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Federal Trade Commission
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Procedural Integrity in the Merger Review Process

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Good afternoon, and thank you all for being here. I would especially like to thank the Bureau of Competition and staff for putting together today's event.

As you've heard today, the issue of litigating the fix has become a bigger challenge for the Agencies in recent years. To address this challenge, it is important to reflect on the problematic policy choice pursued by the Agencies during the Biden administration in its approach to remedies, and corrective steps this Administration has taken to ensure that the premerger review program operates in a manner consistent with Congressional intent underlying the Hart-Scott-Rodino (HSR) Act.

I. Defining "Litigating the Fix"

Litigating the fix refers to the practice of parties proposing remedies during litigation, after the HSR review period has closed and the agency has filed suit to block the transaction. The proposed remedy modifies the transaction the agency challenged, and the court is asked to evaluate the modified transaction rather than the transaction as originally notified.

In some cases, the parties express willingness to discuss remedies during the review period and are rebuffed; in other cases, the parties withhold remedy proposals as a matter of litigation strategy. The defining feature is procedural: the agency must analyze a remedy that was not previously detailed during the HSR process, and it must do so on a litigation timeline, without the investigative tools that would have been available when the transaction was first reported, leaving the court to decide whether to evaluate the transaction on an as-filed or as modified basis.

II. The Posture of the Prior Administration

The prior administration adopted the position that the Agencies should litigate rather than settle.¹ In practice, that meant that whenever the Agencies identified a transaction that appeared problematic based on the parties' merger filings, there was a deliberate policy not to engage on

¹ Margaret Harding McGill, *FTC's New Stance: Litigate, Don't Negotiate*, AXIOS (June 8, 2022), <https://www.axios.com/2022/06/09/ftcs-new-stance-litigate-dont-negotiate-lina-khan>

remedies. The stated rationale was to signal aggressive enforcement and the belief that remedies presumptively do not work.²

That posture produced predictable consequences. Parties who otherwise would have engaged on remedies during the review period had little reason to do so, given that agency leadership had communicated that such engagement would be futile regardless of the specific facts or market realities uncovered during an investigation. Parties who were prepared to propose credible structural fixes were incentivized to hold them in reserve in preparation for responding to an inevitable lawsuit.

The consequences for the premerger review program were easily foreseeable. Investigations became more drawn out. And the agency increasingly found itself litigating transactions the parties were no longer proposing, while the parties presented courts with modified transactions the agency had not been able to evaluate during the review period Congress designed for that purpose.³

These consequences are an important reminder that aggressive enforcement is not the same as aggressive posturing. Any serious enforcement approach must take account of the institutional capabilities of the agency that is doing the enforcing. In the merger context, these include the discovery and evidentiary tools available to the Agencies during the premerger review period, and the agency’s substantial expertise in designing and managing remedies. An enforcement posture that does not make use of those competencies is not more aggressive—it is simply less effective and a rejection of the Congressional mandate that the Agencies use their investigatory and enforcement authority to arrest anticompetitive conduct in its incipiency.

The posture that reflexively favored litigation also left the agency flat-footed in cases that proceeded to court. Rather than take advantage of the premerger review process as the forum to evaluate a proposed remedy in a manner consistent with the HSR statutory regime, the posture created incentives for parties to shield their proposals and to shift the analysis into a litigation proceeding in which the analytical work is harder and the timelines are compressed. The agency ended up analyzing transactions in forms the court would not end up actually evaluating.⁴

This Administration is dealing with the fallout from that reflexive litigation-first posture and the incentives it created for merging parties to use unilateral “fixes” as a litigation tactic.

Some of the fallout is operational. Cases that could have been resolved through negotiated consents with more robust relief instead proceeded to litigation, consuming agency resources that

² Jonathan Kanter, U.S. Assistant Att’y Gen. for the Antitrust Div., Remarks to the N.Y. Bar Ass’n Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york>.

³ See Hugh Hollman, Elaine Johnston & Nicholas Putz, *Parties are More Willing Than Ever to “Litigate the Fix” in the United States*, GLOB. COMPETITION REV. (Oct. 25, 2023), <https://globalcompetitionreview.com/guide/the-guide-merger-remedies-archived/fifth-edition/article/parties-are-more-willing-ever-litigate-the-fix-in-the-united-states>.

⁴ See Eleanor Tyler, *Analysis: How “Litigating the Fix” is Upending Merger Review*, BLOOMBERG L. (May 11, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-how-litigating-the-fix-is-upending-merger-review>.

could have been deployed elsewhere, and allowing proposed “fixes” to proceed with increased execution risk and without the benefit of the Agencies’ expertise in remedy design.

Some of the fallout is doctrinal. Cases involving litigate-the-fix present important legal questions around burden-shifting in merger challenges.⁵ They also raise questions about whether parties who intentionally use unilateral “fixes” as a litigation tactic have complied with their obligations under the HSR Act, given that the statute requires that parties provide the Agencies with documentary materials and information necessary for analyzing the deal the parties presumably intended to consummate when notifying their proposed transaction.⁶

III. Process, Trust, and the Conditions for Effective Enforcement

But I want to focus today on the institutional fallout. One of the most important steps the Agencies can take to address this challenge is to reaffirm their commitment to procedural integrity, which creates a foundation of trust that enables the effective and efficient operation of the premerger review program.

The premerger review program is not about promoting litigation opportunities for their own sake. Prior to the enactment of the HSR Act, there was plenty of merger litigation. But the Agencies nonetheless confronted significant challenges in preventing anticompetitive acquisitions from happening in the first place. It is therefore helpful to recall how Congress sought to address this problem and why the premerger review program was established.

Mergers and acquisitions have long been a central focus of antitrust enforcement since the Sherman Act⁷ was enacted in 1890. But in the immediate decades that followed, experience from cases such as *Standard Oil*⁸ and *American Tobacco*⁹ raised concerns about the effectiveness of challenging deals solely on a post-hoc basis, as significant anticompetitive harms manifested during the intervening years while challenges were pursued.

Section 7 of the Clayton Act,¹⁰ enacted in 1914, reflected Congress’s recognition that acquisitions warranted heightened scrutiny and should be addressed in their incipiency—that is, to prevent acquisitions that presented a reasonable risk of anticompetitive harms and to act before those harms took hold.¹¹ The Celler-Kefauver Amendments in 1950 further strengthened that framework by closing loopholes the Supreme Court had read into Section 7.¹²

⁵ See, e.g., *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1048, 1057 (5th Cir. 2023) (agreeing with Concurring Opinion of Commissioner Christine S. Wilson § II, *In re Illumina, Inc. and GRAIL, Inc.* (Apr. 3, 2023), that the burden of production falls to the defendant to rebut the agency’s prima facie case against the proposed merger).

⁶ 15 U.S.C. § 18a(d)(1).

⁷ 15 U.S.C. §§ 1–38.

⁸ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁹ *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911).

¹⁰ 15 U.S.C. § 18.

¹¹ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 621 (1957) (quoting S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914)).

¹² *Brown Shoe Co. v. United States*, 370 U.S. 294, 314–16 (1962) (discussing the Celler-Kefauver Act, Pub. L. No. 81–899, 64 Stat. 1124).

But even with a strengthened Section 7, the Agencies' enforcement posture remained primarily reactive: a transaction would close, the agency would investigate, and litigation would follow years later, after the merger or acquisition was already consummated. Pursuing challenges to consummated transactions is particularly resource-intensive, given the need to separately establish liability and then devise a remedy, which presents a separate challenge often referred to as "unscrambling the eggs."¹³

The Department of Justice's longstanding litigation involving the El Paso Natural Gas Company is illustrative. It took seventeen years of litigation and eight trips to the Supreme Court before complete relief in the form of divestitures could be achieved.¹⁴

The HSR Act of 1976¹⁵ was Congress's response to that problem. As Congressman Rodino put it on the floor of the House, the case for premerger notification was "startlingly simple"¹⁶: under then existing law, by the time a merger was judged anticompetitive and divestiture ordered, the remedy was typically a costly exercise that took years to litigate and administer. The HSR Act sought to address this problem by requiring advance notification and establishing applicable waiting periods, allowing the Agencies to evaluate proposed transactions before consummation. It also granted the Agencies expanded investigatory powers to conduct their substantive review and authorized the Federal Trade Commission to institute rules allowing the Agencies to request information necessary to determine whether proposed transactions violate the antitrust laws.¹⁷

The use of reporting requirements and expanded investigatory powers was aimed at allowing the Agencies to make enforcement decisions on a complete record, without first allowing anticompetitive harms to manifest. It also enabled the Agencies to save time and resources in bringing enforcement actions since remedies could be addressed upfront without the need to separately address these issues over multiple proceedings that could take years to complete. Put simply, the HSR program exists because addressing competitive concerns before consummation is more efficient and does more to ensure the benefits of competition remain for consumers.

In sum, the HSR Act, in conjunction with the Clayton Act, creates a statutory framework that is preventative. It provides the Agencies with the means to identify and prevent problematic transactions more quickly and effectively, consistent with the Clayton Act's focus on incipiency. Whether an anticompetitive transaction is abandoned, blocked in court, or modified through a remedy to eliminate probable anticompetitive effects, the result is the same: consumers continue to enjoy the benefits of rigorous competition.

The successful operation of the program requires a firm commitment to procedural integrity and ongoing cooperation during the review process. The agency's investigative authority is robust, but the value of that authority depends on a working relationship in which both enforcers and

¹³ William J. Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 830 (1997), <https://www.jstor.org/stable/40843386>.

¹⁴ *Id.* at 827.

¹⁵ Pub. L. No. 94-435, 90 Stat. 1383.

¹⁶ 122 CONG. REC. 25051 (1976) (statement of Rep. Peter Rodino).

¹⁷ See Kelly Signs, *Milestones in FTC History: HSR Act Launches Effective Premerger Review*, FED. TRADE COMM'N: COMPETITION MATTERS (Mar. 16, 2015), <https://www.ftc.gov/enforcement/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective-premerger-review>.

merging parties engage in good faith. A commitment to process is the functional precondition for the program to deliver on the benefits Congress envisioned when enacting the HSR Act.

The litigate-first posture of the prior administration did significant damage to those commitments. It demonstrated that early candor and proposed engagement would be reflexively opposed by leadership, even over the objections of staff and evidence that parties had acted in good faith. The effect of that deliberate policy choice was to place the Agencies in exactly the kind of informational disadvantage the HSR process was designed to prevent. It also led to worse outcomes for consumers by enabling parties to prevail in litigation without the benefit of staff and agency leadership having taken the opportunity to evaluate remedy design through an iterative process far less drawn out than litigation.¹⁸

IV. This Commission’s Approach

This Commission has made it a priority to ensure the efficient operation of the premerger review program and reaffirm core commitments to procedural integrity.

One important aspect of adhering to the rule of law is consistency and predictability in the substantive legal framework that is used to analyze whether mergers and acquisitions as proposed violate the antitrust laws. Indeed, as Chairman Ferguson wisely noted at the time, the decision to keep the existing Merger Guidelines in place was a straightforward expression of that principle.¹⁹

But there is another commitment that is equally important when we talk about the rule of law: due process. It is the principle that an agency’s procedural conduct should be predictable, that parties should know what to expect when they engage in good faith, and that procedural posturing should not be used as a vehicle for generating headlines or discouraging M&A activity writ large.

Different administrations will, of course, pursue different enforcement priorities, and that variation is a legitimate feature of democratic accountability. But the process by which the agency engages with parties should not be the variable that distinguishes one administration from another. Process should not be used as a weapon, and the Agencies’ credibility and effectiveness depend on ensuring that it is not.²⁰

V. Conclusion

The work of restoring the conditions under which the HSR program operates effectively is ongoing. The FTC is doing its part, but these efforts also depend on parties holding up their end

¹⁸ See generally FED. TRADE COMM’N, BUREAU OF COMPETITION, NEGOTIATING MERGER REMEDIES (Jan. 2012), <https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf> (providing guidance for settlement negotiations in a merger case through a structured review process).

¹⁹ Andrew Ferguson, A Conversation with FTC Commissioner Andrew Ferguson Hosted by Alden Abbott, MERCATUS CTR. (June 13, 2024), <https://www.mercatus.org/economic-insights/event-videos/conversation-ftc-commissioner-andrew-ferguson-hosted-alden-abbott> (“Guidelines work best when there’s some stability.”).

²⁰ See Mark Meador, *Antitrust and the Rule of Law*, 9 AM. AFFS. 3, 7–8 (2025).

of the bargain: approaching the Commission early, engaging candidly about competitive concerns, proposing credible buyers, and developing remedy proposals that fully address the harms staff identify. When all sides meet their obligations, the premerger review system works as Congress intended, and American consumers benefit from markets that remain open, competitive, and dynamic.

Thank you.