

United States Senate
WASHINGTON, DC 20510-4404

July 27, 2021

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairwoman Khan:

I write to share a number of concerns with recent developments at the Federal Trade Commission.

First, I would direct you to my May 18 letter to then-Acting Chairwoman Slaughter in which I expressed my alarm at the FTC's continued refusal to grant early termination of the HSR waiting period for mergers that pose no competitive threat.¹ I urge you to rescind the suspension and return to this longstanding, good-government practice. As I wrote in that letter, "it is an appalling abuse of regulatory discretion to require businesses to wait out the entire 30-day period for no benefit to either competition or consumers. The blanket refusal to grant early termination in any instance is nothing more than a tax on American entrepreneurs trying to fuel our economic recovery."

Second, I am also concerned by your moves to diminish the role of minority Commissioners. As I also wrote in my May letter, "The bipartisan collegiality of the Federal Trade Commission has long been regarded as one of its best weapons." From just the first month of your tenure, it has become clear that you view this bipartisan collegiality as an impediment rather than an asset. By pre-approving broad investigatory authorizations, as opposed to considering the merits of individual investigations, and allowing just a single commissioner to approve the use of compulsory process, the FTC has chosen to avoid bipartisan input and accountability until the very end of the investigative process when filing a complaint. If the FTC is going to approach antitrust enforcement like the Antitrust Division, that is all the more reason to consolidate the two agencies at the Department of Justice.

Third, the FTC is projecting a false sense of concern for public input as it undertakes this radical alteration to how the Commission operates. While I commend the use of public meetings to give citizens more insight into what the Commission is doing and how Commissioners view these

¹ <https://www.lee.senate.gov/public/cache/files/394620bf-0342-4949-8abb-7b1cf70de39b/sen.-lee-letter-to-acting-chairwoman-slaughter-05.18.21.pdf>.

important issues, it is cold comfort to allow public input only *after* the Commission has voted on the issues at hand. It is akin to allowing a defendant to testify only after the verdict has been rendered—the exact opposite of the rule of law.

Finally, I was shocked to read in a recent article that the FTC “is preparing to issue [] second requests unless the merging parties convince it not to do so.”² This guilty-until-proven-innocent approach to law enforcement, in addition to being nothing short of prosecutorial harassment, is unacceptable in a constitutional republic. The Hart-Scott-Rodino Act was implemented to give antitrust enforcers the ability to stop anticompetitive mergers before they are consummated, not to impose regulatory burdens on *all* mergers or allow the agencies to invert the burden of proof in merger cases. Second requests are an essential tool to protect consumers, but they can also be extremely burdensome and expensive to comply with. For deals that pose no risk to competition, such an unexpected cost and delay could sink the deal entirely. Congress has not granted the antitrust enforcement agencies the power or discretion to impose such a policy.

If the FTC is indeed taking this approach, there is also a dangerous chance that it could backfire. Second requests are rarely if ever litigated, but parties would be right to do so where there are no competitive concerns. The HSR Act allows parties to object to second requests that are “unreasonably cumulative, unduly burdensome, or duplicative.”³ The FTC may soon find itself on the losing end of such a case, potentially permanently diminishing the agency’s ability to investigate mergers before consummation.

The unifying theme of these developments is a progressive putsch to consolidate power and burden American businesses. For the sake of our antitrust enforcement regime, competitive markets, and the American economy, I hope you will change course.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael S. Lee".

Sen. Michael S. Lee
Ranking Member
Senate Judiciary Subcommittee on
Competition Policy, Antitrust, and Consumer Rights

² The Capitol Forum, “FTC Issues More Second Requests to Companies, Launching In-Depth Investigations of Deals,” June 30, 2021.

³ 15 U.S.C. § 18a(e)(1)(B)(i)(I).