



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson
Regarding the Issuance of Two Omnibus Compulsory Process Resolutions**

July 1, 2022

Just over a year ago, Chair Lina Khan's appointment gave Democrats a majority at the Federal Trade Commission. Two weeks later, with only five business days of notice and without the benefit of staff input, that new majority approved seven resolutions authorizing the use of compulsory process¹ in several broad categories of investigations.² These resolutions removed from Commission oversight an array of important and expensive investigations.³ Several weeks later, the majority adopted, again via a 3-2 vote and without substantial consideration, an additional eight blanket resolutions.⁴

¹ Compulsory process is the method generally used at the FTC to compel testimony, documents, or data from targets to an investigation and third parties. Until Chair Khan's arrival, staff working on an antitrust investigation needed a Commission vote to issue a resolution specific to the investigation to authorize the use of compulsory requests.

² Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf; FTC Authorizes Investigations Into Key Enforcement Priorities (July 1, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>.

³ Dissenting Statement of Commissioner Christine S. Wilson, *supra* note 2, at 9-10; Dissenting Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Issuance of Seven Omnibus Resolutions 1-2 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591634/p210100phillipsstatementomnibusresolutions.pdf

⁴ FTC Streamlines Consumer Protection and Competition Investigations in Eight Key Enforcement Areas to Enable Higher Caseload (Sept. 14, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-streamlines-consumer-protection-competition-investigations-eight-key-enforcement-areas-enable>.

Given the scope of these 15 so-called omnibus resolutions,⁵ we asked, “what’s left?”⁶ The answer then was “not much.” Today, following the majority’s adoption of two additional resolutions, the answer is “virtually nothing.”

In its statement, the majority assures us that the omnibus resolutions “will not substantially change the multiple layers of checks and balances that are critical to the Commission’s oversight of investigations.” This assertion is baffling, as these broad resolutions eliminate the *only* layer of Commission oversight concerning the use of compulsory process in the vast majority of the agency’s competition-related investigations.

The justifications for these actions rang hollow at the time, and still do now. As before, the majority emphasizes the need for expeditious investigations, yet again it fails to produce a shred of evidence that the Commission’s longstanding process causes material delays. The omission is unsurprising; the Commission has always been perfectly able and willing to initiate timely investigations on a case-by-case basis, imposing little real additional cost.

In fact, the omnibus resolutions impose costs of their own. We voted against those resolutions in July and September 2021, expressing our concern that removing Commission oversight failed to make investigations more effective but did mean less Commission input and supervision.⁷ We further noted that those resolutions decreased accountability and created more room for mistakes, overreach, cost overruns, and even politically-motivated decision making.⁸ Those criticisms have been validated by developments in the intervening months, and apply equally to the resolutions announced today.

The first of the new omnibus resolutions pertains to the use of compulsory process in merger investigations. It resembles the hastily-adopted resolution on the same topic to which we

⁵ The 15 omnibus resolutions authorize compulsory process in investigations of possible illegality stemming from (1) any merger subject to federal premerger notification requirements, including those under the HSR Act, (2) any suspected monopolization, attempt to monopolize, or conspiracy to monopolize, (3) any consummated merger or acquisition by an entity with a current enterprise value over \$5 billion, (4) any simultaneous service as an officer or director of, or a contemporaneous financial stake in, two or more competing entities, (5) any suspected abuse of intellectual property; (6) prohibited conduct targeting workers or small-business operators; (7) prohibited conduct by any person or entity subject to an FTC administrative order; or prohibited conduct related to (8) any healthcare market, (9) any market with participants that provide technology platform services, (10) any algorithm or biometrics, (11) any marketing of goods and services on the Internet, manipulation of user interfaces, or use of email, metatags, computer code, or programs, (12) any good or service marketed, in whole or in part, to children under 18 years of age, (13) any good or service marketed, in whole or in part, to members or veterans of the U.S. Armed Forces and States’ National Guards, (14) any diagnosis, treatment, or government benefits for COVID-19, or (15) any repair restriction.

⁶ See Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Issuance of Eight Omnibus Resolutions 1 (Sept. 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596256/p859900njpcswomnibusdissent.pdf.

⁷ *Id.*

⁸ *Id.*

objected last July, when we worried that the absence of a normal level of Commission consideration and staff review would lead to mistakes.⁹ The new omnibus resolution for merger investigations amends the earlier resolution by deleting language stating that the transactions at issue were those “subject to any federal premerger notification requirements.” Because a copy of the omnibus resolution accompanies civil investigative demands issued to third parties in connection with a merger investigation, the inclusion of this language could permit recipients to infer that the underlying transaction had been notified to the antitrust agencies pursuant to the Hart-Scott-Rodino (HSR) Act. Unless the merging parties make this information public, the antitrust agencies are supposed to keep it confidential.

The language in the new resolution avoids the risk that the resolution will inadvertently disclose to third parties the existence of a nonpublic HSR filing. But it also expands the scope of the resolution, giving the green light for compulsory process in *all* merger investigations, not only those subject to notification under HSR. To initiate a long and expensive investigation into any stock or asset acquisition, no matter how small, a Commission vote is no longer required.

The majority asserts that “the merger omnibus equips the FTC to expeditiously investigate even those deals that would otherwise fly under our radar.” Since it makes investigation no more expeditious and we can (and do) investigate deals that do not trigger HSR, that is simply wrong. The merger omnibus resolution cannot, and does not, impose new filing obligations. The agency has long had the authority to review deals that fall below HSR filing thresholds, and staff routinely reviews industry trade press and a variety of other news sources to identify potentially problematic non-reportable deals that warrant investigation. The Commission routinely has authorized investigations of those deals and sometimes pursued remedies.¹⁰ The suggestion that the merger omnibus resolution will somehow put more deals on our radar is, in our view, disingenuous.¹¹

The second omnibus resolution pertains to the use of compulsory process in non-public investigations of “collusive practices.” U.S. antitrust law rightfully condemns collusion to stifle competition by, say, fixing prices or dividing markets among competitors. The FTC should dedicate resources to rooting out unlawful collusion in the marketplace. But this new resolution also applies to conduct that is legal under well-established case law. Congress drafted Section 1 of the Sherman Act to prohibit contracts, combinations, and conspiracies that restrain trade.¹² To find a violation, courts require proof of agreement – *i.e.*, proof that the competitors were not acting independently. In the absence of an explicit agreement, courts demand evidence of a

⁹ *Id.*; Dissenting Remarks of Commissioner Noah Joshua Phillips, *supra* note 3, at 1 (“And when things go wrong, there will be less accountability”).

¹⁰ *See, e.g.*, In re Otto Bock HealthCare North America, Inc., File No. 171-0231, <https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf>; In re ProMedica Health System, Inc., File No. 101-0167, <https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120625promedicaopinion.pdf>.

¹¹ In addition, the Commission previously issued an omnibus resolution to authorize the use of compulsory process for investigations of consummated transactions, which would cover most of the transactions referenced by the majority statement.

¹² 15 U.S.C. § 1.

“conscious commitment to a common scheme” beyond mere parallel conduct.¹³ This showing is important because firms in most markets cannot make rational decisions unless they take into account what other market participants, including their competitors, are doing or are likely to do.¹⁴

The new compulsory process resolution exceeds the law’s common-sense limits by authorizing investigations to examine not just collusion, but firms that are “participating in . . . coordination in any way with any other market participant[.]” The resolution thus suggests using Section 5 of the FTC Act to attack conduct that the courts routinely have concluded does not violate the antitrust laws.¹⁵ There may be circumstances in which investigations of tacit coordination are appropriate, but those investigations should be authorized on a case-by-case examination of the facts rather than under an omnibus resolution.

The new resolutions announced today continue an ill-advised overhaul of longstanding and well-functioning (and perfectly expeditious) Commission procedures that promoted transparency, oversight, and accountability. This overhaul remains as problematic now as it was on the day it began. If anything, developments in the intervening months repeatedly have validated the objections we voiced at the outset. We dissent.

¹³ See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984) (“The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.”); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *Quality Auto Painting Center of Roselle, Inc. v. State Farm Indemnity Co.*, 917 F.3d 1249, 1264 (11th Cir. 2019) (“It is well settled in this circuit that evidence of conscious parallelism alone does not permit an inference of conspiracy unless the plaintiff either establishes that . . . each defendant engaging in the parallel action acted contrary to its economic self-interest, or offers other ‘plus factors’ tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices”) (quoting *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1301 (11th Cir. 2003)).

¹⁴ As then-Judge Stephen G. Breyer once asked rhetorically, “How does one order a firm to set its prices without regard to the likely reactions of its competitors?” *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988).

¹⁵ The Commission has used Section 5 of the FTC Act to challenge invitations to collude. See, e.g., *In re Quality Trailer Prods.*, 115 F.T.C. 944 (1992); *In re AE Clevite*, 116 F.T.C. 389 (1993); *In re Precision Moulding*, 122 F.T.C. 104 (1996); *In re Stone Container*, 125 F.T.C. 853 (1998); *In re MacDermid*, 129 F.T.C. (C-3911) (2000); see also *In re McWane, Inc.*, Docket No. 9351, Opinion of the Commission on Motions for Summary Decision at 20-21 (F.T.C. Aug. 9, 2012) (“an invitation to collude is ‘the quintessential example of the kind of conduct that should be . . . challenged as a violation of Section 5’”) (citing the Statement of Chairman Leibowitz and Commissioners Kovacic and Rosch, *In re U-Haul Int’l, Inc.*, 150 F.T.C. 1, 53 (2010); *InstantUPCCodes.com*, File No. v 141-0036 (Aug. 29, 2014), <https://www.ftc.gov/system/files/documents/cases/140721instantupcanalysis.pdf>. In each of those cases, the Respondent’s conduct – inviting its competitor to collude – formed the basis for liability. In contrast, the use of Section 5 to investigate and challenge coordination may threaten a firm with liability when it has not acted, but only had a rival that copied its conduct. In addition, the omnibus resolution potentially authorizes an investigation into every industry that has a limited number of participants.