



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

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Issuance of Eight Omnibus Resolutions

September 14, 2021

Today, the Commission publicly announced that it has issued eight more blanket resolutions authorizing compulsory process, on top of the seven it approved at the public meeting on July 1, 2021. What's left?

We voted against these resolutions for the same reason we opposed the prior omnibus resolutions: removing Commission oversight of investigations does virtually nothing to make those investigations more effective but does mean less input and oversight from the Commission. These resolutions create less accountability and more room for mistakes, overreach, cost overruns, and even politically-motivated decision making.¹

Congress gave the Commission, not a single commissioner or staff, the authority to bless compulsory process in its investigations,² but the 15 sweeping resolutions have undone that legislative delegation of authority for essentially all antitrust investigations, and many others.³ Now, in all of these matters, the application of the FTC's considerable investigative power no

¹ Dissenting Remarks of Commissioner Noah Joshua Phillips Regarding the Commission's Issuance of Seven Omnibus Resolutions (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591634/p210100phillipsstatementomnibusresolutions.pdf; Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021, 9-11 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

² 15 U.S.C. § 57b-1(i) ("Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information, under authority of this subchapter or any other provision of law, unless such subpoena or demand for information is signed by a Commissioner acting *pursuant to a Commission resolution.*") (emphasis added).

³ The 15 omnibus resolutions authorize compulsory process in investigations of possible illegality stemming from (1) any merger subject to federal premerger notification requirements, including those under the HSR Act, (2) any suspected monopolization, attempt to monopolize, or conspiracy to monopolize, (3) any consummated merger or acquisition by an entity with a current enterprise value over \$5 billion, (4) any simultaneous service as an officer or director of, or a contemporaneous financial stake in, two or more competing entities, (5) any suspected abuse of intellectual property; (6) prohibited conduct targeting workers or small-business operators; (7) prohibited conduct by any person or entity subject to an FTC administrative order; or prohibited conduct related to (8) any healthcare market, (9) any market with participants that provide technology platform services, (10) any algorithm or biometrics, (11) any marketing of goods and services on the Internet, manipulation of user interfaces, or use of email, metatags, computer code, or programs, (12) any good or service marketed, in whole or in part, to children under 18 years of age, (13) any good or service marketed, in whole or in part, to members or veterans of the U.S. Armed Forces and States' National Guards, (14) any diagnosis, treatment, or government benefits for COVID-19, or (15) any repair restriction.

longer requires an informed and deliberated decision by all commissioners; unilateral approval from the Chair or his or her chosen commissioner is sufficient.⁴

In the past few months, the Commission has discarded a number of longstanding, bipartisan (and sound) policies and practices, justifying some of these actions with the claim that the agency is overwhelmed by merger filings.⁵ In fact, several of these changes made merger review *less* efficient. In any event, an increase in agency workload is precisely the wrong context in which to remove the ability of all commissioners to ensure that our work is done in an efficient, effective, and fair manner.

⁴ Chair Khan and Commissioner Slaughter call omnibus resolutions “a mainstay” at the FTC, and note that 56 such resolutions were in place when Chair Khan joined the agency. They omit two important facts. First, the scope of those prior delegations generally was much narrower than the 15 at issue here. Second, virtually all of the prior delegations applied only to consumer protection investigations, which are generally much less complex, burdensome, and costly than antitrust investigations.

⁵ 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; Press Release, Fed. Trade Comm’n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under>; 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 at the Open Commission Meeting on July 21, 2021, 8-11, https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf; Press Release, Fed. Trade Comm’n, FTC Rescinds 1995 Policy Statement that Limited the Agency’s Ability to Deter Problematic Mergers (July 21, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter>; 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; Holly Vedova, *Adjusting merger review to deal with the surge in merger filings*, Fed. Trade Comm’n: Competition Matters (Aug. 3, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings>.