Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Reynolds American Inc. and Lorillard Inc.
FTC File Number 141-0168

May 26, 2015

The Commission has voted to issue a Complaint and Decision & Order against Reynolds American Inc. ("Reynolds") to remedy the allegedly anticompetitive effects of Reynolds' proposed acquisition of Lorillard Inc. ("Lorillard"). I respectfully dissent because the evidence is insufficient to provide reason to believe the three-way transaction between Reynolds, Lorillard, and Imperial Tobacco Group, plc

examined as a whole does not substantially lessen competition, the default approach should be to close the investigation. An exception to the default approach, and a corresponding remedy, may be appropriate if there is substantial evidence that the three-way deal will not be completed as proposed. In such a case, the Commission must ask: what is the likelihood of only a portion of the deal being completed while the other portion, which is responsible for ameliorating the competitive concerns, is not completed? In this case, this second inquiry amounts to an assessment of the likelihood that Reynolds' proposed acquisition of Lorillard would be completed but the Imperial transaction would not be.

I agree with the Commission majority that the first question should be answered in the negative because the proposed transfer of brands to Imperial makes it unlikely that there will be a substantial lessening of competition from either unilateral or coordinated effects.[2] I also agree with the Commission majority that if Reynolds and Lorillard were attempting a transaction without the involvement of Imperial, the acquisition would likely substantially lessen competition.[3] Thus, taken as a whole, I do not find the three-way transaction to be in violation of Section 7 of the Clayton Act.

The next question to consider is whether there is any evidence that the Imperial portion of the transaction will not be completed absent an order. In theory, if the probability of the Imperial portion of the transaction coming to completion in a manner that ameliorates the competitive concerns arising from just the Reynolds-Lorillard portion of the transaction were sufficiently low, then one could argue the overall transaction is likely to substantially lessen competition. I have seen no evidence that, absent an order, Reynolds and Lorillard would not complete its transfer of assets and brands to Imperial. While there are no guarantees and the probability that the Imperial portion of the transaction will be completed is something less than 100 percent, I have no reason to believe it is close to or less than 50 percent.[4]

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[2] Statement of the Federal Trade Commission, supra note 1, at 3.

[3] Statement of the Federal Trade Commission, supra note 1, at 1. While I agree with the Commission's ultimate conclusion that Reynolds' proposed acquisition of Lorillard would substantially lessen competition, I do not agree with the Commission's reasoning. In particular, I do not believe the assertion that higher concentration resulting from the transaction renders coordinated effects likely. Specifically, I have no reason to believe that the market is vulnerable to coordination or that there is a credible basis to conclude the combination of Reynolds and Lorillard would enhance that vulnerability. For further discussion of why, as a general matter, the Commission should not in my view rely upon increases in concentration to create a presumption of competitive harm or the likelihood of coordinated effects, see Statement of Commissioner Joshua D. Wright, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015).

[4] I would find a likelihood that the Imperial portion of the transaction would be completed less than 50 percent to be a sufficient basis to challenge the three-way transaction or enter into a consent decree.

I fully accept that a consent and order will increase the likelihood that the

issue—in this case the three-way transaction—is likely to substantially lessen competition. This one does not.

transactions would not substantially lessen competition, as is the case with the three way transaction originally proposed here, there are no competitive issues with the proposed transaction to be addressed, and the belief that a consent order may even further mitigate concerns regarding the transfer of assetsis not material to our analysis under the Clayton Act. The HSR Act is not in conflict with the Clayton Act and does not change this result.