Office of Acting Chairwoman
Rebecca Kelly Slaughter

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

CONCURRING STATEMENT OF ACTING CHAIRWOMAN REBECCA KELLY SLAUGHTER JOINED BY COMMISSIONER ROHIT CHOPRA

Regarding the Revised Clayton Act Thresholds

Commission File No. P859910
February 5, 2021

The Hart-Scott-Rodino (HSR) Act,[1] which amends the Clayton Act, requires the Federal Trade Commission to adjust merger-reporting thresholds, as we have done today, but contains no similar mechanism for adjusting merger-filing fees. As a result, per-transaction filing fees have stagnated for 20 years even as the economy and the size of the deals we consider have grown. We strongly support efforts in Congress led by Senators Klobuchar and Grassley to increase merger-filing fees for large transactions and to ensure that they keep pace with the U.S. economy.[2]

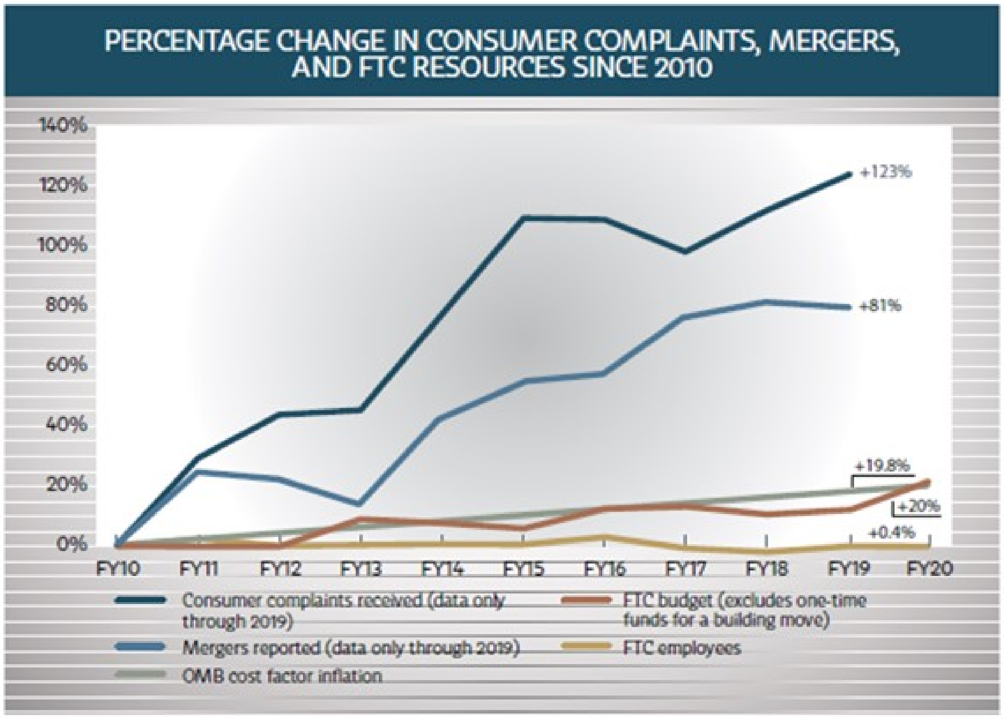
Every year, the FTC complies with its statutory mandate to adjust the dollar figures for the size of a transaction that must be reported to the FTC and Department of Justice under the HSR Act. In 2000, Congress set the thresholds at $50 million and required that the amount be adjusted annually.[3] Year after year, we make these adjustments; the threshold announced recently is $92 million. Yet the statutory fees that must accompany these filings have remained exactly the same since 2001.[4] In contrast, other federal agencies such as the Food and Drug Administration annually adjust the fees charged for reviews.[5] Congress should amend the HSR Act so that the merger-filing fees account for the last twenty years of economic growth, and going forward should require the annual adjustment of these fees.

In addition to adjusting fees, Congress should consider how to ensure that the resources the FTC must devote to merger review and enforcement keep pace with the demand on the agency.[6] That has not been the case for the last several decades. Over the past ten years, the absolute number of

---

[1] Hart-Scott-Rodino Antitrust Improvements Act of 1976.
[2] *See* Merger Filing Fee Modernization Act of 2019, S. 1937, 116th Cong. (1st Sess. 2019), https://www.congress.gov/bill/116th-congress/senate-bill/1937/text.
[3] 15 U.S.C. § 18a(a)(2).
[4] 15 U.S.C. § 18a note (Assessment and Collection of Filing Fees). *See also* Fed. Trade Comm'n, *Filing Fee Information*, (Feb. 27, 2020), https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information (showing the current filing fees).
[5] *See, e.g.*, 21 U.S.C. § 379j(c)(2) (providing for annual inflation adjustments to FDA medical device user fees).
[6] More than 60 percent of Full Time Employees in the Bureau of Competition focus on mergers.

HSR filings has nearly doubled,[7] but the number of employees we have in our Bureau of Competition has stayed almost flat.[8]



Federal Trade Commission Fiscal Year 2020 Agency Financial Report, page 50. (Note: This chart includes consumer complaints received by the FTC across its mission areas.)

Not only have our filings doubled, the size and complexity of mergers have substantially increased. In FY 2019, the FTC and DOJ received 476 HSR filings where the "size of the transaction" was between $500 million and $1 billion.[9] This is more than double the number of such deals that were filed in many of the years between 2001 and 2019, and in some years more than triple and quadruple. These large deals require more resources and staff. For example, large retail or service mergers often require investigation into dozens of geographic markets and large pharmaceutical or industrial mergers often require investigation into a dozen or more product

---

[7] FED. TRADE COMM'N, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 50 (2020), https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2020/ftc_fy2020_agency_financial_report.pdf. Note that these numbers do not include filings for the first four months of Fiscal Year 2021, during which filing rates have been especially high, even compared to the past several years.

[8] FED. TRADE COMM'N, FISCAL YEAR 2021 CONGRESSIONAL BUDGET JUSTIFICATION 43 (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/reports/fy-2021-congressional-budget-justification/fy_2021_cbj_final.pdf.

[9] *See* FED. TRADE COMM'N & DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2019 Exh. A, Tbl. 1 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

markets.[10] In many cases, costly experts are required for investigations and litigation; the amount of money the FTC spends on expert costs has risen dramatically over the last several years.[11]

As more of the filings reflect competitively troubling transactions, we must bring more merger enforcement actions. The FTC set a record with seven merger challenges on our litigation docket at one point last year.[12] These court actions were in addition to several mergers that were abandoned in the face of competition concerns and following significant investigations.

An increase in fees should be coupled with an increase in funding, which is desperately needed to fulfill our competition mission.[13] While Congress has increased the FTC's funding in the past two fiscal years, for which the agency is profoundly grateful, these increases have not been enough to keep pace with the increasing demand.[14] For example, in the first three months of FY 2021, the number of HSR filings jumped dramatically, and if they continue at this pace for the rest of the year we are facing down a 60 percent increase in filings that need to be reviewed with the same number of FTEs that we had last year.[15]

We hope that Congress will consider both baseline increases to and regular statutory adjustment of HSR filing fees in the coming year.

---

[10] *See, e.g.,* Alimentation Couche-Tarde Inc./Holiday Co.; Fidelity Nat'l Fin., Inc./Stewart Info. Servs. Corp.; Teva Pharm. Indus. Ltd./Allergan plc; Pfizer Inc./Mylan N.V.; Danaher Corp./GE Healthcare Life Sciences; Praxair Inc./Linde AG. The ultimate number of divested products is often lower than the number of products that require investigation to determine concerning overlaps.

[11] Between FY 2015 and 2018, the cost of expert-witness services rose from $10.3 million to $14.9 million. In FY 2020, it jumped to $18.9 million, mostly due to our merger workload and litigation.

[12] In December, pending merger litigation challenges were Jefferson Health/Albert Einstein Health Network; Methodist Le Bonheur Healthcare/Tenet Healthcare; Hackensack Meridian Health, Inc./Englewood Healthcare Found.; Axon Enters., Inc./VieVu LLC; Altria Grp., Inc./JUUL Labs, Inc.; CoStar Grp. Inc./RentPath Holdings, Inc.; Procter & Gamble Co./Billie Inc.

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

[14] Congress should also clarify that the FTC and DOJ can keep and use all HSR fees collected.

[15] *See* Fed. Trade Comm'n, *Premerger Notification Program* HSR *Transactions by Month*, https://www.ftc.gov/enforcement/premerger-notification-program; FED. TRADE COMM'N, *supra* note 8, at 43.