



July 28, 2021

The Honorable Frank Pallone
Chairman, House Committee on Energy and Commerce

The Honorable Cathy McMorris Rodgers
Ranking Member, House Committee on Energy and Commerce

The Honorable Janice D. Schakowsky
Chair, House Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce

The Honorable Gus M. Bilirakis
Ranking Member, House Committee on Energy and Commerce
Subcommittee on Consumer Protection and Commerce

RE: HEARING ON ‘TRANSFORMING THE FTC: LEGISLATION TO MODERNIZE CONSUMER PROTECTION’

Dear Representatives Pallone, Rodgers, Schakowsky, and Bilirakis:

We at the Committee for Justice write today to provide you with comments for inclusion in the record of the Subcommittee’s July 28th hearing, "Transforming the FTC: Legislation to Modernize Consumer Protection."

Founded in 2002, CFJ is a non-profit legal and policy organization that educates the public and policymakers about the rule of law and promotes constitutionally limited government. CFJ has a long history of leadership on Supreme Court and federal judicial nominations in the Senate and has recently focused on issues at the intersection of constitutional law and technology. Consistent with that mission, our latest efforts have encompassed areas such as data privacy policy, administrative law, and antitrust law.

By way of background, on July 1, 2021, the Federal Trade Commission (FTC), after allowing six days for public comment, voted to rescind the 2015 Statement of Enforcement Principles Regarding “Unfair Methods of Competition” (UMC) Under Section 5 of the FTC Act. Prior to the FTC’s meeting, comments were submitted by Ashley Baker of the Committee for Justice and Daren Bakst of The Heritage Foundation, on behalf of a group of 20 legal experts, conservative advocates, former FTC officials, and economists.

On July 21, 2021, the FTC voted to rescind its bipartisan 1995 Policy Statement on Prior Approval and Prior Notice Provisions in merger cases. Relevant comments were once again provided. Notably, both of these actions – along with other significant changes – were effected along party lines, with limited opportunity for public input, and without dialogue among the Commissioners.

Since today’s hearing will consider a wide array of reforms, many of which are relevant to the level of discretion and enforcement principles under FTC Act § 5 and to the broader capabilities and mandate of the Commission, we attach to this letter the two recent comments to take into consideration in your discussion of the FTC’s legal and administrative authorities.

We thank you for your oversight of this important issue and ask that this letter be included on the Committee or Subcommittee’s website and repository. Please feel free to contact us should you have any questions or requests for additional input from signatories. We welcome the opportunity to further discuss these views and relevant proposals or congressional assessment with the Committee.

Respectfully,

Ashley Baker
Director of Public Policy, The Committee for Justice
Founder, The Alliance on Antitrust

Attachments:

1. Comments In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5
2. Comments In Re: Rescission of 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

Submitted: June 30, 2021

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COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 1, 2021 OPEN MEETING AGENDA

In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5

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

We, the undersigned, appreciate this opportunity to provide comments regarding the possible rescission of the Commission's 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition (UMC) Under Federal Trade Commission Act § 5 (2015 statement).

While we applaud the Commission's broader goal of bringing transparency through a series of monthly open meetings, allowing only six days for public comment on significant agenda items that will drastically affect enforcement policy decisions is a deterrent to substantive public input.¹ As Commissioner Noah Phillips stated, "a mere week's notice on matters requiring serious deliberation, and a number of the policies themselves, undermine that very goal" of transparency.² To allow for both transparency and substantive public participating in these proceedings, the Commission should allow for a standard of 30 days of public input.

More troubling still is the fact that the Commission will be considering a significant shift in enforcement policy as the open meeting agenda will include this sudden push to revoke the 2015 statement. This policy statement provides a bipartisan framework that lays out widely agreed upon core principles regarding antitrust law and the Commission's Section 5 enforcement. Among these principles is "the promotion of consumer welfare" and focusing enforcement on acts or practices that "must cause, or be likely to cause, harm to competition or the competitive process."

¹ See "FTC Announces Agenda for July 1 Open Commission Meeting." The Federal Trade Commission. (June 24, 2021), available at: <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>.

² Commissioner Noah J. Phillips. @FTCPhillips, Twitter. (June 25, 2021), available at: <https://twitter.com/FTCPhillips/status/1408459407134973955>.

As the Commission explained when issuing its 2015 statement: “In describing the principles and overarching analytical framework that guide the Commission’s application of Section 5, our statement affirms that Section 5 is aligned with the other antitrust laws, which have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis.”³

The rescission of the 2015 statement would untether the Commission’s enforcement decisions from concerns over harms to consumers and to the competitive process. Consumer welfare is appropriately prioritized in the 2015 statement and remains the goal of antitrust as recognized and reaffirmed in existing case law.

Additionally, the Commission’s recent Notice of the open meeting did not even state an objective justification for the quick removal of the 2015 policy, nor did it indicate whether it would be replaced by new guidance.

Abandoning the 2015 statement’s framework would remove important guardrails that established predictability and guidance in enforcement actions. The lack of predictability resulting from the FTC’s re-expanded discretion in invoking broad Section 5 authority on a case-by-case basis would create uncertainty for businesses of all sizes and across all industries. The Commission’s misadventure into UMC expansionism would generate unwarranted confusion, and eventually courts would have to grapple with questions of interpreting the outer boundaries of Section 5 authority that were previously cabined by the 2015 statement.

Above all, we are concerned that the Commission’s sudden rush to revoke the 2015 statement foreshadows a broader agenda to radically change antitrust law by greatly expanding the Commission’s enforcement discretion.

These concerns have been echoed by others such as Senator Mike Lee (R-UT), who stated that “[s]hould the FTC rescind the statement, it will replace clarity with ambiguity in the midst of a fragile economic recovery. Rescinding the statement would also signal that the Commission rejects the idea that there are any limits to its power or regulatory reach, and that it intends to use Section 5 to address non-economic harms outside the agency’s purview or expertise.”⁴

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and

³ “Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act.” The Federal Trade Commission. (August 13, 2015), available at: https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

⁴ See “Sen. Lee Expresses Concerns about Possible Revocation of FTC 2015 Statement of Section 5 Enforcement Principles.” (June 24, 2021), available at: <https://www.lee.senate.gov/public/index.cfm/press-releases?ID=88C0AA07-BB92-427C-8EEC-63B92E8E6A26>.

consideration of proposals. We welcome the opportunity to further discuss these views and stand ready to provide additional input.

Sincerely,

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Submitted: July 18, 2021

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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.⁵ 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).⁶

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.⁷ 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

⁵ 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>.

⁶ "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.

⁷ 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) Act⁸ 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.⁹

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.”¹⁰

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.”¹¹

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

⁸ Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

⁹ 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.”)

¹⁰ *Id.*

¹¹ 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.¹² 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.”¹³

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,

Ashley Baker
Director of Public Policy, The Committee for Justice
Founder, The Alliance on Antitrust

¹² “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/>.

¹³ 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.