



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

**Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson
Regarding the Issuance of Two Omnibus Compulsory Process Resolutions**

July 1, 2022

Just over a year ago, Chair Lina Khan’s appointment gave Democrats a majority at the Federal Trade Commission. Two weeks later, with only five business days of notice and without the benefit of staff input, that new majority approved seven resolutions authorizing the use of compulsory process¹ in several broad categories of investigations.² These resolutions removed from Commission oversight an array of important and expensive investigations.³ Several weeks later, the majority adopted, again via a 3-2 vote and without s

Given the scope of these 15 so-called omnibus resolutions,⁵ we asked, “what’s left?”⁶ The answer then was “not much.” Today, following the majority’s adoption of two additional resolutions, the answer is “virtually nothing.”

objected last July, when we worried that the absence of a normal level of Commission consideration and staff review would lead to mistakes.⁹ The new omnibus resolution for merger investigations amends the earlier resolution by deleting language stating that the transactions at issue were those “subject to any federal premerger notification requirements.” Because a copy of the omnibus resolution accompanies civil investigative demands issued to third parties in connection with a merger investigation, the inclusion of this language could permit recipients to infer that the underlying transaction had been notified to the antitrust agencies pursuant to the Hart-Scott-Rodino (HSR) Act. Unless the merging parties make this information public, the antitrust agencies are supposed to keep it confidential.

The language in the new resolution avoids the risk that the resolution will inadvertently disclose to third parties the existence of a nonpublic HSR filing. But it also expands the scope of the resolution, giving the green light for compulsory process in *all* merger investigations, not only those subject to notification under HSR. To initiate a long and expensive investigation into any stock or asset acquisition, no matter how small, a Commission vote is no longer required.

The majority asserts that “the merger omnibus equips the FTC to expeditiously investigate even those deals that would otherwise fly under our radar.” Since it makes investigation no more expeditious and we can (and do) investigate deals that do not trigger HSR, that is simply wrong. The merger omnibus resolution cannot, and does not, impose new filing obligations. The agency has long had the authority to review deals that fall below HSR filing thresholds, and staff routinely reviews industry trade press and a variety of other news sources to identify potentially problematic non-reportable deals that warrant investigation. The Commission routinely has authorized investigations of those deals and sometimes pursued remedies.¹⁰ The suggestion that the merger omnibus resolution will somehow put more deals on our radar is, in our view, disingenuous.¹¹

The second omnibus resolution pertains to the use of compulsory process in non-public investigations of “collusive practices.” U.S. antitrust law rightfully condemns collusion to stifle competition by, say, fixing prices or dividing markets among competitors. The FTC should dedicate resources to rooting out unlawful collusion in the marketplace. But this new resolution also applies to conduct that is legal under well-established case law. Congress drafted Section 1 of the Sherman Act to prohibit contracts, combinations, and conspiracies that restrain trade.¹² To find a violation, courts require proof of agreement – *i.e.*, proof that the competitors were not acting independently. In the absence of an explicit agreement, courts demand evidence of a

⁹ *Id.*; Dissenting Remarks of Commissioner Noah Joshua Phillips, *supra* note 3, at 1 (“And when things go wrong, there will be less accountability”).

¹⁰ *See, e.g.*, In re Otto Bock HealthCare North America, Inc., File No. 171-0231, <https://www.ftc.gov/system/files/documents/cases/d09378commissionfinalopinion.pdf>; In re ProMedica Health System, Inc., File No. 101-0167, <https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120625promedicaopinion.pdf>.

¹¹ In addition, the Commission previously issued an omnibus resolution to authorize the use of compulsory process for investigations of consummated transactions, which would cover most of the transactions referenced by the majority statement.

¹² 15 U.S.C. § 1.

