Statement of Commissioner Noah Joshua Phillips
Hart-Scott-Rodino Act Premerger Notification
Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking
Matter No. P110014

September 18, 2020

Today, the Federal Trade Commission ("Commission") voted to publish for public comment a Notice of Proposed Rulemaking ("NPRM") and an Advance Notice of Proposed Rulemaking ("ANPRM"), both relating to the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act" or "HSR").[1] The NPRM proposes two non-ministerial changes: (1) adding the filing requirement to include holdings of affiliates of the acquirer, and (2) the creation of a new exemption, discussed below. The ANPRM poses a series of questions around several topics that may inform future efforts to update and refine the rules.

I write today to discuss the proposed exemption for *de minimis* acquisitions of voting securities, and to explain why I voted in favor of seeking comment on this proposal. In brief, the proposed exemption will carve out from the HSR Act's reporting requirements acquisitions of voting securities that leave the acquirer holding 10% or less of the issuer's total voting stock,[2] subject to several limitations.

The HSR Act was enacted to give the Commission and the Antitrust Division of the Department of Justice (the "Division") (collectively, the "Agencies") advance notice of mergers and acquisitions so that the Agencies could challenge anticompetitive transactions before they were consummated. Among other things, this system it established often allows the government and companies to avoid the difficult process of "unscrambling the eggs"—separating, say, two illegally merged companies.

---

[1] The HSR Act established the federal premerger notification program, which provides the Federal Trade Commission and the Department of Justice with information about large mergers and acquisitions before they occur. The parties may not close their deal until the waiting period outlined in the HSR Act has elapsed, or the government has granted early termination of the waiting period. Under this framework, the government may sue to block those deals it determines may violate the antitrust laws before the deals have been consummated.

[2] The 10% threshold applies to the acquirer's aggregate holdings of the issuer's voting securities. Therefore, the *de minimis* exemption does not permit those claiming it to avoid HSR review by acquiring control of an entity via a "creeping" series of acquisitions, each involving less than 10% of the firm's voting securities. Once an acquirer comes to own 10% of an issuer's voting securities, it may no longer avail itself the exemption.

That is a good thing; but, like most good things, it comes at a cost. Investors must notify the target of the acquisition, wait as long as a month, and pay a fee of $45,000 to $280,000. That can make simple transactions much more costly, and sometimes not worth doing. The target may publicize the deal, driving up the price. Management may take defensive measures. The waiting period may change the viability of the transaction. The fees are substantial. All of that leads investors to hold off, to keep quiet, and to hide what they are doing. They are less likely to pressure management, or share ideas about improving operational and financial improvement—and, ultimately, competition. The HSR Act provides an exemption for the acquisition of 10% or less of voting securities made "solely for the purpose of investment."[3] But the large grey area between what the investment-only exemption clearly permits shareholders to do (e.g., just hold on to their stock) and what it clearly forbids (e.g., proposing corporate action requiring shareholder approval) encompasses interactions with management that play a critical role in keeping corporations accountable and stoking competition.

Today, in effect, HSR operates as a tax on activities that can be beneficial. But it is not supposed to be a tax, whether on shareholder interventions or mergers and acquisitions activity. It also is not supposed to be an early-warning system for tender offers and corporate takeovers—for that we have a number of laws at the federal and state level.[5] And it is not supposed to be a monitoring system for equity investments generally. To the extent possible, it should not be any of those things. It should effectuate its purpose: helping the Agencies spot transactions

unlikely to lessen competition today as they were 30 years ago; and small stock purchases have almost never needed even a second look. Those decades of experience speak volumes, and what they tell us is that, at the least, the benefits of continuing to tax de minimis stock purchases are virtually non-existent. We can change that.