

Submitted: June 30, 2021

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Ashley Baker
Director of Public Policy,
The Committee for Justice

Daren Bakst
Senior Research Fellow in Regulatory Policy Studies
The Heritage Foundation

Asheesh Agarwal
Former Assistant Director
FTC Office of Policy Planning

Robert H. Bork, Jr.
President
Antitrust Education Project

Dan Caprio
Senior Fellow
The Lares Institute

James Edwards
Executive Director
Conservatives for Property Rights

Richard A. Epstein
The Laurence A. Tisch Professor of Law,
New York University School of Law
The Peter and Kirsten Bedford Senior Fellow,
The Hoover Institution
The James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer,
The University of Chicago

Theodore A. Gebhard
Former Senior Attorney
FTC Office of Policy and Coordination

Douglas Holtz-Eakin
President

American Action Forum

Tom Hebert
Executive Director
Open Competition Center

Jennifer Huddleston
Director of Technology and Innovation Policy
American Action Forum

Thomas A. Lambert
Wall Family Chair and Professor of Law
University of Missouri Law School

Curt Levey
President
The Committee for Justice

Katie McAuliffe
Executive Director
Digital Liberty

Doug McCullough
Director
Lone Star Policy Institute

Grover Norquist
President
Americans for Tax Reform

Timothy Sandefur
Vice President for Litigation
The Goldwater Institute

Thomas A. Schatz
President
Citizens Against Government Waste

NOTE: Organizations and affiliations are listed for identification purposes only.

