

Oral Remarks of Commissioner Melissa Holyoak
Open Commission Meeting on November 14, 2024

Presentation on Older Americans Report

Presentation on Negative Option Rule

Presentation on the Merger Portal

I. Presentation on Older Americans Report

Thank you, Chair Khan. And thank you to the staff who prepared this report, including but not limited to staff in the Division of Marketing Practices, the Division of Consumer Response and Operations, and the Division of Consumer and Business Education.

Much of the Commission’s most important work requires robustly enforcing the law—including in ways that benefit older adults. As the report says: “Aggressive law enforcement remains the keystone of the FTC’s efforts to protect older consumers.” But this report describes the Commission’s other important efforts, as well. These include extensive education and outreach, such as the Commission’s *Pass It On* fraud prevention education campaign for older adults. The report also describes the Commission’s work with partners—such as military partners working to warn veterans and servicemembers about scams targeting them—that benefit older consumers. These efforts and others the report details, like using information from Consumer Sentinel to develop strategies to better protect the American people, are significant ways our staff are working to protect older adults. I thank staff for their efforts and for today’s presentation.

II. Presentation on Negative Option Rule

Thank you, Chair Khan. As an enforcer, I am concerned when companies use deceptive negative option features to mislead consumers. Enforcement in those circumstances is an effective and appropriate use of Commission resources. But as explained in my written dissent, I had several reasons for disagreeing with the Majority’s approach to this rulemaking. First, I believe it did not follow the FTC Act’s requirements for rulemaking under Section 18. Second, the rule goes well beyond simply proscribing deceptive negative option features and will likely incentivize companies to avoid negative option features that honest businesses and consumers find valuable. Last, I believe this rulemaking represents a missed opportunity to make useful amendments to the preexisting negative option rule within the scope of the Commission’s authority.

Even though I have disagreed with the Majority’s approach, I am, as always, deeply grateful for the efforts and hard work of our talented staff.

III. Presentation on the Merger Portal

Thank you, Chair Khan. I recently concurred in the Majority’s decision to finalize the Hart-Scott-Rodino rulemaking that governs required submissions during merger review. The final rule did not align exactly with my preferences. But it meaningfully curbed the proposed rule’s extreme excesses—which would have been beyond the Commission’s legal authority, unjustifiably

burdensome, and just plain bad policy. We have a duty to robustly enforce the laws Congress has enacted, including during the merger review process. The HSR rulemaking closes certain informational gaps and allows the Commission to better assess the competitive effects of filed-for transactions under Section 7 of the Clayton Act.

But with that said: I believe the current Commission has made *many* missteps in its approach to merger review and enforcement. There is much I could mention here—such as defects in the 2023 Merger Guidelines, or, as detailed in my dissents, the Majority’s wrongfully abusing its authority to extract consents in the *Exxon* and *Chevron* matters. These and other missteps stem in large part from the current leadership’s biases that all mergers and acquisitions should be treated with immense skepticism—and that, all other things equal, the goal of the administrative state should be making M&A more difficult. To be blunt: during the current administration, leadership at the FTC appears to think our default should be placing roadblocks in the way of all mergers wherever possible.

I believe the merger comment portal is just the latest application of the Majority’s biases against mergers. The comment portal provides a way for the public to “comment on a proposed merger.” But the form’s constructions and prompts are written to foreclose potentially positive opinions about the relevant merger and elicit only negative opinions. For example, Step 2 requires submitters to answer the question: “How will this transaction affect competition?” But the form only provides four options for the submitter to choose between: “increased prices,” “reduced quality,” “reduced innovation,” and “labor market concerns.” While the form provides the option to select “other” (and a comment box), it does not provide pre-populated options for the submitter to indicate that the merger may benefit consumers through, *e.g.*, increased efficiency, lower costs, more innovation, or other traditional procompetitive benefits. This approach conflicts with the reality that most mergers do not raise anticompetitive concerns. In fact, the Commission only issued second requests on 1.4% of transactions in fiscal year 2023.¹ Despite this reality, this new comment portal, by its prompts alone, puts a heavy thumb on the scale and continues the oft-repeated narrative from the Commission’s Majority: all mergers are bad.

Rather than prejudge mergers, the Commission must return to its strong foundation of employing economic analyses to assess competitive effects. Prejudgment and policy preferences in a public comment portal are no substitute for the rigorous analysis we must meet under Section 7 of the Clayton Act.

¹ Fed. Trade Comm’n & U.S. Dept. of Just., Hart-Scott-Rodino Annual Report, Fiscal Year 2023, at Appendix A (Oct. 10, 2024).