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JOINT ECONOMIC COMMITTEE

May 18, 2021

The Honorable Rebecca Kelly Slaughter
Acting Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FTC Mismanagement

Dear Acting Chairwoman Slaughter:

I write to express concern at what appears to be a growing trend of mismanagement in the Federal Trade Commission's handling of merger enforcement.

I was alarmed to read the public statements from you and Commissioner Chopra,[1] Commissioners Phillips and Wilson,[2] and from 7-Eleven[3] regarding 7-Eleven's acquisition of Speedway. Despite the fact that all four FTC commissioners agree that the acquisition presents serious competitive concerns—and the merging parties' and FTC staff's extensive efforts to resolve those concerns—the Commission took no action to prevent or remedy the harm to consumers.

The bipartisan collegiality of the Federal Trade Commission has long been regarded as one of its best weapons. While it is not unheard of for the Commission to deadlock when limited to four commissioners, I have never heard of it failing to act in the interest of consumers when the entire Commission agrees that they will be harmed by a pending transaction. If the FTC cannot even stop an anticompetitive merger when its bipartisan Commission is in *agreement*, it would seem to be powerless to protect competition and consumers.

Beyond the issues of bipartisanship, this matter also raises issues of basic competence. Your public statement characterized 7-Eleven's conduct as "highly unusual." On the contrary, it is the almost universal practice for parties to a merger to close their deal on the date agreed to with enforcers absent a court order or settlement agreement preventing or altering it. What *is* highly

[1] https://www.ftc.gov/news-events/press-releases/2021/05/statement-ftc-acting-chairwoman-slaughter-commissioner-chopra-7
[2] https://www.ftc.gov/public-statements/2021/05/statement-commissioners-noah-joshua-phillips-christine-s-wilson-closing-7
[3] https://corp.7-eleven.com/corp-press-releases/05-14-2021-7-eleven-inc-response-to-ftc-commissioner-statement

unusual is for federal antitrust enforcers to let a closing date—one which they themselves agreed to with the merging parties—pass without taking action to address competitive concerns. It is particularly egregious to do so when the merging parties have agreed to extend that deadline *four times* at FTC's request. This suggests a grave failure on the government's part, and 7-Eleven's statement indicates that the failure does not lie with the FTC's professional staff, but with the Commission itself.

At this point, the only thing preventing greater harm to consumers is the merging parties' voluntary decision to abide by the terms of the settlement agreement they negotiated with FTC staff, and which FTC staff and management have recommended that the Commission approve. The Commission's failure to do so, or to sue to block a deal that all four commissioners publicly stated is anticompetitive in the alternative, is inexplicable and inexcusable.

Additionally, these concerns compound the FTC's decision in February to suspend granting early termination of HSR waiting periods to transactions that pose no risk to competition.[4] It has been over three months since that "temporary" suspension was announced, and no reasonable explanation has yet been given. At the time, the Commission cited "the transition to the new Administration" and an "unprecedented volume of HSR filings" as reasons for the suspension. Neither reason made sense at the time, and neither makes sense now.

A presidential transition should have almost no effect on the day-to-day operations of an independent agency,[5] and certainly not on the staff of FTC's premerger notification office. And while an increase in HSR filings would certainly explain granting *fewer* early terminations, it doesn't justify granting none at all.

As you are aware, the Hart-Scott-Rodino Act does not require FTC or DOJ to grant early termination of the statutory waiting period for deals that present no competitive threat. The development and maintenance of the practice, however, is an example of good government: protecting consumers while minimizing the burden of regulatory compliance on innocent parties.

Presumably, the FTC is still reviewing each of the HSR filings it receives. And presumably, many of these reviews are completed quickly because they present no competitive overlap or risk to competition. In such cases, it is an appalling abuse of regulatory discretion to require businesses to wait out the entire 30-day period for no benefit to either competition or consumers. The blanket refusal to grant early termination in any instance is nothing more than a tax on American entrepreneurs trying to fuel our economic recovery.

I hope you give both of these concerns thoughtful consideration. I will be asking Sen. Klobuchar to request nonpublic briefings from FTC staff on each of these issues so that we can get to the bottom of these troubling developments. Consumers deserve better, and Congress must make sure they get it.

[4] https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early
[5] In fact, FTC staff have cited this to my staff as an explicit benefit of the FTC's structure.

Sincerely,

Sen. Michael S. Lee
Ranking Member
Senate Judiciary Subcommittee on
Competition Policy, Antitrust, and Consumer Rights