

Oral Remarks of Commissioner Christine S. Wilson

Open Commission Meeting on July 21, 2021

Care Labeling Rule

Proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers

Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

Today the Commission held an open meeting on three agenda items. To facilitate transparency, I post my remarks from the meeting here.

I. Introductory Remarks

Before voting on the first matter, I want to take a moment to talk generally about the process of these meetings. I found the comments from the public during our last open Commission meeting to be informative and thought-provoking, and I look forward to hearing from the public today. The value of these open meetings for Commission decision making, though, is a different matter. To avoid waiver of the Commission's deliberative process privilege, we must avoid both staff input and a dialogue among the Commissioners. Instead, the Chair and Commissioners are limited to delivering monologues with no interaction. The format makes these events more akin to theatre than to the reasoned decision making that should characterize our institution.

To reach conclusions about policy matters, the Commission should proceed in the manner that has served the agency well for decades. I benefit greatly from a process that facilitates full consultation with staff, through oral briefings and comprehensive memoranda, as well as a robust dialogue among the Commissioners. News reports have revealed that FTC staff has been muzzled externally – agency personnel are forbidden from appearing at any public events.¹ Unfortunately, it appears that staff is being silenced internally, as well. Perhaps this is due to a view some have expressed that FTC staff is unimaginative and has failed to advance the Commission's mission effectively for decades.

I strongly disagree. I believe that FTC staff include some of the most talented lawyers in the competition and consumer protection bar. Staff are skilled at executing the agency's mission in an exemplary manner, given clear direction regarding the Commission's strategic and enforcement priorities. I saw this firsthand as Chief of Staff for Chairman Tim Muris, who brought to the Commission an aggressive agenda and worked constructively with staff to implement it.

¹ Leah Nylen, et al. "*FTC staffers told to back out of public appearances*," POLITICO (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>.

During his tenure, staff brought the agency's first privacy and data security cases against Microsoft² and Eli Lilly,³ deploying Section 5 of the FTC Act in new and innovative ways to address evolving technologies and emerging consumer harms. These matters launched the FTC's privacy and data security program and laid the foundation for the protection of sensitive health and other information for years to come.⁴

In the competition arena, both the FTC and DOJ lost a string of hospital merger challenges in the late 1990s. Chairman Muris created a cross-disciplinary hospital merger task force to conduct retrospectives to gauge the actual effects of the challenged mergers, and to revisit the agency's approach to challenging these mergers in court.⁵ Economists and lawyers working together devised new ways to challenge these mergers. The result? Beginning with the Evanston⁶ case, the Commission has had only one ultimate loss in this sector in the ensuing 16 years.

In addition, Chairman Muris solicited and applied the views of others – Commissioners and staff.⁷ I am encouraged that Chair Khan worked with our office more collaboratively on some of today's agenda items and urge her to continue the FTC's long-standing tradition of bipartisan collaboration. Each Commissioner brings varied perspectives and policy preferences to this job that enable the body to consider issues in a far more comprehensive way than any one of us would or could on his or her own. FTC staff have similarly varied perspectives, professional experiences, and comparative advantages. While we may not always agree with each other or with staff, our analysis is deeper and richer because of staff's recommendations and insights, particularly when our analyses diverge.

Our agency has come under attack from a variety of quarters in recent years. In the face of these attacks, we could be proud of our robust dialogue and thorough analysis at every stage of each matter and proceeding. Crushing internal dialogue diminishes the quality of our decision making and gives our detractors more ammunition. Process matters, so let's get it right.

² In the Matter of Microsoft Corporation, C-4069 (Dec. 24, 2002), <https://www.ftc.gov/enforcement/cases-proceedings/012-3240/microsoft-corporation-matter>.

³ In the Matter of Eli Lilly and Company, C-4-47 (May 10, 2002), <https://www.ftc.gov/enforcement/cases-proceedings/012-3214/eli-lilly-company-matter>.

⁴ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUMBIA L. REV. 583 (2014). Solove and Woodrow explain that FTC settlements have created a common law of privacy. “[C]ompanies look to these agreements to guide their privacy practices. Thus, in practice FTC privacy jurisprudence has become the broadest most influential regulating force on information privacy in the United States – more so than nearly any privacy statute or any common law tort.” *Id.*

⁵ OVERVIEW OF MERGER RETROSPECTIVE PROGRAM IN THE BUREAU OF ECONOMICS, <https://www.ftc.gov/policy/studies/merger-retrospectives/overview>.

⁶ *Evanston Northwestern Healthcare Corp.*, F.T.C. No. 9315, 2007 WL 2286195 (Aug. 6, 2007).

⁷ In fact, during Chairman Muris' tenure, dissenting votes were rare because he took the time to work closely with his colleagues and develop a bipartisan consensus on both enforcement and policy issues.

II. Care Labeling Rule

The FTC's Care Labeling Rule specifies the care instructions that can be placed on garment labels.⁸ There is no question this is useful information to consumers. What is less clear is whether a Rule is necessary to ensure that clothing manufacturers provide care instructions.⁹ Most European Union nations and Canada have voluntary care instruction systems and, according to the record, manufacturers in those markets voluntarily provide cleaning instructions.¹⁰ Regulations, by nature, risk inhibiting innovation and stifling competition. The Care Labeling Rule provides a great example of these phenomena because the Rule is tied to specific care instructions and procedures and is woefully out of date. Industry associations have developed new types of care instructions for both existing and new fabrics that are not reflected in this Rule. In addition, the Rule references symbols that are generations out of date.¹¹

Repeal of the Rule would resolve these accuracy issues and allow manufacturers and sellers the freedom to include new care procedures and perhaps novel methods of disclosing instructions to consumers.¹² I am pleased that the Commission considered repeal. The majority

⁸ FED. TRADE COMM'N, *Clothes Captioning: Complying with the Care Labeling Rule*, <https://www.ftc.gov/tips-advice/business-center/guidance/clothes-captioning-complying-care-labeling-rule>.

⁹ *See Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods: Supplemental notice of proposed rulemaking*, 85 Fed. Reg. 44,485-86 (July 23, 2020), <https://www.federalregister.gov/documents/2020/07/23/2020-13919/trade-regulation-rule-on-care-labeling-of-textile-wearing-apparel-and-certain-piece-goods> (July 23, 2020) (following multiple periods of comments and a roundtable in March 2014 and finding "the record suggests that the Rule may not be necessary to ensure manufacturers provide care instructions, may have failed to keep up with a dynamic marketplace, and may negatively affect the development of new technologies and disclosures.").

¹⁰ *Id.* at 44,491. The Commission's Federal Register Notice proposing repeal of the Rule explained that care labeling is voluntary in Canada and most of Europe. *See* Roundtable Transcript at 175 (indicating that care labeling is voluntary in Europe and Canada) and Ginetex (384-83) (urging the Commission to consider a voluntary approach); *see also*, Feltham, T. Martin, L. (2006, June) "Apparel Care Labels: Understanding Consumers' Use of Information," https://www.researchgate.net/publication/228295594_Apparel_Care_Labels_Understanding_Consumers'_Use_of_Information ("Even though the care labeling (in Canada) is voluntary, consumers see care labels on almost all garments purchased in Canada"); and "European Commission DG Enterprise and Industry Study of the need and options for the harmonisation of the labelling of textile and clothing products," 24 January 2013, Final Report, Matrix Insight Ltd., at 43-44, available at ec.europa.eu/DocsRoom/documents/10480/attachments/1/translations/en/renditions/native.

¹¹ Numerous comments filed in response to the Commission's July 2020 Supplemental notice of proposed rulemaking urged the Commission to revise the Rule to allow the use of updated symbols. *See, e.g.*, National Consumers League, Consumer Federation of America et al Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0193>; Retail Industry Leaders Association Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0199>; Footwear Distributors & Retailers of America (FDRA) Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0214>.

¹² The Commission's Federal Register Notice proposing repeal noted: "To the extent that current mandated labels may be imperfect or limited, a benefit of the Rule's repeal would be to afford manufacturers and sellers the freedom to improve existing labels, to label new cleaning methods as they enter the market, and to use widely recognized care symbol systems without waiting for updates to the Rule." *Id.* at 44,490. The Commission also explained that: "Repeal would also eliminate any possibility the Rule negatively affects market innovation. Over the course of the proceeding, some commenters suggested that the Rule might have had a negative impact on the adoption of new

of the comments did not support repeal; however, they also did not support maintaining the Rule in its current, outdated form. It is disappointing that the Commission votes today to terminate the proposed repeal but takes no immediate steps to update the Rule. If the Commission is going to maintain a Rule regulating an industry, we should ensure it is accurate.

The Commission has a laudable practice of conducting regular reviews of our Rules and Guides on a ten-year schedule. The FTC website explains: “Since 1992, the FTC has conducted a regular, systematic review of all its rules and guides on a rotating basis. Rules and guides are critically important, but need to be reviewed periodically to ensure they are up-to-date, effective, and not overly burdensome.”¹³ We are not meeting our self-described obligations in our review of this Rule. This is notable because in other contexts the Commission has been meticulous in updating Rules to address changes.¹⁴

The inaccuracies in the Care Labeling Rule are not trivial.¹⁵ The failure of the FTC to acknowledge the existence of an emerging rival to dry cleaners known as wet cleaners likely has impacted competition in this industry.¹⁶ And, in today’s global economy, I do not understand why the Commission would maintain a Rule requiring symbols that do not align with international standards.

cleaning technologies. For example, commenters and workshop participants explained that the Rule’s failure to address wetcleaning has placed professional wetcleaners at a competitive disadvantage and discouraged greater use of that technology.” *Id.* at 44,491.

¹³ RETROSPECTIVE REVIEW OF FTC RULES AND GUIDES, <https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides>.

¹⁴ For example, the Commission sought comments or made updates to the Energy Labeling four times in the past five years to conform to Department of Energy standards or to make other changes for accuracy. *See* 81 Fed. Reg. 62861 (Sept. 12, 2016) (seeking comment on proposed amendments regarding portable air conditioners, ceiling fans, and electric water heaters); 84 Fed. Reg. 9261 (Mar. 14, 2019) (proposing amendments to organize the Rule’s product descriptions); 85 Fed. Reg. 20218 (Apr. 10, 2020) (seeking comment on proposed amendments regarding central and portable air conditioners); 86 Fed. Reg. 9274 (Feb. 12, 2021) (finalizing amendments to conform labels for air conditioners to Department of Energy descriptors).

¹⁵ 85 Fed. Reg. at 44,485-86 (finding that “the record suggests that the Rule may not be necessary to ensure manufacturers provide care instructions, may have failed to keep up with a dynamic marketplace, and may negatively affect the development of new technologies and disclosures.”).

¹⁶ 85 Fed. Reg. at 44,491 (noting that “commenters and workshop participants explained that the Rule’s failure to address wetcleaning has placed professional wetcleaners at a competitive disadvantage and discouraged greater use of that technology.”). Although it is possible some clothing manufacturers have devised ways to communicate wetcleaning instructions to consumers, having a Rule that precludes its use on the care label – the location to which consumers are most likely to turn for care instructions – is significant. The Commission received over two dozen comments urging its inclusion in a revised Rule in response to the Commission’s July 2020 Supplemental notice of proposed rulemaking. *See, e.g.*, National Consumers League, Consumer Federation of America et al Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0193>; Natures Best Cleaners Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0150>; <https://www.regulations.gov/comment/FTC-2020-0058-0165>; GreenEarth Cleaning LLC Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0137>; Footwear Distributors & Retailers of America (FDRA) Comment, available at: <https://www.regulations.gov/comment/FTC-2020-0058-0214>.

I reluctantly agree with the Commission's decision to refrain from repealing the Rule, and I am pleased that the Commission will continue to consider changes to update the Rule. I would have preferred that the Commission commit to a timeline and direct the staff to prepare a Supplemental Notice of Proposed Rulemaking to make the necessary changes to update and reassess the Rule – particularly so that our agency is not impeding entry in the clothing care arena. As this Commission appears poised to engage in a period of aggressive rulemaking, we should first ensure that our existing rules are sensible. I urge the Commission to prioritize updates to this Rule.

III. Proposed Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers

In recent years, stakeholders increasingly have expressed concerns about their ability to repair items they have purchased. The FTC's response to these concerns is emblematic of the agency's unique capabilities. Beyond law enforcement efforts, the agency can also conduct research and development to inform its policy and enforcement approaches. Here, the FTC launched a multi-pronged response to assess the dynamics of the repair market in measured and thoughtful ways.

- First, the agency has used its authority under the Magnuson-Moss Warranty Act to launch enforcement efforts. Under Chairwoman Ramirez, for example, the FTC settled allegations that BMW's MINI division violated the Magnuson-Moss Warranty Act by telling consumers that BMW would void their warranty unless they used MINI parts and MINI dealers to perform maintenance and repair work.¹⁷ The FTC also sent warning letters to potential violators, including six warning letters.¹⁸
- Second, under Chairman Simons, the Commission staff in March 2019 issued a Call for Empirical Research asking members of the public to provide data and research regarding the prevalence of repair restrictions, the impact of such restrictions, and the rationale for such restrictions.¹⁹

¹⁷ Fed. Trade Comm'n Press Release, *BMW Settles FTC Charges that Its MINI Division Illegally Conditioned Warranty Coverage on Use of Its Parts and Service* (Mar. 19, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/bmw-settles-ftc-charges-its-mini-division-illegally-conditioned>.

¹⁸ See Fed. Trade Comm'n Press Release, *FTC Staff Warns Companies that It Is Illegal to Condition Warranty Coverage on the Use of Specified Parts or Services* (Apr. 10, 2018), <https://www.ftc.gov/news-events/press-releases/2018/04/ftc-staff-warns-companies-it-illegal-condition-warranty-coverage>.

¹⁹ Fed. Trade Comm'n, *Call for Empirical Research: Nixing the Fix: A Workshop on repair restrictions*, <https://www.ftc.gov/nixing-the-fix-call-for-research>.

- Third, in July 2019, the Commission hosted the “Nixing the Fix” workshop.²⁰ I was honored to provide opening remarks at the workshop and applauded the Commission for studying this complex issue.²¹
- And fourth, in May 2021, the four-member Commission under Acting Chair Slaughter issued a unanimous report to Congress on our findings to date.²² My colleagues and I worked hard to develop this consensus report, and I applaud Acting Chair Slaughter for leading that transparent and bipartisan process.

The FTC’s bipartisan study of this issue in recent years has underscored the need to craft policy positions that balance both competition and consumer protection goals.

- **Competition:** Consumers rightly seek to enjoy competition in the consumer goods repair market. The Magnusson-Moss Warranty Act was intended to protect consumers’ choice and stimulate competition among small businesses vying to serve consumers’ repair needs.
- **Consumer Protection:** While competition is beneficial, it is not the only worthy goal. Safety, privacy, and data security are other laudable goals. Companies may have legitimate justifications for restricting repair options either implicitly or explicitly, including through design choices to meet consumer demand for certain product characteristics or to address safety and security concerns.

The FTC has experience addressing these twin concerns. The Commission’s final rule on the Contact Lens Rule strikes a balance between promoting competition in the sale of contact lenses and protecting consumers’ eye health and safety by requiring prescriptions for these FDA-regulated medical devices.²³

But to the extent consumer protection is used as a veneer for eradicating competition in the consumer goods repair market, the FTC must be prepared to step in and act. I support law enforcement efforts to challenge companies that violate laws under our authority, including both our consumer protection and competition authority. I also support coordinating with state officials – both legislators and enforcers – as well as other policy makers to advance the goal of providing more choice when it comes to repairs.

I support the effort of this Commission to translate the learnings of our *Nixing the Fix* report into a Commission policy statement. And I applaud Chair Khan for leading efforts to

²⁰ Fed. Trade Comm’n, *Nixing the Fix: A Workshop on Repair Restrictions* (July 16, 2019), <https://www.ftc.gov/news-events/events-calendar/nixing-fix-workshop-repair-restrictions>.

²¹ Statement of Commissioner Christine S. Wilson Regarding FTC’s Nixing the Fix: A Workshop on Repair Restrictions, <https://www.ftc.gov/public-statements/2019/07/statement-commissioner-christine-s-wilson-regarding-ftcs-nixing-fix>.

²² FED. TRADE COMM’N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf.

²³ Contact Lens Rule, 85 Fed. Reg. 50668 (Aug. 17, 2020).

reach consensus on a policy statement. While this policy statement is an important next step in the FTC’s efforts to address unreasonable repair restrictions, I offer two points of clarification on my understanding of the policy statement.

First, as the *Nixing the Fix* report acknowledged, intellectual property rights foster innovation by protecting significant investments in research and development.²⁴ IP and trademark rights can create barriers to independent repairs, but manufacturers have intellectual property rights that may provide legitimate justification for some repair restrictions. While a full exploration of those IP issues fell outside the scope of the report, I am confident that we will be pressed to consider those issues more fully in upcoming cases. Although assertions regarding IP rights may not ultimately carry the day, we should not dismiss those proffered justifications automatically.

Second, I do not support blanket condemnation of exclusionary design choices. The House Judiciary Committee’s Majority Staff Report “recommends that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2.”²⁵ If this criterion is satisfied, the recommendation suggests finding an antitrust violation “regardless of whether the design change can be justified as an improvement for consumers.”²⁶ This approach would elevate competitors over consumers to protect businesses that do not offer a desired product or service and ultimately would stifle innovation.

Instead, I ascribe to the position advanced by the D.C. Circuit in *Microsoft*, which defines the standard for finding an exclusionary conduct violation under Sherman Act Section 2 for design changes.²⁷ *Microsoft* warns that “[i]n a competitive market, firms routinely innovate in the hope of appealing to consumers, sometimes in the process making their products incompatible with those of rivals; the imposition of liability when a monopolist does the same thing will inevitably deter a certain amount of innovation. This is all the more true in a market . . . in which the product itself is rapidly changing. Judicial deference to product innovation, however, does not mean that a monopolist’s product design decisions are per se lawful.”²⁸

I urge the Commission to adopt this approach when evaluating the issue of exclusionary design.

²⁴ FED. TRADE COMM’N, NIXING THE FIX: AN FTC REPORT TO CONGRESS ON REPAIR RESTRICTIONS 22 (May 2021), https://www.ftc.gov/system/files/documents/reports/nixing-fix-ftc-report-congress-repair-restrictions/nixing_the_fix_report_final_5521_630pm-508_002.pdf

²⁵ MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

²⁶ *Id.*

²⁷ *United States v. Microsoft Corp.*, 253 F.3d 34, 65-67 (D.C. Cir. 2001).

²⁸ *Id.* at 65 (internal citations omitted).

IV. Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases

I oppose rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases for at least three reasons.

First, this policy was adopted in 1995 following nearly nine years of highly resource-intensive litigation undertaken by the FTC against an abandoned transaction. A second, similar transaction undertaken contemporaneously did not receive the same treatment, leading some to question the motives of the agency in pursuing litigation against the first. Chairman Robert Pitofsky (a Democrat) and the Commission implemented this policy at least in part as a guardrail to prevent similarly questionable exercises of enforcement discretion. Given recent actions by this Commission to bulldoze through other guardrails,²⁹ I have heightened concerns about removing this one.

The details are enlightening. The 1995 Policy Statement was adopted following the Commission's pursuit of almost nine years of litigation in connection with Coca-Cola Co.'s ("Coke's") proposed acquisition of the Dr Pepper Company ("Dr Pepper").³⁰ The saga began when, in 1986, PepsiCo, Inc. ("Pepsi") sought to acquire Seven Up Co. ("7-Up") from Philip Morris, Inc. Shortly afterwards, Coke announced its intention to acquire Dr Pepper. After the FTC voted to challenge both transactions, Pepsi and 7-Up abandoned their deal. Coke, however, chose to litigate the preliminary injunction challenging its transaction. After the district court granted the FTC a preliminary injunction, Coke abandoned the transaction, but the Commission did not abandon its own litigation efforts. Notably, the FTC did not pursue a similar remedy with Pepsi, which abandoned its deal before trial. Some observers viewed this disparate treatment as evidence that the FTC's continued litigation against Coke was a punishment for Coke's temerity to exercise its legal rights and litigate.

The FTC insisted on a full Part 3 trial and asked the administrative law judge to impose a prior approval obligation. The ALJ found that the Coke/Dr Pepper deal would have been unlawful, but concluded that a prior approval order was unnecessary because the deal was abandoned. On appeal, the Commission issued an order that included a prior approval provision, which Coke appealed. While Coke's appeal was pending before the Court of Appeals, the Commission recognized that its ongoing nine-year litigation with Coke regarding an abandoned deal was not good government. In short, the Commission issued the 1995 Policy Statement as it reflected on the excessive, burdensome litigation against Coke.³¹ I am concerned that the

²⁹ See Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf; Statement of the Commission Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

³⁰ Coca-Cola Co. 117 F.T.C. 795 (1994).

³¹ Crafting and implementation of the 1995 Policy Statement was also guided by the 1989 American Bar Association Antitrust Section's Special Committee to Study the Role of the Federal Trade Commission. In that report, the Special Committee found that a "firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal

Commission intends to revert to the vindictive approach that led to the nine-year litigation against Coke.³²

Based on a recent press release discussing Berkshire Hathaway Energy Company's ("BHE") abandoned proposal to acquire assets of Dominion Energy, Inc. ("Dominion"), it appears that the majority's purported rationale for rescinding the Policy Statement lies in saving agency resources that it would otherwise spend to review a transaction the Commission previously considered.³³ As the Coke/Dr Pepper saga reveals, the opposite may be true. And in any event, the agency's previous investigation of the BHE/Dominion deal occurred in 1995. Does the Commission plan to issue prior approval orders that will last for more than 25 years? Only then would this policy change save Commission resources. I fear that rescinding the policy statement is being sold to the public under false pretenses.

Second, it is also important to recognize that the 1995 Policy Statement did not eliminate the use of prior approval and prior notice provisions in merger cases. The Policy Statement provides that the Commission would continue to use prior approval and prior notice provisions when there is a reason for the provisions. A prior approval provision may be used where there is a credible risk that a company would attempt the same or approximately the same merger already reviewed by the agency.³⁴ A prior notification provision may be used where there is a credible risk that a company would engage in an otherwise unreportable anticompetitive merger.³⁵

practices." Special Committee to Study the Role of the Federal Trade Commission, Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L. J. 43, 92 (1989) (internal citations omitted).

³² I have previously cautioned against using the agency's law enforcement authority to pursue an agenda of vindictiveness rather than "to obtain effective relief and instill effective deterrence." See Statement of Commissioner Christine S. Wilson Regarding FTC v. Progressive Leasing at 2 (Apr. 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571921/182_3127_prog_leasing_-_statement_of_commissioner_christine_s_wilson_0.pdf.

³³ Fed. Trade Comm'n Press Release, *Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah* (July 13, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/statement-regarding-berkshire-hathaway-energys-termination> ("Although this outcome preserves competition, it is disappointing that the FTC had to expend significant resources to review this transaction when we previously filed suit in 1995 to block the same combination. Questar Pipeline attempted to purchase a 50% share in the Kern River Pipeline but the parties abandoned those plans shortly after the Commission's suit. Given our prior action, and the even closer competition that developed between the pipelines since then, this is representative of the type of transaction that should not make it out of the boardroom. The Bureau of Competition will be actively exploring its options on how to curtail this type of re-review to better deploy the Commission's scarce resources.").

³⁴ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745, 39476 (Aug. 3, 1995). Under the Policy Statement, ... a narrow prior approval provision may be used where 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.

³⁵ *Id.* ("Under the Policy Statement, ... a narrow prior notification provision may be used where 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.").

Moreover, the Commission uses these provisions with some frequency. In 2020 alone, there were seven Commission orders that included prior notice provisions and one order that included a prior approval provision. As a practical matter, I am dubious about whether rescission of this policy will facilitate further constructive use of prior notice and prior approval provisions. Instead, as my colleague Commissioner Phillips will discuss, I fear that it will facilitate a massive end-run around Hart-Scott-Rodino (“HSR”) filing requirements and, for mergers subject to prior approval provisions, a shifting of the burden of proof that will chill procompetitive deals and hurt consumers.³⁶ I am aware that some legislators in Congress favor the creation of special pre-merger notification requirements for certain sectors of our economy;³⁷ others seek to make merging parties prove their transactions are benign before permitting them to proceed.³⁸ Shifting the traditional burden of proof offends longstanding notions of due process and fairness, so it is not a step to be taken lightly. If the majority wishes to overhaul the pre-merger notification framework and flip the burden of proof in large swaths of mergers, it should ask Congress to pass the appropriate legislation.

The Commission currently is conducting a 6(b) study requiring Alphabet Inc. (including Google), Amazon.com, Inc., Apple Inc., Facebook, Inc., and Microsoft Corp. to provide information about prior acquisitions not reported to the antitrust agencies under the HSR Act over a 10 year period.³⁹ I issued a statement urging the Commission to study sub-HSR deals driving consolidation in other industries, including dialysis facilities, pharmaceutical companies, and hospitals.⁴⁰ The Commission has not yet issued findings from its 6(b) study in the tech sector, and has not yet announced studies in other industries.⁴¹ When completed, these analyses may ultimately provide a basis for recommendations to Congress about changes to the HSR framework, but the majority’s actions today are unsupported by any empirical analysis.

Third, rescinding the 1995 Policy Statement will create uncertainty. For example, under what circumstances will the Commission now seek to impose prior notice and prior approval provisions? On a related note, existing Commission rules establish the procedure for the

³⁶ See Statement of Commissioner Noah Joshua Phillips, Dissenting Statement Regarding the Commission’s Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases.

³⁷ See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 388 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (“This process would occur outside the current HartScott-Rodino Act (HSR) process, such that the dominant platforms would be required to report all transactions and no HSR deadlines would be triggered.”).

³⁸ Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021). Some commentators argue that shifting the burden to the defendant for potentially procompetitive transactions diminishes the role of the judiciary and offends due process and fairness.

³⁹ Fed. Trade Comm’n Press Release, *FTC to Examine Past Acquisitions by Technology Companies* (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies>.

⁴⁰ See Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders, (Feb. 11, 2020), <https://www.ftc.gov/public-statements/2020/02/statement-commissioner-christine-s-wilson-joined-commissioner-rohit-chopra>.

⁴¹ Notably, based on its experience leading up to the 1995 Policy Statement, the Commission in 1995 found that “the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur. Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995)

Commission to consider prior approvals. Should we anticipate changes to these Commission rules?

Similar uncertainty was created three weeks ago when the majority rescinded the Bipartisan 2015 Section 5 Policy Statement and offered only vague promises of filling the vacuum in the future.⁴² And today, by rescinding the 1995 Policy Statement without providing further guidance, the Commission substitutes uncertainty for a policy that has worked for more than 25 years. In both instances, the majority creates confusion regarding the policies that will guide the agency's actions. Creating confusion is not the hallmark of good government.

This uncertainty is heightened by the potential for differing practices at the two federal antitrust agencies. It is my understanding that the Antitrust Division of the Department of Justice sometimes incorporates a provision in consent agreements that prohibits the reacquisition of divested assets, similar to the approach the FTC currently employs. After withdrawal of the 1995 Policy Statement, though, I can envision liberal use of prior approval provisions covering far more than divestiture assets. This differential between the two agencies will enhance perceptions that the agencies apply different standards and processes, and give ammunition to those who seek to consolidate jurisdiction at the DOJ.

When the Commission issued the Policy Statement in 1995, it solicited public comments. Chair Khan and Commissioners Chopra and Slaughter previously have emphasized the importance of democratic participation in government.⁴³ In the interest of facilitating stakeholder input on the benefits and costs of the 1995 Policy Statement, including the potential drawbacks I have described, I offer a topping motion:

⁴² See Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf; Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf.

⁴³ See Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 367 (2020), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf; Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm’n, Keynote Remarks at the Consumer Federation of America’s Virtual Consumer Assembly (May 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589607/keynote-remarks-acting-chairwoman-rebecca-kelly-slaughte-cfa-virtual-consumer-assembly.pdf (“As we describe above, the current approach generates ambiguity, is unduly burdensome, and suffers from a democratic participation deficit. Rulemaking can benefit the marketplace and the public on all of these fronts.”). But what became known as “Mag-Moss rulemaking” is so much more formal and cumbersome, looking more like high-stakes litigation in federal court than a public-input hearing before a state legislative committee. Many of the burdens associated with “Mag-Moss” come not from the enabling statute but from the Commission’s own rules, 32 which have not been updated recently. ... I believe that the efficient, democratic spirit of section 18’s text can be revived through a streamlining of the FTC’s own implementing rules, and I hope that we do just that.”).

I move that the Commission direct staff to prepare a Federal Register Notice seeking public comment on the proposal to rescind the 1995 Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions.