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

**STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER
JOINED BY CHAIR LINA M. KHAN AND COMMISSIONER ALVARO M. BEDOYA**

In the Matter of HSR Premerger Notification
Commission File No. P110014
February 10, 2023

Every year, the Federal Trade Commission, with concurrence of the Department of Justice Antitrust Division, submits an annual report on the agencies' administration of the Premerger Notification program designed by the HSR Act of 1976.¹ The Commission recently approved submission of the Fiscal Year 2021 HSR Annual Report to Congress. We thank the staff of the FTC's Premerger Notification Office, along with the Operations Division and the Antitrust Division staff, who prepared the Report and led the charge in tackling the astronomical number of merger filings the agency received in fiscal year 2021. The Report reflects the unprecedented challenges the FTC faces in conducting effective merger review in the modern economy. We, therefore, write today to emphasize the value and urgency of Congressional action to revise key facets of the HSR Act and to better resource the Commission's mission.

The text of the HSR Act invites the agencies to discuss the efficacy of the statutory scheme and to submit "any recommendations for revisions[.]"² Consistent with Congressional intent, we have written over the last two years to recommend to Congress revisions to the HSR Act that would enable our Premerger Notification program to keep pace with the growth of the American economy over the last 20 years and the historic rise in the volume and complexity of transactions we must police under our competition mandate.³

We continue to recommend that Congress revisit statutory timelines imposed by the HSR Act on the agencies.⁴ The 30-day window provided for the agencies to assess whether a transaction warrants

¹ Hart-Scott-Rodino Antitrust Improvements Act of 1976.

² 15 U.S.C. § 201(j)

³ Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Concurring Statement Joined by Commissioner Rohit Chopra, Regarding the Revised Clayton Act Thresholds, File No. P859910 (Feb. 5, 2021). https://www.ftc.gov/system/files/documents/public_statements/1587163/p859910_concurring_statement_of_ac_slaughter_and_c_chopra_re_revised_hsr_thresholds.pdf; Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Concurring Statement Joined by Chair Lina M. Khan, Regarding the Revised Clayton Act Thresholds, File No. P859910 (January 24, 2022). https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf

⁴ Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Concurring Statement Joined by Chair Lina M. Khan, Regarding the Revised Clayton Act Thresholds, File No. P859910 (January 24, 2022). https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf; Chair Lina M. Khan, Fed. Trade Comm'n, Statement Joined by Comm'r Rebecca Kelly Slaughter, Regarding the FY 2020 Hart-Scott-Rodino Annual Report for Transmittal to Congress, File No. P110014 (November 8, 2021). https://www.ftc.gov/system/files/documents/public_statements/1598131/statement_of_chair_lina_m_khan_joined_by_rks_regarding_fy_2020_hsr_rep_p110014_-_20211101_final_0.pdf.

close investigation and the 30-day window in which we must decide whether to challenge a transaction after parties certify that they have “substantially complied” with our inquiries are no longer adequate. Since the HSR Act was passed in 1976, the volume and complexity of information and data produced by merging parties have increased by several orders of magnitude. The fact that the FTC routinely resorts to voluntary timing agreements with merging parties to provide the necessary time for staff review is further evidence of the inadequacy of the enabling statutory timelines. We should not have to rely on permission from merging parties to have enough time to do the work required by law.”

In addition, we have explained the need to amend the HSR Act to increase merger-filing fees for large transactions that must be reported to the FTC and Antitrust Division and to mandate annual adjustments to the merger-filing fees.⁵ We indicated strong support for efforts in Congress to advance these solutions led by Senators Klobuchar and Grassley and Representatives Cicilline, Neguse, and Buck.⁶ We are pleased that amendment is now law.

Further, we continue to support funding the FTC adequately in order to properly resource its mission. This need is acute across the board, but merger review provides a statistically clear picture of the disparities between the demands on the agency and its resources.⁷ We are deeply grateful for funding increases Congress has provided. But marshalling the enforcement resources required to closely investigate and challenge potentially anticompetitive transactions remains a significant challenge for our talented and dedicated staff given the substantial increase in the volume, size and complexity of HSR filings and in expert costs in recent years.

The data in the Fiscal Year 2021 HSR Annual Report make clear that the need for increased funding is more acute than ever. The Report confirms that the volume of transactions surged to historic levels in fiscal year 2021. Specifically, the number of reported transactions increased from 1,637 in fiscal year 2020 to 3,520 in fiscal year 2021. Yet the funding required to review these transactions and take enforcement action where warranted did not keep pace with the resulting demands on the FTC. For example, the number of transactions reported in fiscal year 2021 represented a 115% increase from the corresponding number in fiscal year 2020.⁸ Despite this record-setting merger wave, the FTC’s annual appropriations only increased by 6%, from \$330 million in fiscal year 2020 to \$351 million in

⁵ *Id.*

⁶ Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Concurring Statement Joined by Commissioner Rohit Chopra, Regarding the Revised Clayton Act Thresholds, File No. P859910 (Feb. 5, 2021). https://www.ftc.gov/system/files/documents/public_statements/1587163/p859910_concurring_statement_of_ac_slaughter_and_c_chopra_re_revised_hsr_thresholds.pdf; Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Concurring Statement Joined by Chair Lina M. Khan, Regarding the Revised Clayton Act Thresholds, File No. P859910 (January 24, 2022). https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf

⁷ Hearing on Strengthening the FTC’s Authority to Protect Consumers, at 2-3 (Apr. 20, 2021), <https://www.ftc.gov/public-statements/2021/04/prepared-statement-acting-chairwoman-rebecca-kelly-slaughter-strengthening>; Concurring Statement of Commissioner Rebecca Kelly Slaughter Joined by Chair Lina M. Khan, Regarding the Revised Clayton Act Thresholds, File No. P859910 (January 24, 2022). https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf

⁸ Comm’r Rebecca Kelly Slaughter, Fed. Trade Comm’n, Concurring Statement Joined by Chair Lina M. Khan, Regarding the Revised Clayton Act Thresholds, File No. P859910 (January 24, 2022). https://www.ftc.gov/system/files/documents/public_statements/1600207/p859910hsrthresholdskhanslaughterstatement_0.pdf

fiscal year 2021.⁹ Of course, merger filings are but one data point; even if the absolute number of filings had leveled off or decreased, there would still be increased demand on the agency because of the complexity of the acquisitions we are required to scrutinize.

In addition to the record spike in the volume and complexity of reported transactions, the Report's Second Request statistics for fiscal year 2021 also underscore the need for increased funding. Requests for additional information and documentary material—commonly known as Second Requests—are a vital tool the FTC employs to identify potentially anticompetitive transactions. They help the agency gather the evidentiary support required to mount effective litigated challenges and to craft remedy agreements that restore competition that transactions threaten to eliminate. But the fiscal year 2021 Second Request data demonstrate that the agency's ability to scrutinize reported transactions lagged significantly behind the record-breaking increase in the number of transactions reported under the HSR Act.

While the total number of Second Requests issued by the agencies increased in fiscal year 2021, the proportion of filings that received a Second Request actually decreased.¹⁰ The pattern holds true for the largest (and most complex) transactions.¹¹ We simply do not have the capacity to keep up with the markets in terms of the scrutiny mergers should receive.

The Fiscal Year 2021 Annual Hart-Scott-Rodino Report affirms the urgent need for HSR Act reform. Therefore, I hope that Congress will consider expansion of the statutory review and enforcement timelines and approach appropriations by providing resources proportionate to the demands on the agency.

⁹ FTC APPROPRIATION AND FULL-TIME EQUIVALENT (FTE) HISTORY, <https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation>. Even if the agency's budget authority—how much it is authorized to spend—is used as a measure of its financial resources, the inadequacy of those resources to meet the demands on the agency remain clear. Specifically, the agency's budget authority only increased by 13%, from \$332 million in FY 2020 to \$383 million in FY 2021. FED. TRADE COMM'N, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 48-49 (2020), https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2020/ftc_fy2020_agency_financial_report.pdf; FED. TRADE COMM'N, FISCAL YEAR 2020 AGENCY FINANCIAL REPORT 45-47 (2021), https://www.ftc.gov/system/files/documents/reports/agency-financial-report-fy2021/ftc_fy2021_agency_financial_final.pdf (including \$30.4 million under the American Rescue Plan Act of 2021 to address unfair or deceptive practices related to COVID-19).

¹⁰ There were 48 Second Requests issued in FY 2020, compared to 68 in FY 2021; the percentage of transactions in which a Second Request were issued decreased from 3.0% in FY 2020 to 1.9 % in FY 2021, *Id.*

¹¹ The total number of Second Requests issued for transactions valued at or above \$500 million increased from 30 in fiscal year 2020 to 45 in fiscal year 2021. But the percentage of these large transactions that received Second Requests decreased from 4.7% in fiscal year 2020 to 2.9% in fiscal year 2021, also due to the significant rise in the absolute number of reported transactions.