



Office of Commissioner  
Rebecca Kelly Slaughter

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

**STATEMENT OF COMMISSIONER  
REBECCA KELLY SLAUGHTER**

*Regarding the Hart-Scott-Rodino Act Premerger Notification Rulemaking Notices  
Commission File No. P110014  
September 21, 2020*

Today, the Commission voted to advance two proposals with respect to our HSR premerger notification rules. I support the broad solicitation of input in the Advance Notice of Proposed Rulemaking and the proposed aggregation provisions in the Notice of Proposed Rulemaking (NPRM). But I oppose provisions in the NPRM that would broaden the categories of transactions exempt from filing HSR notice. I share the concerns Commissioner Chopra articulated, and write separately only to add a few points.

I share the general view that we should do what we can to right-size our HSR requirements. We generally benefit when the universe of transactions that are required to file under HSR matches as closely as possible the universe of transactions that are competitively problematic. Too many filings on non-problematic transactions are an unnecessary resource drain for the agency, and too few filings on problematic transactions clearly would allow anticompetitive acquisitions to proceed unnoticed and unchallenged. I also generally agree that transaction size (the main trigger for HSR filing under current law) is not the only or even necessarily the best indicator of competitive significance.

However, I am concerned about the expanded *de minimis* exemptions in the proposal released today for two reasons: its broadening of the black box of unseen transactions and its effect on corporate governance.

Commissioner Phillips is correct that, of the filings the agency has reviewed of sub-10% acquisitions, none have led to enforcement action. But we cannot conclude that sub-10% acquisitions could never be problematic, because we do not know if any problematic transactions were deterred from consummation for fear of disclosures that are required in a filing, nor do we know how many might fall into that category. I worry that adding exemptions broadens the category of transactions outside of the agencies' view, and therefore share Commissioner Chopra's preference that the agency consider something other than a full exemption.

My other concern is that expanding the *de minimis* exemptions will have profound policy effects primarily in an area outside of the FTC's particular expertise and jurisdiction: corporate governance. Commissioner Phillips in his statement points out the ways in which the current HSR filing requirement for non-passive acquisitions can chill investors. He notes the rules around HSR may lead "investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas, dampening operational and financial

improvement—and, ultimately, competition.” Although I have not seen evidence to support his conclusion about the effect on competition, the evidence we have seen, even anecdotally, supports his assertions about investor behavior. It follows, therefore, that expanding HSR exemptions may likely change investor incentives and behavior.

These changes may ultimately be a good thing as a matter of public policy, and they might not be; the concern for me is that they would effect a public policy goal outside the realm of antitrust, and I am hesitant for the FTC unilaterally to enact rules outside the scope of our primary authority. I certainly understand that the rules as they exist today have a public policy effect outside antitrust, but they are the rules that we have, and disrupting the status quo is something that should be done only after careful consideration of and in consultation with experts on corporate governance, investor behavior, and securities law and policy.

So, I welcome comments on this NPRM from those in the corporate governance and securities community, and experts on investor behavior, to help us better understand the implications of such a change—including whether it would, as Commissioner Phillips asserts, actually improve competition.