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Federal Trade Commission
WASHINGTON, D.C. 20580

PREPARED REMARKS OF COMMISSIONER ROHIT CHOPRA

Regarding Non-HSR Reported Acquisitions by Big Tech Platforms

September 15, 2021

When large, dominant firms are unable to innovate on their own, it's common for them to focus more on how to find those ideas from their smaller competitors. Today's report begins to shed light on how the largest technology giants — Facebook, Google, Amazon, Microsoft, and Apple — engage in acquisitions to lock up assets and intellectual property that may someday threaten their dominance.

Importantly, the mergers and acquisitions analyzed in the report were not subject to pre-merger notification under our nation's antitrust laws. More and more of us believe there is a growing case to be made that the Hart-Scott-Rodino Act should be amended to ensure that the very largest firms in the economy report more of their M&A activity to the antitrust agencies, including those transactions that may fall below today's existing HSR reporting thresholds.

However, the report and the underlying confidential data also underscore a critical policy issue that the Commission can address through formal HSR guidance or rulemaking: avoidance devices. Avoidance devices are tricks that buyers can use to disguise a transaction so that the transaction doesn't trigger the HSR thresholds. This happens all the time.

The implementing regulations of the HSR Act forbid avoidance devices, but for many years, across multiple Administrations, Commissioners have decided not to meaningfully enforce this prohibition.

Take the example of acquihires. An acquihire is a merger strategy that provides a payout to a startup and its employees, in exchange for the target's assets and, crucially, key employees

staying on to work at the acquiring firm. It's a common way for dominant firms to take over potential innovators and competitors. But it's easy to structure an acquihire agreement so that the takeover looks more like an employment agreement than an acquisition, by locking up assets at an undervalued basis and disguising the real purchase price in the form of future stock grants and options in an employment agreement. The companies don't report the deal, but in many cases, it can be a classic example of anticompetitive collusion, where the acquiring and selling companies benefit, but the rest of us lose out on the valuable benefits that future competition would bring.

Or take the example of special dividends. A dominant firm can orchestrate a merger agreement where the target firm pays off investors with a special dividend, leaving the buyer free to take over the target at a price below the HSR reporting thresholds. This is a clear avoidance device.

Rather than take on these issues through formal guidance and rulemaking, I have been deeply concerned that past Commissioners decided to create loopholes through a trove of so-called "informal interpretations." These documents provide a roadmap for dominant firms on how they can avoid reporting. Many of these so-called "informal interpretations" are also not grounded in business reality. Most concerning, these "informal interpretations" are not formally voted on by Commissioners, allowing political leadership to evade accountability.

That is why I commend our Bureau of Competition for recently reversing one of the most egregious interpretations related to the exclusion of debt payoffs that has been frequently abused by merging companies.¹

It is critical that Commissioners continue this change in course. We must hold ourselves accountable for the guidance and rules issued under the HSR Act by actually voting on them, rather than directing FTC staff to send up signal flares on how to sidestep the law. We also have to toughen our rules on avoidance devices, rather than assume we are powerless to do anything. And we need to go to court to seek all appropriate relief as authorized by the HSR Act when companies violate the law.

¹ Press Release, Fed. Trade Comm'n, Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt (Aug. 26, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/reforming-pre-filing-process-companies-considering>.

I want to thank everyone who has helped to analyze the data from our study on tech platform acquisitions. I look forward to meaningfully enforcing our premerger notification laws against those who engage in avoidance devices and for Commissioners to hold ourselves accountable for our policies on HSR rules and guidance.