



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

## **STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS**

In the Matter of Bristol-Myers Squibb and Celgene

Commission File No. 191-0061

November 15, 2019

I write to address the dissenting statements issued by my colleagues, Commissioners Chopra and Slaughter.

From these statements, a reader unfamiliar with the U.S. antitrust laws could be forgiven for gleaning several inaccurate conclusions. First, companies in the U.S. may not merge unless the antitrust enforcement agencies permit them to do so. Second, to stop a merger, the government need not provide any theory as to why a merger violates the law, nor any evidence to support that theory. Third, antitrust enforcement agencies can and should condemn mergers they cannot prove violate the law because the agencies deem the business justifications for the merger insufficient.

The unfamiliar reader would be wrong on each count. That is not the law. (Nor, for that matter, is it sound policy.)

The structural remedy agreed to by the merging parties in this case addresses every competition concern uncovered after an extensive investigation. Every one. But Commissioners Chopra and Slaughter still dissent. Why?

Commissioner Chopra cites a study purporting to show that mergers “can choke off innovation”. Okay. But how does this merger do that? Without an answer to that question, the logic is rather like saying an individual defendant is guilty of a crime because there is too much of that crime in society. Thank goodness that is not how our criminal justice system works.

He next writes that we must approach our investigations of pharmaceutical mergers with careful scrutiny and with great humility. I agree completely. What I fail to see is how careful scrutiny and great humility lead to the conclusion, without any clearly articulated theory of liability or facts to support it, that this merger violates the law – or, again without any facts in support, that the remedy is inadequate.

The next basis Commissioner Chopra offers for his dissent is his view that the merger is animated by financial and tax considerations, which he deems insufficient to justify the merger. Leaving aside the question of why he thinks the job of antitrust enforcers is to value-judge a merger beyond its impact upon competition, that gets the law precisely backwards. The parties get to merge unless we can show a harm to competition, not the other way round.

His dissent also alludes to “distorted” incentives of the buyer due to the overlapping ownership of the parties. I must admit that the precise meaning of that escapes me. Perhaps it is a reference to the theory of “common ownership”, which has stoked great academic debate and about which I have spoken repeatedly.<sup>1</sup> Whatever the meaning, Commissioner Chopra fails to articulate how the merger will distort the buyer’s incentives, much less in a way that violates the law. To sue, or to seek an additional remedy, we need more.

The dissenting commissioners both criticize the Commission’s investigations of pharmaceutical mergers generally, expressing concern that they fail to capture all the harms to competition posed by such mergers.<sup>2</sup> But, again, the most they offer is speculation about vaguely articulated harms, without reference to any evidence that *this* merger is likely to exacerbate them. Nor do the dissenters cite a previous case that resulted in anticompetitive effects that they insinuate the Commission missed. The dissenting statements mention various violations of the antitrust laws committed by firms in the pharmaceutical industry, but neither explains how this merger makes such conduct more likely. For decades, the Federal Trade Commission has pursued enforcement against many different kinds of anticompetitive conduct in the pharmaceutical industry. That work, critical to controlling healthcare costs for Americans, will continue.

Neither dissenting commissioner argues that the consent order and associated divestiture are bad for competition or consumers, or identifies any additional remedy they believe is warranted. And neither proposes any basis to sue to stop the merger.<sup>3</sup> So, again, why dissent? At the end of the day, we are left only with the sense that Commissioners Chopra and Slaughter feel the merger will threaten competition and wish to dissociate themselves with it. To me, that is not enough. (Even if it were, a vote to join Commissioners Chopra and Slaughter would result, at the end of the day, in the merger without the remedy. Are they calling on their colleagues to vote with them?)

Returning to our unfamiliar reader, here is how the law actually works. First, to block a merger outright, U.S. antitrust enforcement agencies must convince a judge that it violates the law. In this country, where people and companies are free to do what they wish with their property subject to the constraints imposed by the law, our judges are somewhat hostile to the notion that we should block a merger when the parties have agreed to address *every* problem that we can identify. Second, we need to articulate a viable theory of harm to competition posed by the merger and produce evidence to support that theory. Third, our job is to enforce the antitrust laws, which guard against particular (competitive) harms that mergers may present. Other parts

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<sup>1</sup> Noah Joshua Phillips, Commissioner, U.S. Fed. Trade Comm’n, Taking Stock: Assessing Common Ownership, Address at the Global Antitrust Economics Conference (June 1, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1382461/phillips\\_-\\_taking\\_stock\\_6-1-18\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf); Noah Joshua Phillips, Commissioner, U.S. Fed. Trade Comm’n, Competing for Companies: How M&A Drives Competition and Consumer Welfare, Address 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](https://www.ftc.gov/system/files/documents/public_statements/1524321/phillips_-_competing_for_companies_5-31-19_0.pdf).

<sup>2</sup> Like Commissioner Wilson, I believe staff conducted a careful investigation of this merger. See Statement of Commissioner Christine S. Wilson, In the Matter of Bristol-Myers Squibb Company / Celgene Corporation.

<sup>3</sup> In fairness, Commissioner Chopra does state his view that the agency should litigate to block more pharmaceutical mergers outright. But he fails to answer whether the Commission should litigate this case, and – more importantly – on what legal and factual basis. That is the question we face today.

of the government guard against other harms posed by mergers, for example the Committee on Foreign Investment in the United States, which looks at certain investments for their potential impact on national security,<sup>4</sup> or the Securities and Exchange Commission, which reviews transactions to protect investors.<sup>5</sup> Our job is not to opine on whether a merger is “good” or “bad” for society as a whole, or to use our authority to make sure firms merge for reasons that someone might like (innovation) as opposed to reasons that they may not (tax).<sup>6</sup>

In reviewing the dissenting statements, readers – unfamiliar and otherwise – would do well to keep all of that in mind.

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<sup>4</sup> See 50 U.S.C. § 4565.

<sup>5</sup> See, e.g., 15 U.S.C. §§ 78m(d), 78n(d).

<sup>6</sup> This is not to say that we should view financial or tax considerations as improper motivations for a merger.