Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Multilateral Pharmaceutical Merger Task Force

May 11, 2021

Antitrust enforcement predicated on a sound legal and evidentiary basis helps ensure that consumers continue to benefit from competition in pharmaceuticals. As business practices and economic analysis evolve, so must our assessment of transactions. And the Federal Trade Commission has long placed great weight upon updated learning to inform sound enforcement. For these reasons, we welcome ongoing efforts to assess competitive concerns that pharmaceutical mergers may raise. In particular, we commend the Acting Chairwoman for coordinating with our sister agencies to launch the Multilateral Pharmaceutical Merger Task Force, which will review our approach to analyzing the potential effects of pharmaceutical mergers.[1] If there are anticompetitive dynamics we are missing in the mergers before us, identifying and acting upon them will benefit American consumers paying more than they should for the drugs they need.

To stop a merger, the government must articulate a viable theory of harm to competition that explains why that merger violates the law, and must proffer evidence to support that theory. Merely asserting a general opposition to large pharmaceutical mergers, however heartfelt, does not suffice. Yet, when the Commission announced its resolution of competitive concerns with the BMS/Celgene and AbbVie/Allergan mergers, two of our colleagues did just that. They dissented emphatically, based primarily on vague assertions that "massive" pharmaceutical mergers categorically "choked off innovation" or "exacerbate[d] anticompetitive conduct by the merged firm"—without ever explaining precisely how the mergers at issue led to those results.[2] One colleague even went so far as to recommend that the Inspector General of the agency be called in to review the "flawed" and "ineffective" work of staff.[3]

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[1] FTC Press Release, *FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers* (Mar. 16, 2021), https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.

[2] Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Bristol-Myers Squibb/Celgene* (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554293/dissenting_statement_of_commissioner_chopra_in_the_matter_of_bristol-myers-celgene_1910061.pdf (hereinafter "Chopra Bristol-Meyers Dissent"); Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Bristol-Myers Squibb/Celgene* (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf. In the AbbVie/Allergan matter, Commissioner Chopra also took issue with the remedies ordered to resolve the competitive concerns that were supported with evidence. Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of AbbVie Inc./Allergan plc* (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf (hereinafter "Chopra AbbVie Dissent"). Commissioner Chopra's accompanying statement today rehearses these critiques, failing to link his categorical objections to the mergers themselves. Statement of Commissioner Rohit Chopra, *Regarding the Review of the FTC's Pharmaceutical Merger Enforcement Program* (May 11, 2021).

[3] Chopra AbbVie Dissent.

The Task Force that Acting Chairwoman Slaughter announced seeks to uncover additional harms that large pharmaceutical mergers might present and the corresponding evidence that might be gathered to support challenging them. Our colleagues previously accused the Commission and its staff of "wear[ing] blindfolds" and "miss[ing] the big picture"—a picture they refused to paint.[4] We hope that this Task Force will represent a more thoughtful approach, the kind of approach that is necessary to bring an action to enjoin a merger. Strong words are not enough.

Antitrust enforcement is not perfect, and agencies benefit from critical self-examination, as well as examination from outside. But assertions that there are systemic failures in the Commission's review of pharmaceutical mergers (not to mention those of other authorities worldwide) should be supported by facts.[5] And a recalibration of our current approach should be undertaken only if warranted by industry dynamics, economic analysis, and transaction-specific evidence, and only after a thorough evaluation of how that new approach would work. For decades, the Commission has pursued enforcement against all manner of anticompetitive conduct in the pharmaceutical industry, including anticompetitive mergers.[6] That critical work will continue. So too will our support for gathering more information about past enforcement and policy decisions, so that we can improve our current efforts, within the scope of the law and in light of the facts.

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[4] Chopra Bristol-Meyers Dissent; Chopra AbbVie Dissent.

[5] Attacking pharmaceutical mergers based solely on the size of the merging parties would, as a matter of fact, *reduce* antitrust enforcement. Antitrust enforcers benefit from narrower market definitions, without which the law often will not support merger challenges. (Also, to the extent the market is all pharmaceutical companies (or even all large ones), there are a substantial number.) The Commission has long focused on the many markets in which pharmaceutical companies operate—including down to the single drug level—so that anticompetitive effects from mergers of companies large *and* small can be avoided.

[6] *See e.g.,* Statement of Commissioner Christine S. Wilson, *In the Matter of Bristol-Myers Squibb/Celgene* (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554278/bms-celgene_-_wilson_statement.pdf (detailing the Commission's efforts to address anticompetitive mergers and unlawful conduct in the pharmaceutical industry); Health Care Div., FTC Bureau of Competition, *Overview of FTC Actions in Pharmaceutical Products and Distribution* (2019), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/overviewpharmajune2019.pdf; FTC Press Release, *Federal Trade Commission Closes Investigation of Johnson & Johnson's Proposed Acquisition of TachoSil from Takeda Pharmaceutical Company* (Apr. 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-closes-investigation-johnsonjohnsons. The parties subsequently abandoned the transaction.