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0002-price-choppertops-markets-matter.

[27] Noah Higgins-Dunn, *AstraZeneca closes mega $39B Alexion buyout despite antitrust fears, making a splash in rare diseases*, FIERCE PHARMA (July 21, 2021), https://www.fiercepharma.com/pharma/astrazeneca-closes-mega-

billion acquisition of Acceleron Pharma,[28] and Facebook's $1 billion acquisition of Kustomer,[29] each of which went through without any prior approval or other kind of obligation?[30]

Smaller companies are more likely to accede to prior approval requirements because they have less leverage and often need the deal more, and with a prior approval obligation their ability to engage in M&A will be less than their larger competitors. That is a competitive disadvantage to larger rivals.

And let's not forget the divestiture buyers. We are punishing the companies (often smaller ones) that have done nothing but step up to help resolve a competitive concern. This is what Commissioner Wilson and I dubbed "bonkers crazy".[31]

Who does all of this help? One answer, as with the termination of ET, is agency heads who do not wish to be associated with "clearing" mergers. Prior approval requirements deter consents, not mergers. Among other things, they scare off better buyers of assets. Without a consent, there is nothing for enforcers to approve. Sure, this strategy probably will push a few otherwise settleable matters into expensive, uncertain litigation and force staff to review prior approval applications for transactions that would not otherwise merit investigation. Fine, companies will fix it first. And, yes, the agencies will be

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39b-alexion-buyout-despite-antitrust-fears-making-a-splash-rare; Charley Grant, *Post Covid-19, Don't Forget About Healthcare Stocks*, WALL ST. J. (Apr. 19, 2021), https://www.wsj.com/articles/post-covid-19-dont-forget-about-healthcare-stocks-11618830180 ("U.S. regulators gave the green light to drugmaker AstraZeneca's AZN 1.29% planned acquisition of Alexion Pharmaceuticals, which was earlier than investors had expected. Alexion shares shot higher in response.").

[28] CNBC, *Merck to buy Acceleron for about $11.5 billion in rare-disease drugs push* (Sept. 30, 2021), https://www.cnbc.com/2021/09/30/merck-to-buy-drugmaker-acceleron-for-about-11point5-billion.html ("Merck is buying Acceleron Pharma for about $11.5 billion, broadening its portfolio beyond aging cancer drug Keytruda with potential treatments that could bring in fresh revenue. The deal gives Merck access to Acceleron's rare disease drug candidate, sotatercept, which the company expects to be a multi-billion dollar peak sales opportunity, and comes as Keytruda moves toward the loss of market exclusivity in 2028."); Press Release, Merck & Co., Merck Completes Acquisition of Acceleron Pharma Inc. (Nov. 22, 2021), https://www.merck.com/news/merck-completes-acquisition-of-acceleron-pharma-inc/.

[29] Kurt Wagner, *Meta Closes $1 Billion Kustomer Deal After Regulatory Review*, BLOOMBERG (Feb. 15, 2022, 4:30 PM), https://www.bloomberg.com/news/articles/2022-02-15/meta-closes-1-billion-kustomer-deal-after-regulatory-review ("What followed was a lengthy review process, showing that Meta can still complete big acquisitions, just not quickly. The company passed an FTC review and a separate approval by antitrust authorities in the U.K.").

[30] I take no position on whether any of these deals warranted action by the antitrust agencies. I only note them to illustrate the gulf between the Progressives' strong words and their subsequent deeds.

[31] Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips, *supra* note 20, at 6.

less effective and efficient as a result. But at least the leadership will be able to dodge some difficult and unpopular decisions. This is a political benefit, not a policy.

I am very concerned we are going to start seeing deals with divestitures but without consents. There are today murmurings in the private bar that the agencies are refusing to engage on remedies, and instead are conveying their competitive concerns and leaving it up to the merging parties to attempt a resolution. This is fixing it first with a wink and a nod—and no enforceable agreement with the government. As a result, the public loses out on the protections that a consent agreement provides—including, ironically, prior approval policy. Only agency heads, who get to avoid the appearance of blessing mergers, gain. Reading strident dissents about failed remedies for years, it never occurred to me that one solution might be neither blocking nor remediating deals at all.

Pre-Consummation Warning Letters

The final change to merger control I'll highlight is the promiscuous use of pre-consummation warning letters, sometimes called "close-at-your-own-peril letters". The point of HSR is to enable the antitrust agencies to review transactions, and block or remedy the anticompetitive ones, before they are consummated.[32] That is not always possible, of course. If the agencies do not expect to complete their review before the merging parties are free to consummate their deal, they will sometimes issue pre-consummation warning letters that typically inform the parties that the investigation is ongoing, may ultimately find that the merger is illegal, and the parties cannot avoid an enforcement action by consummating now.

When a merger presents legitimate competitive concerns and there is a good reason why the investigation will not be completed in time, I have no objection to issuing such letters. But last August, the Director of the FTC's Bureau of Competition announced a new practice of issuing these letters far more liberally.[33] By my count, of late, the FTC has sent warning letters in at least 60 investigations. Some of those are in matters where we haven't even begun to conduct an investigation. In others, the real investigation is over and we lack

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[32] *See* PREMERGER NOTIFICATION OFF., FED. TRADE COMM'N, INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 1 (Mar. 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

[33] Holly Vedova, Dir., Bureau of Competition, *Adjusting merger review to deal with the surge in merger filings*, FED. TRADE COMM'N COMPETITION MATTERS BLOG (Aug. 3, 2021), https://www.ftc.gov/enforcement/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings.

a reasonable basis to conclude the merger violates the law. But the letters say we're still investigating.

There is a bad government aspect to this. For those matters where we've decided there isn't a competitive issue to address, one of two things must be true. Either we are wasting staff's time and taxpayer dollars on needless investigation, or we are misrepresenting to parties what is really happening.

But to parties trying to make and implement M&A decisions, the result—and, I fear, the goal—is to sow uncertainty about the future. Uncertainty, in turn, discourages post-merger integration and investment. This effect is particularly harmful for small companies, which are more likely than larger firms to need M&A to become more efficient and competitive, and which will have a harder time remaining viable should their merger be unwound. How is that a good thing? Once again, there is a critical benefit to agency heads: because investigations never end, we can never be seen as approving the deals we are investigating.

How is the M&A Tax Working?

If these various M&A taxes have borne fruit as strategies to stop more anticompetitive mergers, those fruit are not apparent. But the disproportionate burdens already are.

Are the big guys running scared? The New York Times' DealBook recently reported that while global M&A is down overall from last year—a natural and predictable corollary of plummeting equity values and rising interest rates—there has been a sharp *increase* in the value and volume of very large deals—i.e., $10 billion or more—"despite increased scrutiny from antitrust regulators and other factors that dampened enthusiasm for smaller deals".[34] If that was the goal in the first place, it is very different from the rhetoric.

Conclusion

Policy involves tradeoffs. In their zeal to tax M&A however they can, especially in ways that courts cannot police, those running the antitrust agencies and their supporters are already inviting perverse consequences. They are driving up costs and sowing uncertainty that disparately impact smaller players, putting them at a competitive

[34] Michael J. de la Merced, *Deal-making took a hit in the first quarter of 2022*, N.Y. TIMES (Apr. 15, 2022, 2:15 PM), https://www.nytimes.com/live/2022/04/01/business/economy-news-inflation-russia#deal-making-took-a-hit-in-the-first-quarter-of-2022.

disadvantage to the biggest companies. And, apart from press releases and avoiding political accountability, what's the payoff?

Everything I have described today involves the process for merger control. But substantive changes are surely coming, as the Antitrust Division of the Department of Justice ("DOJ") and FTC undertake revisions of the merger guidelines. I am not opposed to this project in principle, and I am open to exploring well-supported, administrable changes to the 2010 Guidelines.

But the hostile mentality about M&A responsible for recent process reforms is a bad place to start, and I am concerned that bias is already skewing the Guidelines revisions. The January 18 Request for Information issued jointly by the DOJ and FTC solicits "specific examples of mergers that have harmed competition" but not of mergers that benefited competition. Or consider the "listening forums" undertaken by FTC Chair Lina Khan and Assistant Attorney General Jonathan Kanter, with the ostensible purpose of "hear[ing] from those who have experienced firsthand the effects of mergers and acquisitions beyond antitrust experts." Public sessions are great, but there is no transparency to me or the public about how the presenters—who have uniformly negative things to say—are being selected. This stands in stark contrast to countless past public hearings, where commissioners besides the Chair got input into who would speak.

Even well-crafted policy has unintended consequences. The reforms to the merger process already in place are not well-crafted, so it's little surprise the consequences have not been good. They are doing little for competition, weakening small companies vis-à-vis larger competitors, and serving only to support personal branding and lack of accountability at the agencies. While the RFI process thus far has left much to be desired, the antitrust agencies still have a choice.

Prudence dictates that any new approach to merger enforcement should be warranted by developments in legal and economic analysis, and only after a thorough evaluation of both the administrability and likely impact of that new approach. The process should be transparent. I urge my colleagues and DOJ leadership to proceed with care, and I encourage the public to participate. We've seen too many mistakes already.

Thank you.