NetChoice Comment for the Record: FTC Open Meeting, July 21, 2021

NetChoice[1] is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Introduction

We welcome the opportunity to provide the Federal Trade Commission with feedback about the important issues it will consider at its open meeting on July 21st, 2021. As discussed below, we ask that the FTC:

- Vote **against** rescinding the FTC's Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases;
- Carefully consider the trade-offs involved in any proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers; and
- Refrain from adopting major policy changes without providing adequate opportunity for meaningful public comment going forward.

We appreciate the Commission's consideration of our views, and welcome the opportunity to provide any additional information or answer any questions.

The Benefits of the FTC's Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

The Commission is considering whether to rescind the FTC's Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases. It should vote against doing so. Overall, the statement on prior approval and prior notice provisions was a carefully considered proposal that struck a necessary balance between identifying and deterring anticompetitive mergers and ensuring that American businesses are not unduly burdened by overly cumbersome restrictions that stifle innovation, harm small businesses, detract from consumer welfare, or cripple America's competitiveness in the global economy. Repealing this policy statement would reimpose these burdens *and* waste the FTC's resources.

[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org. The views expressed here do not necessarily represent the views of every NetChoice member.

The FTC's Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases is the well-balanced product of careful consideration

The FTC's policy statement was the result of an extensive investigation into the efficacy of the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino Act, and the burdens imposed by prior approval requirements on mergers and acquisitions by businesses subject to a previous order. The outcome was not a complete abandonment of prior approval requirements for businesses found to have engaged in or attempted to engage in an illegal merger. Instead, the FTC retains the ability to impose these requirements in situations where it deems them appropriate. The policy statement specifically provides that "[t]he Commission reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances."

The statement was simply a recognition that in the majority of these cases, the Hart-Scott-Rodino procedures strike a better balance between the benefits and burdens of premerger notification and approval requirements. In circumstances where the FTC feels it is warranted, they retain the ability to impose prior approval requirements when issuing an order regarding a completed or attempted merger that is illegal under the United States' antitrust laws. In fact, the policy statement goes out of its way to describe the situations in which these requirements are most likely warranted. These include when:

- 1) "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger"; or
- 2) "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger."[2]

The statement also explains that the need for prior approval requirements will "depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors (including whether the challenged transaction itself was not reportable)."[3]

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[2] Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995).
[3] *Id.*

The statement is nothing more than a modest attempt to weigh the benefits of prior approval requirements with the costs they impose. It does not prevent the FTC from imposing these requirements, it only limits their use to situations where they are appropriate and likely to create more benefits than they are costs. This is important because, as discussed below, the costs of prior approval requirements for mergers and acquisitions can be significant and can ultimately end up harming those that the FTC is trying to protect.

Moreover, reimposing these requirements in a significant number of additional cases would waste taxpayer money when it could be better spent in many of the other core functions of the FTC. By forcing the FTC to engage in unnecessary prior approval procedures in a significant number of additional cases, the Commission will have to bear costs that limit its ability to expend resources in more important areas that pose a greater threat of anticompetitive harm to consumers, such as cases of intentional fraud and COVID scams.

Prior Approval Requirements Can Harm Innovation, Small Businesses, and Consumers

The economy constantly finds new and better ways to serve the needs of consumers. A core component of this dynamism is the ability of businesses to merge with one another or acquire entities to provide innovative products and services that take advantage of each companies' comparative advantage in a way that could not be achieved in a premerger world. This innovation is possible only because of gained efficiencies and the development of capabilities that did not exist previously. Acquisitions and mergers are about far more than just acquiring another business, they're about gaining infrastructure, talent, intellectual property, and a variety of other capabilities that can help both businesses provide better products and services to consumers going forward.

Take the Amazon-Whole Foods acquisition, for example. This partnership sparked incredible innovation, much of which has been particularly important during the ongoing COVID-19 pandemic. From at-home delivery to pick-up lockers that minimize the need for interpersonal contact, Whole Foods was able to develop and integrate a number of new services that would have been unthinkable just five years ago. In addition, many consumers have seen fairly significant price decreases since the acquisition, as a result of continuous pricing cutting and Whole Food's post-merger Amazon Prime discounting program.

By imposing cumbersome prior approval requirements, the FTC risks deterring these kinds of consumer-welfare enhancing mergers and undermining the enormous potential for innovation that comes with them. Decisions regarding mergers and acquisitions are made on the margin and an increase in the cost of these transactions or the risk that they will not be approved even after the expense of significant administrative costs can have the effect of killing them before they ever even have the chance to be reviewed by the FTC. As such, many of these transactions that would spur innovation and promote economic growth will never see the light of day, regardless of whether the FTC would have ultimately approved them. By artificially deterring what would be procompetitive transactions, the FTC risks not only undermining innovation but also weakening the United States' economic position in the global community.

Unnecessary and overly burdensome prior approval requirements also threaten to harm small businesses and forward-thinking entrepreneurial endeavors. The potential of being purchased by a larger, more well-established business provides a major financial incentive for up-and-coming entrepreneurs to engage in innovative activities.[4] It allows for greater specialization and creates incentives for entrepreneurs to invest in narrowly focused, but ultimately value-enhancing, ventures without having to stand up an entire corporate infrastructure to bring their innovative product or service to fruition. In fact, many entrepreneurs now begin innovative undertakings with the explicit goal of being acquired by one of the larger players, and venture capitalists often invest with an eye toward this possibility.[5] It is important to remember that businesses only agree to merge or sell if they and their stakeholders feel it will ultimately be beneficial. By raising the costs and increasing the difficulty of these mergers and acquisitions, the FTC risks harming small businesses and cutting off a core incentive to invest in these enterprises, which can also serve to hinder innovation in and of itself.

Finally, and most importantly, imposing excessive prior approval requirements on a substantial number of additional mergers will ultimately harm consumers, which should be the primary focus of any action taken by the FTC. Not only will these requirements hinder innovation, as discussed above, they will also likely lead to higher prices and lower quality goods and services. Mergers and acquisitions do not

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[4] Michael Mandel & Diana G. Carew, *Innovation by Acquisition: New Dynamics of High-Tech Competition*, Progressive Policy Institute (Nov. 2011), https://www.progressivepolicy.org/wp-content/uploads/2011/11/11.2011-Mandel_Carew-Innovation_by_Acquisition-New_Dynamics_of_Hightech_Competition.pdf.

[5] Gordon Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity around the World*, Harvard Law School Forum on Corporate Governance (Dec. 29, 2017), https://corpgov.law.harvard.edu/2017/12/29/venture-capital-investments-and-merger-and-acquisition-activity-around-the-world/#:~:text=Most%20venture%20capital%20investments%20are,strategy%2C%20but%20increasingly%20less%20so.

just allow businesses to develop new and innovative products and services, they provide businesses with the tools necessary to both improve and lower the prices of their currently existing products and services. The purchase of a company with superior data security capabilities allows an existing firm to improve their offerings by providing their customers greater privacy protections in the services they already supply. The purchase of a company with superior manufacturing capabilities allows an existing firm to make their production capabilities far more efficient, leading to lower prices for their customers. By raising the cost of these types of procompetitive transactions, the FTC risks harming consumers when it comes to innovation, price, and quality.

Moreover, the requirements jeopardize other core values of the FTC and undermine the agency's reputation for apolitical expertise. For example, without the consistency provided by the consumer welfare standard, and without objective criteria to replace it, the FTC's discretion over merger and acquisition approval will be even more concerning as this subjective approach allows the Commission to hinder what would otherwise be procompetitive transactions. In essence, the more deals the FTC gets to review and approve before they commence, the more likely it is to abuse its new ad-hoc, politicized approach to enforcement.

The Considerations Involved in Adopting a Proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers

The Commission is voting on whether to issue a new policy statement on Repair Restrictions Imposed by Manufacturers and Sellers, which would likely include restrictions on the use of adhesives that make parts difficult to replace, limiting the availability of spare parts for third-party repairers and users, and making diagnostic software unavailable to third-party repairers and users.

The Commission should consider the potential unintended consequences of such restrictions. For example, limiting the use of adhesives on electronic devices could end up making the products less safe and harming consumers, particularly as an increasing number of children are using these types of devices.

Moreover, it will also be important for the FTC to consider the equity of such restrictions, as forcing manufacturers to provide their diagnostic software and replacement parts indiscriminately would harm authorized third-party repairers who have expended the time and resources necessary to earn the trust of these manufacturers. Their investment would be all but wiped out by such requirements.

However, if the FTC is intent on imposing these restrictions on manufacturers, it should also adopt companion rules that serve to protect consumers from third-party actors and promote trust throughout the economy.

If the FTC is going to force businesses to provide replacement parts and diagnostic equipment to third-party repairers, it should:

- Require repairers to **clearly and conspicuously disclose** to consumers whether they are authorized by the manufacturer as an official repairer and whether they have undergone training from the manufacturer on the proper process for repairs to their devices or products.

These requirements will help provide necessary transparency for consumers. At the same time it helps businesses avoid engaging in deceptive or unfair practices.

In addition, such disclosures can help prevent physical and material harm to unwitting consumers who thought their repair was authorized by the manufacturer and would be performed properly. They will also prevent the erosion of trust between manufacturers and downstream customers that can result from improperly performed repairs by third parties that reflect adversely on the original manufacturer in the minds of consumers.

We think that the FTC should refrain from issuing a policy statement on Repair Restrictions Imposed by Manufacturers and Sellers. However, if the FTC is going to issue such a statement, it should include companion rules mandating clear and conspicuous notices of authorization and training that protect consumers and manufacturers from the harm that can result from negligent repairs done by third-party repairers.

The Problems with Adopting Major Policy Changes without Providing Adequate Opportunity for Meaningful Public Comment

In May 2020, Chair Khan and Commissioner Chopra published a law review article themselves arguing that FTC rules should be established through:

> "a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy"

and that the agency should

> "consider and address all submitted comments before issuing the final rule."[6]

We agree. Such opportunities for public input and opportunities for FTC staff to speak about proposed and past decisions with the public help to ensure public trust in the Commission. As an agency designated to protect consumers, it's critical to recognize that trust is a two-way street -- as Chair Khan and Commissioner Chopra suggested in their May 2020 article.

It is hard to square these assertions with the Commission's recent behavior unless it is to be believed that public input is invaluable for the making of a rule, but not for decisions to fundamentally overhaul the rulemaking process itself. Public input is important not just for rulemaking, but for any major decision made by the FTC that substantially impacts its approach to regulation and enforcement.

This is the second open meeting held by the FTC since Commissioner Khan was appointed as the Chair shortly after her confirmation. The first open meeting was announced on June 24th and took place on July 1st. Comments were due on July 1st at 12:00PM and the meeting started on July 1st at 12:00PM. This means that the *public was given fewer than 8 days to consider* and respond to the FTC's proposals.

Moreover, the public's comments were due at the exact same time as the meeting commenced, where the FTC ultimately voted to adopt each of the proposals up for consideration. And all oral public comments were only heard *after* the Commission had voted. This would be like allowing the defense to plead its case only after the judge issued their ruling. These actions are such an abridgement of due process, fairness, and openness that it is sure to erode consumer trust in the FTC.

To describe this time period for public comment as inadequate would be an understatement and the FTC's consideration of the public comments was clearly not meaningful given the Commission quite literally took no time to actually read or contemplate the comments. Even more concerning, the proposals adopted at this meeting were some of the most significant proposals that the FTC has adopted in decades. They involved rescinding a policy statement that tied the FTC's enforcement principles to the lodestar of American antitrust analysis: consumer welfare. They also involved gutting the reasonable restrictions imposed on the FTC's rulemaking procedures and removing requirements that ensured the public had a role to play in such a process.

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[6] Rohit Chopra and Lina M. Khan, *The case for "unfair methods of competition" rulemaking*, 87(2) University of Chicago Law Review 357, 368-69 (2020).

These are major changes that the FTC should have wanted to make only after receiving meaningful input from the public. In fact, these are changes that make the need for public comment all the more necessary, as they remove reasonable restraints on the FTC's broad and potentially devastating power. As Commissioner Wilson and Commission Phillips argue in one of their dissents to these decisions, "What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record."[7]

Unfortunately, rather than changing course, the Commission provided *even less time for public comment* for its second open meeting that will occur on July 21st. The FTC announced its meeting on the 12th and provided that comments would be due on the 18th. This provides fewer than 7 days for public comment, two of which are over the weekend.

While we are grateful that the FTC decided to include at least some period between when the comments are due and when the voting will actually take place this time around, we are skeptical that three days is sufficient to meaningfully consider the significant amount of public commentary it receives on these important issues.

Going forward, we ask that the Commission provide adequate time for public comments and meaningfully consider such comments before adopting major policy changes that will impact the entire United States economy.

Conclusion

As always, we stand ready to work with the Commission to achieve beneficial outcomes that promote the interests of the United States and benefit American consumers and innovation. We appreciate your consideration of our views.

Sincerely,

Carl Szabo, Vice President & General Counsel
Chris Marchese, Counsel
Trace Mitchell, Policy Counsel
NetChoice

[7] Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (Jul. 9, 2021), https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson.