UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips

Regarding the Statement of the Commission on
Use of Prior Approval Provisions in Merger Orders
October 29, 2021

Today,[1] two sitting commissioners join forces with a zombie vote cast weeks ago by the sitting Director of the Consumer Financial Protection Bureau (CFPB) to launch yet another broadside at the market for corporate control in the United States.[2] This attack appears in the form of a policy statement regarding the imposition of "prior approval" provisions in connection with the FTC's merger review process. Despite its unassuming label, a prior approval requirement imposes significant obligations on merging parties and innocent divestiture buyers not with respect to currently pending mergers, but instead with respect to *future* deals. The issuance of this Statement on the Use of Prior Approval Provisions in Merger Orders (2021 Policy Statement) follows the majority's abrupt rescission of the FTC's 1995 Policy Statement on Prior Notice and Prior Approval in July.[3]

---

[1] The policy at issue was announced without our participation, which is contrary to longstanding practice and the opposite of what was promised. We retain the original text. As to precisely when to date its adoption, the sitting Director of the Consumer Financial Protection Bureau Rohit Chopra cast his vote weeks ago, and earlier this week the Chair and Commissioner Slaughter opted to announce it.

[2] Scholars have long recognized the positive competitive effects of the competition for companies, the "market for corporate control." Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); see also Blanaid Clarke, *The Market for Corporate Control: New Insights from the Financial Crisis in Ireland*, 36 SEATTLE U.L. REV. 577, 578 ("Like much of Manne's work, Mergers and the Market for Corporate Control has been described quite correctly as 'groundbreaking,' 'revolutionary,' and 'pioneering.' Roberta Romano argued that the article marked the 'intellectual origin of what would become the new paradigm for corporate law.'" (quoting Daniel Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, Manne, *Mergers and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005)).

[3] *See* Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf; Prepared Remarks of Commissioner Rohit Chopra Regarding the Motion to Rescind the Commission's 1995 Policy Statement on Prior Approval and Prior Notice (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592350/final_chopra_prepared_remarks_on_1995_policy_statement_rescission_0.pdf. *But see* Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf; Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on July 21, 2021, at 8-12 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf; Christine S. Wilson, There's Nothing New Under the Sun: Reviewing Our History

The 2021 Policy Statement contains three pronouncements. First, the FTC will "routinely require merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged."[4] These prior approval provisions will cover deal activity of the merging parties for a *minimum* of ten years. Second, the Commission reserves the right to employ "stronger relief" by imposing prior approval provisions that cover "product and geographic markets beyond just the relevant product and geographic markets affected by the merger."[5] Whether this stronger relief will be employed depends on a set of broad and subjective factors that, without any limiting principles, is almost certain to lead to the routine imposition of these even more onerous remedies. And third, the Commission will require *buyers* of divested assets – that is, not the merging parties – "to agree to a prior approval for any future sale of the assets they acquire in divestiture orders," again "for a minimum of ten years."[6]

The 2021 Policy Statement represents yet another daft attempt by a partisan majority of commissioners to use bureaucratic red tape to weight down all transactions – not just potentially anticompetitive ones – and to chill M&A activity in the United States. Notably, the majority goes far beyond restoring the status quo that existed before the FTC adopted its 1995 Policy Statement on Prior Notice and Prior Approval. Today's action constitutes yet another end-run around the Hart-Scott-Rodino pre-merger notification framework that Congress established in 1976. In attempting to justify its actions, the majority oversells the benefits of its actions and significantly undersells the harms, including further divergence from the Antitrust Division of the Department of Justice with respect to merger review policies. And once again, the majority that ostensibly seeks to "democratize" the FTC has denied the public the opportunity to provide notice and comment on an important policy issue.

For these reasons, which we explain in further detail below, we dissent.

I. The 2021 Policy Statement Will Discourage Procompetitive Transactions and Stifle Economic Growth

We have detailed elsewhere the majority's promiscuous application of red tape to chill merger activity in the United States.[7] The 2021 Policy Statement provides further evidence that the majority's goal is not to improve the sound enforcement of merger law but instead to increase the cost and uncertainty of pursuing mergers. Take, for example, the Statement's assertion that "[i]nvestigating the likely effects of a proposed merger under a prior approval provision is much

---

to Foresee the Future, Keynote Address at GCR Live Merger Control (Oct. 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[4] Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[5] *Id.*

[6] *Id.*

[7] Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf; Wilson, There's Nothing New Under the Sun, *supra* note 3; Noah Joshua Phillips, *The Repeal of Hart-Scott-Rodino*, GLOBAL COMP. REV. (Oct. 6, 2021), https://globalcompetitionreview.com/gcr-usa/federal-trade-commission/the-repeal-of-hart-scott-rodino.

different than a similar investigation under the strictures of the Hart-Scott-Rodino Act."[8] This differential arises for at least two reasons. First, prior approval flips the burden of proof on its head by placing it on the merging parties rather than on the government, and second, the government is freed from the statutory timeframes to which it would otherwise be subject in an HSR merger review process. The FTC can take as long as it likes.

The second difference is worth exploring in detail. Keen observers of FTC investigations will discern that HSR merger reviews typically proceed on an expedited track, while non-HSR merger reviews and conduct investigations tend to take longer. Given the statutory timeframes embedded in the HSR Act, this timing differential is not surprising. But neither should the public be surprised when deals notified to the FTC pursuant to prior approval provisions languish. Indeed, the majority seems to relish the prospect of controlling the clock, stating that "[c]onducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews."[9] Particularly given the torrent of prior approval deal notifications the agency will receive once this policy is up and running, we anticipate lengthy delays in deal review. A lengthy investigation can be a death knell for many deals as financing runs out, suppliers and customers hesitate to do business with the merging parties whose futures remain uncertain, and the parties hemorrhage employees in the face of uncertainty. For the majority, though, this is a feature, not a bug.

Other aspects of the 2021 Policy Statement similarly signal the majority's desire to reduce the number of transactions undertaken in the U.S., regardless of their competitive impact. For example, the majority asserts that "[t]oo many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures."[10] This assertion takes aim at the process by which agencies historically have remedied anticompetitive aspects of transactions with divestitures and other remedies while allowing competitively benign aspects of transactions to proceed. It states that companies should not propose to engage in legal conduct despite being fully prepared at the outset to remedy whatever competitive problems, however minor, may be presented. And, when coupled with the majority's apparent belief that remedies typically fail to preserve competition,[11] the reader accurately could view this assertion as cautioning against the types of deals that previously proceeded with straightforward remedies (e.g., largely complementary grocery chains or retail gas station chains with overlaps in a few geographic markets, or pharmaceutical mergers with overlapping generic drugs). Two sitting commissioners and the Director of the CFPB today effectively announce they would prefer that parties simply not engage in mergers. That is a bad idea; also, it is not the law.

Transactions that move from the boardroom to the FTC face further discouragement. Specifically, merging parties will be punished for following the investigative process established in the HSR Act. For deals viewed as likely to result in anticompetitive effects, the HSR Act envisions the issuance of a so-called Second Request to obtain additional information from the merging

[8] 2021 Policy Statement.

[9] *Id.*

[10] *Id.*

[11] Lina M. Khan, Chair, Fed. Trade Comm'n, Letter to Senator Elizabeth Warren 1 (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

parties about the deal, the industry, and the competitive dynamics of the relevant markets. Once the merging parties have submitted all responsive information, they certify that they are in "substantial compliance" with the Second Requests issued to them. But the Statement observes that the Commission "is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request," which the majority believes will "signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter."[12] God forbid we should do our job of analyzing deals notified pursuant to the HSR Act.

These examples demonstrate that the true impetus for today's announcement lies in the majority's desire to chill deal activity, whether it violates the law or not. Last year, they unsuccessfully sought a legislative moratorium on mergers;[13] now they must use other means to discourage them. The majority hopes that when deals are considered in the boardroom, its disapproving tone will ring in the ears of directors and cause those deals to wither on the vine. Should deals survive the boardroom and get submitted for FTC review, the majority warns against substantial compliance with Second Requests. We repeat: they warn companies not to comply with our requests. And, if parties wish to pursue the full investigative process envisioned by the HSR Act, they will be greeted with broad prior approval provisions at the end of the line.

The 2021 Policy Statement constitutes yet another gratuitous tax on M&A activity. Prior approval provisions impose substantial costs and uncertainty on future transactions. The government will be competitively handicapping companies subject to a prior approval order for at least a decade, preventing them from competing on a level playing field against rivals.[14] A company under an FTC order may have to bid higher – for instance, diverting resources from research and development, incurring debt, or lowering salaries – to compensate the seller for the uncertainty and the longer lead time required to obtain prior approval. The majority's clearly-signaled desire to use these provisions frequently and punitively almost certainly will deter perfectly-legal transactions that the Commission would never challenge. Those procompetitive deals that could drive economic growth will be stopped, contrary to law and for no good reason.

Today our economy is emerging from an unprecedented national crisis that put tens of millions out of work and caused a great deal of suffering. M&A has an important role to play during periods of economic adjustment. Consumers benefit if a merger leads to the delivery of products or services that one company could not efficiently provide on its own, and from the innovation and lower prices that better management and integration can provide. Draconian merger

---

[12] *Id*.

[13] *See* Commissioner Rohit Chopra on Twitter, available at https://twitter.com/chopraftc/status/1240417656941023234; Noah Joshua Phillips, *The case against banning mergers*, N.Y. TIMES, Apr. 27, 2020, *available at* https://www.nytimes.com/2020/04/27/business/dealbook/small-business-ppp-loans.html; Christine S. Wilson, *Remarks for "Merger Control in USA" Panel*, GCR Interactive: Merger Control, Oct. 21, 2020, *available at* https://www.ftc.gov/system/files/documents/public_statements/1583814/wilson_remarks_at_gcr_merger_control_2020.pdf.

[14] In the Coca-Cola / Dr. Pepper transaction, described below, the FTC sought to bar Coke from buying companies that its rival, Pepsi, could pursue without prior approval. That restriction on mergers itself would have lessened competition; the litigation embarrassed the Commission and culminated in the adoption of the policy that the 2021 Policy Statement replaces.

policies that discourage M&A activity on the whole will rob American consumers of the benefits they stand to gain from procompetitive mergers.

Without a crystal ball, we cannot predict the extent to which the 2021 Policy Statement will accomplish the apparent goal of the majority, *i.e.,* meaningfully to lessen the number of mergers in the United States. Many factors other than merger enforcement policies drive M&A activity, including macroeconomic factors like roaring equity markets and loose monetary policy and microeconomic ones like the actual needs of businesses, including to compete, drive down costs, and bolster supply chains.[15] What we *can* predict with confidence is that the impact of the policy will be experienced unevenly in the market, deterring matters when the hassle of dealing with the Commission happens to be too much and otherwise applying only to those firms that happen to come before the FTC (not, mind you, the DOJ); happen to be willing to resolve competitive issues (remember when being willing to work with the government was a good thing?); happen to agree to a prior approval commitment; and happen later to merge. The majority offer no evidence to suggest that "acquisitive firms" – whatever that means – tend toward anticompetitive acquisitions (our legal charge), and so no basis to conclude that the policy will be efficiently targeted. Careful readers of the 2021 Policy Statement will also note that it provides no empirical basis to conclude that its purported justification – *i.e.,* that firms proposing one anticompetitive transaction tend later to propose others – occurs other than in the rarest of cases.

II. Revisionist History: The 2021 Policy Statement is Actually More Aggressive than the Pre-1995 Status Quo

The majority claims it seeks to restore FTC use of prior approval provisions to the status quo that existed before the FTC adopted its 1995 Policy Statement on Prior Notice and Prior Approval.[16] But a careful review of today's announcement indicates that, in fact, the majority is engaged in revisionist history: the 2021 Policy Statement upsets the status quo that existed before the 1995 Policy Statement was enacted. Indeed, the 2021 Policy Statement envisions both broader and lengthier prior approval provisions, no longer tethered solely to problematic transactions.

The majority cite Commissioner Mary Azcuenaga's dissent from adoption of the 1995 Policy Statement. Those who take the time to read it will find a useful explanation of the pre-1995 world and a helpful benchmark for understanding the overreach today. Commissioner Azcuenaga stated:

> "It is important to remember how very limited the Commission's prior approval requirements are. First, and most obviously, the prior approval requirement is imposed only on firms that have attempted unlawful acquisitions. It is limited to proposed acquisitions in the same geographic

[15] *See*, *e.g.,* Fraser Tennant, *Boom time: riding the seventh great 'M&A wave'*, FINANCIER WORLDWIDE MAGAZINE (Nov. 2021), https://www.financierworldwide.com/boom-time-riding-the-seventh-great-ma-wave#.YXloaxrMJPZ; Anne Sraders, *The M&A market is blazing hot. What could cool it off?*, FORTUNE (Oct. 5, 2021), https://fortune.com/2021/10/05/deals-business-mergers-and-acquisitions-market-record-fed-interest-rate-antitrust/; Michelle F Davis, Manuel Baigorri, and Myriam Balezou, *M&A Book Shows No Sign of Abating After Epic First Half,* BLOOMBERG (July 1, 2021), https://www.bloomberg.com/news/articles/2021-07-01/m-a-boom-shows-no-sign-of-stopping-after-epic-first-half; Kaye Wiggins & Ortenca Aliaj, *Spac boom fuels strongest start for global mergers and acquisitions since 1980*, FINANCIAL TIMES (Mar. 31, 2021), https://www.ft.com/content/bacdf86f-e786-4439-966e-f5958adb1c59.

[16] *See* 2021 Policy Statement.

> and product markets in which the Commission has found reason to believe that an acquisition by the respondent would violate the law. It is limited in time, usually to a duration of ten years. And it involves a minute universe of cases."[17]

The majority's approach diverges from the pre-1995 approach in at least three key ways. First, under the 2021 Policy Statement, prior approval provisions will last a *minimum* of 10 years, rather than being capped at 10 years. Second, instead of being limited to "proposed acquisitions in the same geographic and product markets in which the Commission has found reason to believe that an acquisition by the respondent would violate the law,"[18] the majority warns that "where stronger relief is needed, the Commission may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger."[19] The relevant factors are broad and subjective, leading us to fear that the FTC will routinely impose prior approval provisions on geographic and product markets far beyond those at issue in the instant merger—or at least try.

The third way in which the 2021 Policy Statement diverges from the pre-1995 approach pertains to the treatment of divestiture candidates. From now on, the Commission will "require buyers of divested assets in Commission merger consent orders to agree to a prior approval for any future sale of the assets they acquire in divestiture orders, for a minimum of ten years."[20] As a threshold matter, the parties to be bound here are not liable for anything. They do not propose to engage in a problematic transaction. They are stepping in to help the government resolve a competitive issue with someone else's deal. But as they say, no good deed goes unpunished.

The point of a divestiture is to remedy the competitively problematic aspects of a deal and protect the competition that otherwise would have been eliminated by the transaction. This approach permits the non-problematic aspects of the deal—often the overwhelming majority—to proceed. We do not object to the stated purpose, which is to "ensure that the divested assets are not later sold to an unsuitable firm that would contravene the purpose of the Commission's order."[21] Tailoring requirements to that goal presents no issue. And the Commission has discretion to include prior approval provisions where we determine there is credible risk, for example, that the parties to a consent may buy back divested assets. We exercise that discretion today and include those types of provisions as appropriate. But a blanket policy of imposing prior approval requirements on *all* divestiture buyers will deter participation in consents, making it more difficult to find divestiture buyers and costlier and less likely for the Commission to resolve matters without litigation.[22] The Commission is thus raising the cost of solving problems for the purpose of stopping deals it has no reason to believe are illegal. That is bonkers crazy.

---

[17] Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders, 60 Fed. Reg. 39,746, 39,747 (Aug. 3, 1995).

[18] *Id.*

[19] 2021 Policy Statement.

[20] *Id*.

[21] *Id.*

[22] It may provide an excuse for the Commission to avoid the business of consents, protecting Commissioners from accountability for approving some deals but not the public from the cost of wasted resources.

III. The Majority's Prior Approval Policy is an Effort to Abrogate the HSR Process

The 2021 Policy Statement signals another awkward attempt to restructure the pre-merger notification framework established by the HSR Act, without the hard work of persuading Congress to amend it. First, as noted above, the majority warns that prior approval provisions are more likely to be imposed if parties certify substantial compliance with Second Requests, punishing companies for utilizing the process established by the statute. Second, prior approval provisions require parties to notify the agency of future transactions even when those transactions fall below HSR filing thresholds; pervasive use of prior approval provisions will have the same effect as lowering the HSR filing thresholds. Third, prior approval provisions shift the burden of proof to the parties to establish that future transactions are not anticompetitive, a burden the agency would otherwise bear under the Clayton Act. That means, for companies with the temerity to propose a merger and work with the government to resolve problematic parts – or companies with the temerity to buy those parts, helping to resolve the issue – we will presume guilt and force them to prove a negative. Fourth, the Commission's process for providing prior approval of transactions is not constrained by the time periods set by the HSR Act.

The purpose of the HSR Act is to help the government stop anticompetitive mergers, not *all* mergers. (It is also to give businesses certainty before making investments.) By imposing costs on all companies that enter into consents (*i.e.,* companies seeking to remediate problems with their mergers), the majority is flipping our congressional mandate on its head. Congress tasked this agency with blocking anticompetitive deals, while allowing procompetitive and competitively benign transactions to proceed. The majority's policy permits the agency effectively to kill a deal, whether anticompetitive or not, through process requirements and delay. That is simply not what Congress intended.

Pending legislation in Congress contemplates amendments to the pre-merger notification process that would mirror some of these impacts. If the majority wishes to have the pre-merger notification process restructured, it is free to attempt to persuade Congress to amend the HSR Act.

IV. The Majority Overstates the Benefits and Undersells the Harms of its New Policy

In attempting to justify its actions, the majority oversells the benefits of its actions and significantly undersells the harms. Most notably, the majority hopes to conserve staff resources through the ubiquitous use of prior approval provisions. Contrary to the majority's claims, requiring prior approval provisions in all merger orders likely will *increase* the burden on the agency's finite resources. The guarantee of prior approval provisions will make parties more reluctant to resolve merger matters with the FTC through consent agreements. We expect more "strategic behavior" and gamesmanship from companies: giving the government less time to do its work and making it less effective in court; or "fixing it first," where the merging parties (not the government) decide themselves how to address competitive concerns and force the agencies to litigate the impact of the deal with the parties' solution incorporated. Consequently, we anticipate more litigation – always a resource-intensive proposition – rather than less.

Similar consequences will arise from the majority's decision to demand prior approval provisions even if the parties abandon a challenged transaction after certifying substantial compliance with a Second Request. In other words, even after the parties abandon the deal and

there is no competitive problem to be resolved, the Commission will demand that parties enter an order to require a prior approval for future transactions. Few (if any) companies will agree to that, which means we will need a court order. Spending countless hours and dollars to convince a court to impose such a remedy when there is nothing left to remediate is a terrible waste of resources, and belies the professed concerns of the majority that these actions are being undertaken to protect them. We have seen this movie before, when the FTC litigated for nearly nine years to obtain a prior approval provision from Coca-Cola, including a Part 3 trial and appeals that occurred after the transaction was abandoned.[23] That experience prompted adoption of the 1995 Policy Statement in the first place.

Finally, the 2021 Policy Statement indicates that where the agency "has expended those resources to understand the competitive dynamics and market structure of a particular market, the Commission should not have to incur additional costs by either (1) re-reviewing the same transaction on numerous occasions or (2) reviewing a similar transaction by one of the merging parties in the same market."[24] With respect to Prong 1, the cases cited by Chair Khan and former Commissioner Chopra in their statements regarding rescission of the 1995 Policy Statement make clear that very few parties propose the same transaction on numerous occasions.[25] That is, as noted above, the basis for this policy is illusory. And in those few instances in which this situation arises, the proposed deals are frequently separated by a decade or two. While some industries experience little change in that period of time, many industries are characterized by dynamism and perhaps increased competition. Unless we assume that prior approval provisions will run for 25 years so as to capture deals like Berkshire Hathaway Energy Company's Kern River Gas Transmission Pipeline's proposed acquisition of Dominion Energy, Inc.'s Questar Pipeline,[26] and unless we assume that the industries are uniformly static, this thin reed of a justification cannot support the awesome weight of today's pronouncement. And as we explained above, we have no reason to believe that Prong 2 will be the norm. In other words, given our anticipation that prior approval provisions will apply to relevant markets far more broadly than those at issue in the triggering merger, Prong 2 is largely irrelevant.

Just as the majority overstates the benefits of this policy, so too does it underestimate the harms. Specifically, the 2021 Policy Statement creates another disparity in antitrust enforcement between the FTC and the Department of Justice.[27] Disparate approaches to merger policy between

---

[23] *See* Christine S. Wilson, Oral Remarks at Open Commission Meeting 8-9 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf (describing FTC's nine-year litigation with Coca-Cola over prior approval provision).

[24] 2021 Policy Statement.

[25] *See* Lina M. Khan, Remarks Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf (identifying 2 proposed transactions in which Staples sought to acquire Office Depot that occurred 19 years apart and transactions where Quaker Chemical Corp. acquired Houghton International Inc. in 2019 and Houghton's acquisition of D.A. Stuart Gmbh in 2008).

[26] *See* Holly Vedova, 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.

[27] Last month, the Commission voted 3-2 to withdraw the Vertical Merger Guidelines and Commentary on Vertical Merger Enforcement, while the Department of Justice stated that the Vertical Merger Guidelines "remain in place."

the agencies that share jurisdiction is the antithesis of good government. Today's action provides additional support to sponsors of legislation that would strip the FTC of its antitrust authority and consolidate enforcement at DOJ.[28]

The 2021 Policy Statement is designed to deter companies that want to work on the problems their deal might pose, and even to deter the companies that stand up to help the Commission and the merging parties resolve those issues. That is simply perverse. The companies more likely to accede to prior approval terms (especially the broad ones contemplated by the Statement) are smaller companies less capable of spending the time and money to litigate with the government. Bigger companies will simply fight. The net effect will be a regressive merger policy, where the companies about which the majority presumably is most concerned get a competitive edge over the ones with which they are presumably less concerned. That too is perverse.

V. New Majority Once Again Denies the Public the Opportunity for Input

As a matter of process, the new Statement continues a troubling pattern adopted by the new Commission majority. Although new agency leadership ostensibly seeks to "democratize" the FTC,[29] the majority yet again has denied the public the opportunity to provide notice and comment on this important policy issue. (Indeed, they denied half the Commission the opportunity to participate in its release.) Both the rescission of the 1995 Policy Statement and today's announcement of the 2021 Policy Statement lack the benefit of meaningful public comment. The majority's closed-door process starkly contrasts with the transparency previously employed by the FTC in this area – when a bipartisan Commission issued the 1995 Policy Statement, public comments were invited.[30]

See Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines.

[28] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-TheHouse-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[29] *See* Lina M. Khan, Memorandum to Commission Staff and Commissioners Regarding Vision and Priorities for the FTC, at 2 (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf.

[30] 60 Fed. Reg. 39,745 (Aug. 3, 1995).