

Submitted: July 18, 2021

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 21, 2021 OPEN MEETING AGENDA

In Re: Rescission of 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

On behalf of the Committee for Justice, please consider this comment concerning the July 21, 2021 open meeting agenda.¹ We appreciate this opportunity to provide comments regarding the possible rescission of the Commission’s 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (1995 statement).²

The Commission claims to have a broader goal of bringing transparency through a series of monthly open meetings. The July 1 meeting fell short of this goal on all accounts.³ The July 21 meeting does not seem to be an improvement.

The public was given a mere *four business days* to comment on the proceedings. Allowing only several days for public comment on significant agenda items that will drastically affect the merger approval process is a deterrent to substantive public input. To allow for both transparency and public participation in these proceedings, the Commission should allow for a standard of 30 days of public input.

With this in mind, it is troubling that the Commission will be considering a significant shift in

¹ See “FTC Announces Agenda for July 21 Open Commission Meeting.” The Federal Trade Commission. (June 12, 2021), available at: <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-announces-agenda-july-21-open-commission-meeting>.

² “Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions.” The Federal Trade Commission. (June 21, 1995) (hereafter “1995 Statement”), available at: https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

³ See, e.g., “Comments In Re: Rescission of 2015 FTC Statement on Unfair Methods of Competition.” The Alliance on Antitrust. (June 30, 2020), available at: <https://www.allianceonantitrust.org/blog/ftc-july-open-meeting>.

policy as the open meeting agenda will include this sudden push to revoke the 1995 statement. Of particular concern is the rejection of the prior approval provision.

With the adoption of the 1995 statement, the Commission accepted the Hart-Scott-Rodino (HSR) Act⁴ framework as adequate for handling mergers and thereby determined that prior approval of future acquisitions by a respondent should no longer be required as a routine matter.⁵

As the Commission explained when issuing its 1995 policy statement: “In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.”⁶

The rescission of the 1995 statement is another step in the direction of rejecting the HSR regime which, in the words of Peter W. Rodino, Jr on the 25th anniversary of the Act, “absolutely has transformed merger enforcement. Competition, as well as the consumer, has benefitted.”⁷

By requiring agency approval when there is no proof of harm, the Commission is essentially shifting the burden to companies to justify deals within the same market. Congress has considered, but has failed to pass, similar proposals. Furthermore, a bright-line rule that prohibits transactions is not only burdensome, but also unnecessary when agency professionals are more than capable of reviewing these deals.

The Commission’s recent notice of the open meeting did not even state an objective justification for the quick removal of the 1995 policy. But whatever the justifications may be, the likely outcome of rescinding the 1995 statement will be much more litigation over mergers rather than economizing resources and saving law enforcement dollars.

Notably, the decision to consider whether to rescind the 1995 statement regarding prior-approval requirements comes in the immediate wake of President Biden’s signing of the Executive Order on Promoting Competition in the American Economy, which encourages the FTC and DOJ to

⁴ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

⁵ See 1995 Statement. (“The Commission believes that in most such situations the availability of HSR premerger notification and waiting period requirements will adequately protect the public interest in effective merger enforcement, without being unduly burdensome.”)

⁶ *Id.*

⁷ Bruno, M. R., “Hart-Scott-Rodino at 25.” The Federal Trade Commission. (June 13, 2002), available at: <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/pno-news-archive/statement-peter-w-rodino>.

revise the vertical and horizontal merger guidelines.⁸ The Executive Order also affirms the government’s authority to challenge consummated mergers, which could have significant implications for merger review. These changes, along with other proposals, appear to act in tandem and will create uncertainty for businesses of all sizes and across all industries.

Above all, we are concerned that the Commission’s sudden rush to revoke the 1995 statement, combined with other recent actions, foreshadows a broader agenda to radically change antitrust law by shifting towards ex ante control and away from the HSR regime while insulating itself from Congress and from public participation.

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. As Commissioner Christine Wilson stated in dissent to the Commission’s July 1, 2021, meeting: “American consumers are best served when policy decisions are made with input from a variety of stakeholders. The FTC has a laudable history of seeking this input by issuing for notice and comment draft policy statements and other initiatives; holding workshops and hearings on policy issues; and preparing thoughtful and thorough reports.”⁹

We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and consideration of proposals. We welcome the opportunity to further discuss these views and stand ready to provide additional input.

Sincerely,

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Founder, The Alliance on Antitrust

⁸ “Executive Order on Promoting Competition in the American Economy.” The White House. (July 9, 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁹ See Wilson, Christine S., “Dissenting Statement of Commissioner Wilson - July 1 Open Commission Meeting.” (July 1, 2021), available at: https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.