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Commissioner Noah Joshua Phillips
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Prepared Remarks

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Introduction

Thank you for that introduction, and thanks to the ABA's In-House Section for organizing this event and inviting me to speak.

Antitrust changes are afoot, at the agencies under the Biden Administration, in Congress, and across the Atlantic Ocean. While it is difficult to know what impact the changes will have, or how long they will last, my concern is that they represent an attempt to move the American antitrust regime away from competition and in a direction that will hurt consumers and our market economy. I'm stepping down soon from the FTC, so I'd like to take my time with you to do three things. *First*, I'll reflect briefly on where my agency has been since I came to the Commission. *Next*, I'll share my thoughts about where it is under our new leadership. *Finally*, I'll look ahead at where we will probably go in the near future, and the dangers that I believe await us.

As you've no doubt guessed by now, my remarks today are my own and should not be taken to reflect the views of the Commission or any of my fellow commissioners.

Where We've Been

I joined the Commission in May 2018. What I found was no sleepy backwater, as some would have you think, but a vital combination of law enforcer and think tank staffed by dedicated and knowledgeable professionals, whose tireless efforts enabled the agency to punch well above its unassuming headcount.

In each of FY 2018 and 2019, we filed over 20 merger enforcement actions in a wide range of industries, including healthcare delivery, consumer goods, financial services, pharmaceuticals, energy, medical devices, wholesale distribution, and life sciences.[1] In FY 2020, while adjusting to the pandemic, we brought 28 merger enforcement actions, the highest number since 2001.[2] The FTC was no slouch in challenging anticompetitive conduct either. We sued a health information technology company for allegedly monopolizing two markets related to e-prescriptions, as well as several pharmaceutical companies for allegedly anticompetitive schemes to block generic competition.[3]

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[1] *See* FED. TRADE COMM'N & DEP'T OF JUST. ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT FOR FISCAL YEAR 2018, at 12-18 (Sep. 16, 2019), https://www ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf; FED. TRADE COMM'N & DEP'T OF JUST. ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT FOR FISCAL YEAR 2019, at 13-17 (Jul. 8, 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[2] FED. TRADE COMM'N & DEP'T OF JUST. ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT FOR FISCAL YEAR 2020, at 13 (Nov. 8, 2021), https://www ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf; *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

[3] Press Release, Fed. Trade Comm'n, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), https://www ftc.gov/news-events/news/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription-markets; Press Release, Fed. Trade Comm'n, Reckitt Benckiser Group PLC to Pay $50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone (July 11, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc-charges-company-illegally; Press Release, Fed. Trade Comm'n, FTC Again Charges Endo and Impax with Illegally Preventing Competition in U.S. Market for Oxymorphone ER (Jan. 25, 2021), https://www ftc.gov/news-events/news/press-

In the course of this work, the FTC developed innovative legal theories and confronted issues at the cutting edge of antitrust law. Its challenges to the Illumina/PacBio and P&G/Billie mergers addressed two very different markets, next-generation DNA sequencing systems and women's wet shave razors.[4] But both challenges involved nascent competition that did not yet exist in earnest, but was reasonably likely to materialize.[5] PacBio and Billie were innovative upstarts in their respective markets, and there was ample evidence that each was poised compete meaningfully against the company that sought to acquire it.[6] The elimination of that anticipated competition was at the core of the FTC's competitive effects story in each complaint.[7] By bringing these cases, the Commission showed that the antitrust laws care about, and are sufficiently flexible to account for, competition that lies in the future, not just competition that exists today.

We blocked both mergers,[8] and I give tremendous credit to the agency staff, who do most of the heavy lifting in our work.

releases/2021/01/ftc-again-charges-endo-impax-illegally-preventing-competition-us-market-oxymorphone-er; Press Release, Fed. Trade Comm'n, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life-Saving Drug Daraprim (Jan. 27, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin-shkreli-other-defendants-anticompetitive.

[4] Complaint at ¶¶ 23-30, Illumina Inc./Pacific Biosciences of California, Inc., No. 9387 (F.T.C. Dec. 17, 2019), https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf; Complaint at ¶¶ 17-24, Procter & Gamble Co. and Billie, Inc., No. 9400 (F.T.C. Dec. 8, 2020), https://www.ftc.gov/system/files/documents/cases/d09400_administrative_part_3_complaintpublic600214.pdf.

[5] Illumina/PacBio Complaint, *supra* note 4, at ¶¶ 2, 7, 9; P&G/Billie Complaint, *supra* note 4, at ¶¶ 2, 5.

[6] Illumina/PacBio Complaint, *supra* note 4, at ¶¶ 2-7, 43-45, 56, 61, 68-69; P&G/Billie Complaint, *supra* note 4, at ¶¶ 1-2, 4, 5, 51-61.

[7] Illumina/PacBio Complaint, *supra* note 4, at ¶¶ 67-73; P&G/Billie Complaint, *supra* note 4, at ¶¶ 51-61.

[8] Connor Hale, *Illumina calls it quits after FTC blocks its $1.2B offer for PacBio*, FIERCE BIOTECH (Jan. 3, 2020, 9:22 AM), https://www.fiercebiotech.com/medtech/illumina-calls-it-quits-after-ftc-blocks-its-1-2b-offer-for-pacbio; Staff, *P&G, Billie terminate planned merger after U.S. FTC challenge*, REUTERS (Jan. 5, 2021, 10:25 AM), https://www.reuters.com/article/us-billie-m-a-p-g/pg-billie-terminate-planned-merger-after-u-s-ftc-challenge-idUSKBN29A1RA.

Where We Are

Let's move on to the FTC under the Biden Administration. Some of the story is one of continuity and bipartisanship, with cutting-edge merger cases being filed based on consensus.[9] New leadership can and should be proud of that. There has been one marginal merger challenge which elicited two "no" votes.[10] But, so far, most of the change is in the realm of policy, not enforcement.

Hostility to mergers and acquisitions ("M&A") is a keystone of this 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 for corporate control also disciplines management and encourages competition.[11] Under this framework, the role of the antitrust enforcer is to determine which deals present threats to competition, block or remedy them, and otherwise reduce transaction costs and minimize distortions to the market. That is consistent with the statutory scheme laid out by Congress in the Clayton Act of 1914, the 1950 amendments to it, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR").[12]

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[9] Press Release, Fed. Trade Comm'n, FTC Sues to Block $40 Billion Semiconductor Chip Merger (Dec. 2, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger; Press Release, Fed. Trade Comm'n, FTC Challenges Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail (Mar. 30, 2022), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-challenges-illuminas-proposed-acquisition-cancer-detection-test-maker-grail.

[10] Press Release, Fed. Trade Comm'n, FTC Seeks to Block Virtual Reality Giant Meta's Acquisition of Popular App Creator Within (July 27, 2022), https://www ftc.gov/news-events/news/press-releases/2022/07/ftc-seeks-block-virtual-reality-giant-metas-acquisition-popular-app-creator-within.

[11] 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.

[12] Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914); Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976); FED. TRADE COMM'N PREMERGER NOTIFICATION OFF., INTRODUCTORY GUIDE I: WHAT IS THE PREMERGER NOTIFICATION PROGRAM? 2-3 (revised 2009), https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf.

Many Progressive antitrust reformers take a different, and very negative, view of M&A, based on three fundamental beliefs. *First*, M&A generally produces little social value and a great deal of social cost.[13] *Second*, the costs include a wide swath of ills including lessened competition, but also disadvantaged labor,[14] inflation,[15] and undermined democracy.[16] *Third*, M&A is a privilege granted to companies by the government, rather than a natural part of commerce.[17]

These ideas explain the changes to merger policy over the last 19 months, many of them in the context of merger review under HSR. Congress established the HSR process to help agencies spot and address ahead of time deals that lessen competition. I worry that, now, the Commission is using HSR to tax M&A by

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[13] *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.

[14] *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.

[15] *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.

[16] *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.

[17] *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/.

increasing uncertainty and raising costs.[18] Take our February 2021 suspension of early termination ("ET"), which was supposed to be "temporary" and "brief".[19] The justifications rang hollow then, and even more so today.[20] Suspending ET delays what are, *by definition*, competitively innocuous deals.[21] It accomplishes nothing for competition and nothing good for M&A. Our policies on prior approvals and "close at your own peril" letters are similar in this regard.[22]

Policies almost always involve tradeoffs, and these are no exception. One consequence of how the FTC is running merger control is a disparate burden on smaller companies. Small companies lack scale, and so are more likely than larger

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[18] This approach is what I've called elsewhere the "repeal of Hart-Scott-Rodino". 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.

[19] 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.

[20] For one thing, presidential transition was nothing new to the FTC. For another, the uptick in filings had started long before, and the agency had not only managed it, but accomplished the most prolific merger enforcement in decades. *Reviving Competition Part 3*, *supra* note 2, at 1. And when the suspension went into effect, the number of HSR filings had *already dropped* 70% from the 2020 peak. 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.

[21] These deals can even save lives. The day before announcing the suspension, the Commission granted ET to Thermo Fisher's acquisition of Mesa Biotech. 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. 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. 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. 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 also small companies—and people who need help.

[22] *See* Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Disparate Impact: Winners and Losers from the New M&A Policy, Remarks at the Eighth Annual Berkeley Spring Forum on M&A and the Boardroom 6-10 (Apr. 27, 2022), https://www ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf.

firms to need M&A to become more efficient and competitive.[23] Yet small companies are also more likely to struggle with the additional costs that these policies have introduced to the already expensive HSR process.[24]

Are we achieving deterrence of deals and increased agency efficiency? The big guys don't seem to be 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".[25] As for efficiency, the merger review process is taking longer, with fewer decisions being made.[26]

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[23] 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 flee traditional grocers, resulting in lessened investment, store closings, and bankruptcy. 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). 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. *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/. If growth by M&A is deterred substantially, why would anyone believe that the giants would be the most hamstrung?

[24] 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. 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. 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.

[25] 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.

[26] *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-

And we are not undertaking more merger *enforcement*. We went from 28 merger enforcement actions in FY 2020[27] to 15 in FY 2021, and a majority of these were filed before the Biden Administration came into office.[28] In FY 2022, which ends in ten days, we've brought 19 enforcement actions,[29] a slight uptick from the prior year, but no more than the number brought in any prior fiscal year going back to 2015, despite the fact that the number of merger filings in 2021 and in 2022 was significantly higher than in any of those prior years.[30] I don't for a minute doubt my colleagues' commitment to stop as many mergers as they can, but I do wonder about the strategy. (To be clear, while I support vigorous enforcement of the antitrust laws, I also disagree with their view of the impact of M&A on society.) I worry the net result will include pushing a few otherwise settleable matters into expensive, uncertain litigation; forcing staff to review prior approval applications for transactions that would not otherwise merit investigation; companies "fixing it first"; and, ultimately, an agency that is less effective and efficient than it needs to be.

Where We Are Going

Where are we going? When my kids ask this, I just quote Elsa in Frozen II and say "into the unknown". But we know a little about two projects intended to

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).

[27] FED. TRADE COMM'N & DEP'T OF JUST. ANTITRUST DIV., *supra* note 2, at 13.

[28] Compiled based on a review of FTC press releases announcing merger enforcement actions in fiscal year 2021.

[29] Compiled based on a review of FTC press releases announcing merger enforcement actions in fiscal year 2022.

[30] *See generally* Fed. Trade Comm'n Premerger Notification Program, *HSR Transactions by Month*, https:// www ftc.gov/enforcement/premerger-notification-program; Fed. Trade Comm'n, *Annual Competition Reports*, https://www.ftc.gov/policy/reports/annual-competition-reports.

change dramatically the U.S. antitrust regime. The *first* is competition rulemaking at the FTC, and the *second* is new merger guidelines.

Rulemaking on Unfair Methods of Competition

Less than seven months after taking office, President Biden issued an Executive Order titled "Promoting Competition in the American Economy".[31] Among 70-plus initiatives involving multiple federal agencies, some of which I support, it included a call for my agency to promulgate a variety of substantive competition rules pursuant to the FTC Act, Section 5 of which proscribes "unfair methods of competition" (or "UMC"), as well as "unfair or deceptive acts and practices" (or "UDAP").[32] This idea is not new. Eager-beaver agency lawyers came up with it in the early 1960s, Gus Hurwitz wrote about it a eight years ago, and Progressives, including Lina Khan, recently embraced it.[33]

I oppose UMC rulemaking for several reasons.[34] *First*, I don't believe Congress gave the FTC that authority. *Second*, even if Congress did, it would amount to an unconstitutional delegation of legislative power. *Third*, it's a bad idea on a collision course with antitrust law.

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[31] Exec. Order 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

[32] *Id.* at 36,992. Although the Executive Order does not specify whether the specific practices it enumerates should be treated as "unfair or deceptive acts or practices" ("UDAP") or "unfair methods of competition" ("UMC") under Section 5 of the FTC Act, almost all fall squarely into the latter category. The distinction matters, because the FTC's authority to issue UMC rules is highly dubious, while its authority for UDAP rules is well established by both law and practice.

[33] FTC Men's and Boy's Tailored Clothing Rule, 16 C.F.R. § 412 (1968) (repealed in 1994, Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994)); Justin (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. Pitt. L. Rev. 209 (2014); Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. L. 645, 651, 676-78 (2017); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 378 (2020).

[34] *See* Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Remarks at FTC Workshop: Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), https://www ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf; Noah Joshua Phillips, Rules Without Reason, TRUTH ON THE MKT. (May 6, 2022), https://truthonthemarket.com/2022/05/06/rules-without-reason/.

Neither the text nor the structure of the FTC Act support the notion that we can issue rules against anything we deem an "unfair method of competition". Section 6(g) of the FTC Act states that "[t]he Commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter".[35] That is hardly a clear authorization to promulgate broad substantive rules (as opposed to purely procedural ones), and nothing in the structure of the statute supports the idea that it is. The legal basis for claiming substantive rulemaking authority under Section 6(g) is *National Petroleum Refiners Association v. FTC*, a D.C. Circuit case from 1973.[36] But that decision does not hold up under scrutiny, and runs directly counter to modern administrative law jurisprudence.

Consider the Supreme Court's recent decision in *West Virginia v. EPA*.[37] The Court invoked the Major Questions Doctrine to invalidate a far-reaching EPA rule promulgated under the infrequently used Section 111(d) of the Clean Air Act.[38] That doctrine arises out of a line of cases "all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[39] "Extraordinary grants of regulatory authority," the Court explains, "are rarely accomplished through modest words, vague terms, or subtle device[s]."[40] President Biden's Executive Order takes the position that Section 6(g) enables the agency to conduct rulemaking regarding noncompete clauses, competition in major Internet marketplaces, occupational licensing restrictions, repair restrictions, privacy, and pay-for-delay agreements.[41]

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[35] 15 U.S.C. § 46(g) (2018).

[36] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973); Chopra & Khan, *supra* note 33, at 378 (2020) (discussing the D.C. Circuit's opinion).

[37] West Virginia v. EPA, No. 20-1530, slip op. (U.S. June 30, 2022), https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

[38] *Id.* at 20, 31.

[39] *Id.* at 20.

[40] *Id.* at 18 (internal quotations and citations omitted).

[41] Exec. Order, *supra* note 31, at 36,992.

Each of these is a major question on its own. Taken together, they stand for the idea that Section 6(g) gives the FTC virtually limitless regulatory power across the economy. If basing that on Section 6(g)'s vague and pithy language doesn't scream "Major Questions", I'm not sure what does.

Even if Congress intended that—and it didn't—such a broad delegation would be unconstitutional. The non-delegation doctrine, part of the Constitution's separation of powers, requires Congress to provide "an intelligible principle" to guide an agency to which it has delegated rulemaking authority.[42] In *Schechter Poultry v. United States*, the Supreme Court struck down a provision of the National Industrial Recovery Act (NIRA), a New Deal law, that gave the President authority to approve "codes of fair competition".[43] Delegating authority to regulate "unfair methods of competition" is no different.[44]

Also, this UMC rulemaking is just a bad idea. The Major Questions and Non-Delegation doctrines both sound in the idea that, when it comes to exercising a lot of legislative power, that is for Congress. A bare majority of FTC commissioners should not have wholesale control over the American economy.

UMC rulemaking also threatens to clash directly with U.S. antitrust law. Proponents advocate "clear" rules to, in their view, reduce ambiguity, ensure predictability, promote administrability, and conserve resources otherwise spent on

[42] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). As Justice Gorsuch explained in his 2019 dissent in *Gundy v. United States*, condemning unconstitutional delegations of legislative power is "about respecting the people's sovereign choice to vest the legislative power in Congress alone . . . it's about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law". 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting).

[43] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42, 551 (1935). In his concurrence, Justice Cardozo described the NIRA as "delegation running riot". *Id*. at 553 (Cardozo, J., concurring).

[44] Although *Schechter Poultry* explicitly distinguishes Section 5 of the FTC Act from the invalid NIRA provision, what saved the FTC was its *adjudicative* process, in which the Commission, acting as "a quasi judicial body", determines what are unfair methods of competition "in particular instances, upon evidence, in light of particular competitive conditions" via a process of formal complaint, fair notice and hearing, and findings supported by evidence—all subject to judicial review. *Id.* at 532-34. That is different from rulemaking.

case-by-case adjudication.[45] If that means administrative adoption of per se illegality standards, it flies in the face of contemporary antitrust jurisprudence, which has been moving away from per se standards towards the historical "rule of reason" first adopted by the Supreme Court in *Standard Oil.*[46] It was and remains today a fact-specific inquiry.[47] The per se approach, by contrast, involves no weighing of the restraint's procompetitive effects; once proven, a restraint subject to the per se rule is presumed to be unreasonable and illegal. Although certain categories of conduct, such as price fixing and market allocation by competitors,[48] are per se antitrust violations, the Supreme Court has been limiting per se treatment, even overruling some of its per se precedents.[49] Per se rules are reserved

[45] Chopra & Khan, *supra* note 33, at 368 (2020).

[46] Standard Oil Co. v. United States, 221 U.S. 1 (1911). The rule of reason soon became "the prevailing standard of analysis for determining whether an agreement constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act. *See* Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977) ("Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis . . ."). *See also* State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("most antitrust claims are analyzed under a 'rule of reason'"); Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343 (1982) ("we have analyzed most restraints under the so-called 'rule of reason'").

[47] In 1918, Justice Louis Brandeis described the scope of the "rule of reason" inquiry as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[48] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Sealy, Inc., 388 U.S. 350 (1967).

[49] *See*, *e.g.*, *GTE Sylvania*, 433 U.S. at 58-59 (holding that vertical customer and territorial restraints are subject to the rule of reason, overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 441 U.S. 1 (1979) (holding that blanket license issued by a clearinghouse of copyright owners that set a uniform price should be analyzed under the rule of reason); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (holding that per se rule does not apply to all tying arrangements); Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 295 (1985) (holding that per se rule does not apply to all group boycotts); *Khan*, 522 U.S. at 22 (holding that vertical maximum resale price should be analyzed under the rule of reason, overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 907 (2007) (holding that all vertical price restraints should be analyzed under the rule of reason, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911)). It has also demonstrated a reluctance to adopt even a truncated rule-of-reason inquiry, sometimes called "quick look". FTC v. Actavis, Inc., 570 U.S. 136 (2013) (rejecting the FTC's contention that "quick look" should apply to reverse-payment settlements); Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155, 2021 WL 2519036 (2021)

for "conduct that is manifestly anticompetitive" and that "would always or almost always tend to restrict competition and decrease output."[50] If the Commission attempts administratively to adopt per se rules for conduct that is properly considered under the rule of reason, it will run right up against antitrust law itself. Although few would dispute that the FTC Act reaches some conduct *beyond* the Sherman Act, that is not a license to apply per se treatment to conduct *within* the Sherman Act's scope that courts have held to be subject to the rule of reason.

New Merger Guidelines

By now, it's no secret that new guidelines are in the works.[51] I am not opposed to this effort in principle. Periodic review and revision are necessary to ensure that our guidance reflects developments in law, economic learning, and agency practice. But should we expect that what is coming will represent an improvement? I'm concerned.

Take the joint DOJ-FTC Request for Information on Merger Enforcement (the "RFI") issued at the beginning of this year.[52] It contains nine single-spaced pages of questions intended to solicit public input that may inform the new guidelines. Many are thoughtful and germane.[53] But there are red flags. For example, the RFI's introduction solicits examples of mergers that have harmed

(rejecting the NCAA's argument for quick look treatment). These decisions make clear that the rule of reason is the "accepted standard for testing" whether a practice is an unreasonable restraint of trade. *Leegin*, 551 U.S. at 885.

[50] Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988) (citing *GTE Sylvania*, 433 U.S. at 50, and *Nw. Wholesale Stationers*, 472 U.S. at 289-90).

[51] *See*, *e.g.*, Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Respecting the Antitrust Laws and Reflecting Market Realities, Remarks at Georgetown Antitrust Law Symposium (Sep. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

[52] Dep't of Just. & Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

[53] For example, it is appropriate to consider what constitutes a "digital market" and how the assessment of mergers in such markets should differ, if at all, from mergers in other markets. And it is equally appropriate to ensure that the agencies are accurately evaluating mergers involving potential and nascent competitors, assessing impacts on labor markets, and capturing the impact of mergers on incentives to innovate.

competition, including how those mergers "made it more difficult for rivals to compete with the merged firm."[54] It does not ask for the obverse: examples of mergers that have enhanced competition. And the request's wording appears to assume that difficulty for rivals equates to harm to competition. But mergers that benefit consumers through lower prices, enhanced quality, and more innovation may also make it more difficult for rivals to compete with the merged firm. The Supreme Court has instructed that the antitrust laws "were enacted for 'the protection of competition, not competitors'".[55] The idea in the RFI runs counter to the law. And the majority of precedents cited in the RFI—e.g., *Brown Shoe*,[56] *Philadelphia National Bank*,[57] and *Procter & Gamble*[58]—are older than I am; modern merger cases make only a few appearances.[59]

Dramatic changes to the guidelines will not necessarily translate to dramatic changes to the law, however. To be sure, the 2010 Guidelines have fared remarkably well in the courts. But that success stems largely from the fact that those guidelines are rarely, if ever, disputed in litigation, which judges take as a sign of authoritativeness. The 2010 Guidelines enjoy such wide acceptance because they are coherent, incremental, reflective of agency experience and practice, grounded in well-established economic principles, and consistent with the current state of the law. The more the new guidelines are *not* those things, the more they will be attacked by defendants, their testifying experts, and mainstream antitrust scholars generally. Under those circumstances, most judges will be far less inclined

[54] Dep't of Just. & Fed. Trade Comm'n, *supra* note 52, at 2.

[55] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984).

[56] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[57] United States v. Phil Nat'l Bank, 374 U.S. 321 (1963).

[58] Fed. Trade Comm'n v. Procter & Gamble Co., 386 U.S. 568 (1967).

[59] *See* Dep't of Just. & Fed. Trade Comm'n, *supra* note 52, at 1 n. 6, 8 n. 16, 9 n. 18. The RFI also quotes language from *Procter & Gamble* which then-Judge Kavanaugh described as "ahistorical drive-by dicta". United States v. Anthem, Inc., 855 F.3d 345, 379 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("For the majority opinion, we are apparently stuck in 1967. The antitrust clock has stopped. No *General Dynamics*. No *Continental T. V. v. GTE Sylvania*. No *Baker Hughes*. No *Heinz*.").

to afford them much deference. While I believe some of the new guidelines' drafters understand this, they may still push the envelope quite far—perhaps too far. And in the end, the new guidelines may be undone by their own ambition.

Conclusion

I share some of the goals of the new agency leadership. I am in favor of vigorous enforcement, and have supported the vast majority of the FTC's antitrust cases during my tenure, including most of the recent ones. I also support deterrence of clearly anticompetitive deals. And I think that, all else equal, we should strive to establish clear rules for companies. But I don't believe that all M&A is bad, that the right way to address M&A is to tax it without regard to its effects, or that Congress designed the FTC to plan the US economy. I'm in my waning days here at the Commission. I love the agency. I worry that it's headed in a bad direction. I hope it changes course soon. Thank you.