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

PREPARED REMARKS OF COMMISSIONER ROHIT CHOPRA

Regarding the Motion to Rescind the Commission's 1995 Policy Statement on Prior Approval and Prior Notice

July 21, 2021

Thank you, Madam Chair. When companies strike agreements to fix prices or merge in ways that substantially reduce competition, this is a violation of longstanding U.S. law.

After collecting input from stakeholders in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, the FTC is voting to reverse a misguided policy crafted during the Clinton Administration that undermined deterrence and promoted repeat offenses of illegal merger activity.

I thank the many state attorneys general who highlighted the importance of "prior approval" and "prior notice" provisions in their formal comment submission, particularly as they relate to technology platform markets.[1] Today's action is a small, but important step, to better safeguard competition in our markets.

Stopping Repeat Offenders

Over the years, Commissioners have typically shown a willingness to bring down the hammer on small businesses that break the law. Commissioners routinely vote to impose strict "fencing-in" measures to prevent the recurrence of lawbreaking by small market participants. In many cases, Commissioners require lawbreaking firms to take a series of steps to ensure their conduct is lawful. In other cases, Commissioners vote to ban individuals and small businesses from engaging in a business activity altogether. Commissioners also regularly seek injunctions that require compliance with existing law and regulation.

These measures, intended to prevent egregious repeat offenses, are entirely appropriate. They better protect the public and save public resources. However, these measures should be applied to all lawbreaking firms, regardless of their size or clout. In particular, I am concerned that when it comes to enforcement of illegal mergers and acquisitions, the Commission too often acts as a deal proponent, rather than a law enforcement agency.[2]

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[1] *Public Comments of 43 State Attorneys General, Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century,* at 18 (June 11, 2019), https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Comment_Submitted_by_National_Association_of_Attorneys_General.pdf.

[2] Linde AG and Praxair LLC, Dkt. No. C-4660, Dissenting Statement of Commissioner Rohit Chopra (Nov. 13, 2020), https://www.ftc.gov/public-statements/2020/11/dissenting-statement-commissioner-rohit-chopra-regarding-petitions.

As a law enforcement agency, the Commission must redouble its efforts to halt recidivism of our nation's antitrust laws, particularly when it comes to illegal merger agreements. One tool the Commission must deploy is the so-called "prior approval" remedy.

Prior Approval Provisions

Prior to 1995, when prosecuting illegal merger agreements, the Commission routinely sought to not only enjoin the illegal merger, but also to seek a requirement that the companies seek the prior approval of the Commission before engaging in a related transaction.

This is highly sensible, since it helps to prevent repeat offenses of the law and conserves limited public resources, especially in economic cycles with high levels of transaction activity. A simple requirement that a law violator in the merger context be required to gain the approval of the Commission before trying to do the same or similar unlawful deal is quite modest.

Courts have routinely held that the Commission can impose prior approval requirements in merger cases.[3] The Commission's ability to impose such requirements flows from its Supreme Court-sanctioned "wide discretion in its choice of a remedy," for which "courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."[4] As the Supreme Court rightly held in *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952):

> [T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow land the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.

In 1994, in a unanimous opinion authored by a member of the Commission's minority, the Commission found that Coca-Cola's acquisition of Dr. Pepper was unlawful and imposed a requirement that Coca-Cola seek the prior approval of the Commission in advance of making further acquisitions in carbonated beverage branded concentrate and syrup.[5]

The Commission specifically rejected Coca-Cola's argument that the Hart-Scott-Rodino Act's premerger notification regime obviated the need for a prior approval requirement.[6] This was a position that prior Commissions had repeatedly held.[7]

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[3] *See Abex Corp. v. FTC,* 420 F.2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970)).
[4] *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946).
[5] *The Coca-Cola Co.*, 117 F.T.C. 795, 965-67 (1994).
[6] *Id.* at 965-66.
[7] *Warner Communications, Inc.*, 105 F.T.C. 342, 343 (1985) ("nothing in its legislative history suggests that [premerger notification under the Hart-Scott-Rodino Act] was intended to supersede the use of fencing-in provisions imposed after a merger has actually been found improper"); *Louisiana-Pacific Corp.*, 112 F.T.C. 547, 566 (1989) (Hart-Scott-Rodino "premerger notification program is not coextensive with the order's prior approval requirement").

The 1995 Policy Statement on Prior Approval and Prior Notice

Despite the clear logic of seeking prior approval requirements for lawbreaking merging parties and its unanimous decision in the 1994 Coca-Cola decision, the Commission subsequently took a dramatic turn. The Commission instituted a new policy that strongly disfavored the use of prior approval and prior notice provisions,[8] with a highly questionable justification.

The 1995 Policy Statement muddied the waters by only permitting prior approval and prior notice provisions when there was a "credible risk" that the parties would try to do the same deal again. This provision has essentially proven to be unadministrable.

Parties to an unlawful merger do not usually telegraph an intent to engage in yet another illegal deal at a later point in time. Indeed, the Commission rejected a standard very similar to this one back in 1984 when it held that "[I]t is industry market structure and market conditions, not whether a "likelihood of repeated unlawful conduct' has been shown…that determines the appropriateness of imposing a prior approval requirement in a particular case."[9]

The Commission justified its 1995 decision by claiming that the Hart-Scott-Rodino premerger notification requirements were an appropriate substitute for prior approval requirements, even though, in practice, this fundamentally fails to deter repeat offenses. Since the issuance of the 1995 Policy Statement, the Commission has only sought prior approval in a small number of cases.

At the time, minority Commissioner Mary Azcuenaga explained how the rationale for the policy lacked a proper basis and took away a key tool for the Commission to combat illegal merger activity.[10] The policy has also managed to produce some truly absurd results. Because of the 1995 Policy Statement, for example, the agency does not routinely bar the merging parties from seeking to reacquire assets that they have been required to divest. By contrast, the Department of Justice routinely bars merging parties from reacquiring divested assets.[11]

A quarter century later, it is clear that the 1995 Policy Statement has undermined the Commission's mission and disempowered our staff. Firms are repeatedly proposing illegal mergers, soaking up public resources. In one example, the FTC has *twice* litigated (and won) challenges to the legality of Staples' acquisition of Office Depot.[12] The Commission has had to

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[8] *FTC Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases*, 60 Fed. Reg. 39745-46 (Aug. 3, 1995).
[9] *American Medical International, Inc.,* 104 F.T.C. 1, 224 (1984).
[10] *Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders*, 60 Fed. Reg. 39746-47 (Aug. 3, 1995).
[11] *See, e.g.,* Section XII. Limitations on Reacquisitions, Proposed Final Judgment, United States v. Zen-Noh Grain Corp., and Bunge North America, Inc., Civil Action No. 1:21-cv-01482 (D.D.C. filed June 1, 2021), https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-zen-noh-acquisition-grain-elevators.
[12] *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. June 30, 1997) and *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100 (D.D.C. May 16, 2016).

investigate twice deals in industries from gasoline retailing and wholesaling,[13] to gasoline import terminaling,[14] to hot oil used to process aluminum,[15] and to industrial chemicals.[16] Just last week the Commission rejected a deal involving pipelines in Utah that had been proposed once before.[17]

Path Forward

With mergers and acquisitions activity at an all-time high, our dedicated Commission staff is stretched to the breaking point with a surge of merger filings reported to the government, leaving almost no room to investigate anticompetitive roll-ups and serial acquisitions unknown to the agency. With 2021 on pace for a blockbuster year for mergers, we should all be concerned that the Commission is simply not equipped to halt harmful mergers in this environment.

By rescinding a policy that lacked logic and rigor, the Commission is making clear to the market that it will seek, depending on the facts and circumstances, appropriate fencing-in relief to prevent repeat offenses by firms that propose illegal mergers. Firms pursuing anticompetitive mergers – and the lawyers who assist them – should take note.

[13] Hawaii gasoline retailing and wholesaling: Aloha/Trustreet, FTC File No. 051-0131 (Sept. 6, 2005), https://www.ftc.gov/enforcement/cases-proceedings/0510131/aloha-petroleum-ltd-et-al and Par/MidPac, FTC File. No. 141-0171 (May 15, 2015) https://www.ftc.gov/news-events/press-releases/2015/05/ftc-approves-final-order-preserving-competition-bulk-volumes.

[14] Gasoline Terminals in California: Valero/Kaneb, FTC File No. 051-0022 (June 5, 2005), https://www.ftc.gov/news-events/press-releases/2005/06/ftc-orders-significant-divestitures-clearing-valeros-acquisition and Valero/Plains, FTC File No. 161-0220 (parties abandoned deal after California Attorney General's office challenged acquisition, *see* https://oag.ca.gov/news/press-releases/attorney-general-becerra-valero%E2%80%99s-abandoned-takeover-independent-petroleum).

[15] Hot oil used to process aluminum: Houghton/D.A. Stuart, FTC File No. 081-0245 (July 14, 2010), https://www.ftc.gov/news-events/press-releases/2010/07/houghton-international-agrees-sell-aluminum-production-assets and Houghton/Quaker/Houghton, FTC File No. 171-0125 (July 23, 2019) https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-conditions-quaker-chemical-corps-acquisition-houghton.

[16] Titanium dioxide and necessary inputs: *FTC v. Tronox,* 332 F. Supp. 3d 187 (D.D.C. Sept. 12, 2018) (federal court preliminary injunction action) and *In the Matter of Tronox Limited,* Docket No. 9377 (December 14, 2018) (initial administrative law judge decision), https://www.ftc.gov/news-events/press-releases/2018/12/administrative-law-judge-upholds-ftcs-complaint-allegations and Tronox/TTI (January 29, 2021), https://www.ftc.gov/news-events/press-releases/2021/01/following-federal-trade-commission-staff-recommendation-challenge.

[17] Berkshire Hathaway Energy Company/Dominion Energy, Inc., (July 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination (referencing earlier investigation of similar pipeline deal).