Chris Netram

Vice President,
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July 18, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Re: *Open Commission Meeting – July 21, 2021*

To whom it may concern:

The National Association of Manufacturers ("NAM") appreciates the opportunity to provide comment to the Federal Trade Commission ("FTC") in advance of the Commission's July 21, 2021, open meeting.

The NAM is the largest industrial trade association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs for the women and men who make things in America.

The NAM is concerned that the Commission plans to adopt a policy statement at its July 21 open meeting in support of so-called "Right to Repair"—potentially opening the door to new regulations that could endanger consumers without materially improving purchasers' ability to repair their equipment. Similarly, we are concerned that the Commission plans to rescind its existing policy statement regarding "prior approval" and "prior notice" in merger cases, upending more than 25 years of precedent and undercutting the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act ("HSR").

On July 9, President Biden signed an executive order on "Promoting Competition in the American Economy."[1] The NAM is concerned that many of the provisions in the executive order are solutions in search of a problem that threaten to undo the manufacturing sector's progress in responding to COVID-19 by undermining free markets.[2] The NAM looks forward to working with the FTC to address real issues that impact competition in the American economy, and we respectfully encourage the Commission not to adopt the significant and potentially damaging policy changes on its open meeting agenda.

[1] *Promoting Competition in the American Economy*. Exec. Order No. 14036, 86 Fed. Reg. 36987 (14 July 2021). *Available at* https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf.

[2] *Manufacturers on Biden EO: Some Actions Are Solutions in Search of a Problem That Doesn't Exist.* National Association of Manufacturers, 9 July 2021. *Available at* https://www.nam.org/manufacturers-on-biden-eo-some-actions-are-solutions-in-search-of-a-problem-that-doesnt-exist-14545/.

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

Manufacturers were dismayed to see that President Biden's recent executive order encouraged the FTC to promulgate a rule focused on so-called "Right to Repair." Unfortunately, Right to Repair is a misguided solution in search of a problem that simply does not exist.

The executive order claims that "powerful manufacturers" impose "unfair anticompetitive restrictions" that "prevent farmers from repairing their own equipment."[3] In truth, farmers (and other end-users in a wide variety of industries) have access to the information, tools, and parts necessary to repair virtually any malfunction with a piece of equipment they own. Original equipment manufacturers ("OEMs") provide a wide range of resources, including manuals, product guides, product service trainings, diagnostics tools, and more, that enable consumers and third-party repair businesses to maintain, diagnose, and repair their products.

Put simply, farmers and other purchasers have not reported experiencing the significant barriers to equipment maintenance and repair that would necessitate drastic regulatory action to implement Right to Repair. The only information about equipment operations not readily available to the public are portions of the embedded coding in machinery that are either A.) necessary to meet critical, and in many cases government-mandated, safety and compliance (e.g., emissions) standards or B.) proprietary and not needed for repair work.

As we noted in our September 2019 comments[4] submitted in conjunction with the Commission's "Nixing the Fix" workshop, manufacturers stand by their products—and they are committed to providing resources to enable end-users or third parties to maintain, diagnose, and repair those products when necessary. FTC-mandated access to the software and coding embedded inside machinery would not bolster purchasers' rights to repair their own equipment given that the resources currently available are fully sufficient to diagnose and fix problems that might arise. Rather, overbroad Right to Repair regulations would create a new right to *modify*, potentially endangering consumers and allowing for unlawful modifications of government-mandated safety and emissions limits. Right to Repair could also force manufacturers to reduce or remove the warranties they offer given the potential for unauthorized and unsafe modifications.

If the FTC advances a new rule that requires manufacturers to allow access to products' operating software, it would open the door for modification of OSHA-directed safety measures designed to protect both operators and bystanders, EPA-mandated emissions controls, CPSC-required specifications to minimize product hazards, and proprietary machine operation and performance controls. Farmers and other end-users of industrial machinery do not need this information to repair their own equipment: it can only be used to circumvent safety and emissions standards or to access proprietary intellectual property.

The NAM respectfully urges the FTC not to adopt a new policy statement in support of Right to Repair. By declining to prescribe a solution to a problem that does not exist, the FTC can protect consumers from dangerous and potentially unlawful modifications to machinery, equipment, or products that bear the trusted brand of an American OEM.

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[3] Competition EO, *supra* note 1, at 36992.

[4] NAM Comments on FTC "Nixing the Fix" Workshop, 16 September 2019. *Available at* https://documents.nam.org/tax/namr2rcomments.pdf.

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

In 1995, the FTC issued a policy statement concluding that a "general policy of requiring prior approval" for certain future acquisitions was "no longer necessary."[5] In support of this policy, the Commission cited its "extensive experience with the HSR Act," which the statement noted had "proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur."[6]

Under the FTC's now-current practice of relying on HSR review rather than prior approval and prior notice, companies that have had previous transactions investigated or blocked by the Commission must comply with the HSR Rules' premerger filing requirements rather than being subject to an additional prior approval requirement—an appropriate standard given the effectiveness of the HSR Rules. Further, the FTC in its 1995 policy statement reserved its ability to require prior approval when a company may be re-attempting a transaction previously deemed to be anticompetitive or attempting to complete a potentially anticompetitive transaction that would not be subject to HSR review. In effect, the FTC's current practice reduces costs for companies and streamlines the FTC's review of potential transactions by relying on the well-understood and broadly-applicable HSR Rules for most mergers—while preserving the option of prior approval for the potential transactions most likely to raise anticompetitive concerns.

The market has fully adjusted to the FTC's use of the HSR Rules for premerger review of potential transactions in the 26 years since the 1995 policy statement was adopted.[7] As the NAM said in our February 2021 comments on the FTC's proposed rule on HSR coverage, exemption, and transmittal, the HSR Rules "have a significant impact on manufacturers in the United States" because "[c]lear regulatory guardrails…give manufacturers the confidence to engage in pro-competitive mergers, acquisitions, and financings."[8] Further, we noted that "predictability around the…review and enforcement priorities" of the FTC and the Department of Justice ("DOJ") are critical to enabling manufacturers to "plan for potential transactions" and to ensuring that transactions can be "consummated without fear of uncertainty and delay."[9]

The NAM is concerned that reversing course after more than 25 years of reliance on the HSR Rules will create significant uncertainty in the marketplace and undercut the predictability that the Rules currently provide to manufacturers considering pro-competitive transactions. The lack of clarity associated with the prior approval process could also create additional costs for businesses—which the 1995 policy statement sought to reduce. The NAM is hopeful that the FTC will not undermine the regulatory certainty that the HSR Act provides by reversing its now-longstanding policy of relying on the premerger notification rules for potential transactions.

In December 2020, the Commission was clear that it felt that the HSR Rules enable the FTC and the DOJ "to determine which acquisitions are likely to be anticompetitive and to challenge them before

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[5] *Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases*. 60 Fed. Reg. 39745 (3 August 1995). *Available at* https://www.ftc.gov/system/files/documents/public_statements/410471/frnpriorapproval.pdf.

[6] *Ibid.*

[7] Notably, the policy statement has now been in effect longer than the HSR Rules themselves had been when the FTC noted its "extensive experience" with the Rules as support for no longer requiring prior approval and prior notice.

[8] NAM Comments on Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules and Hart-Scott-Rodino Rules ANPRM, 1 February 2021. *Available at* https://documents.nam.org/tax/namhsrcomments.pdf.

[9] *Id.* at 2.

they are consummated."[10] The NAM agrees that HSR premerger review is effective—including in instances when a company may have had a previous transaction investigated or blocked. Manufacturers see no need to reverse more than 25 years of precedent and set a new standard for premerger review when the FTC's existing procedures have been proven over time to accomplish the HSR Rules' critical goals of protecting consumers from anticompetitive behavior while also allowing for pro-competitive transactions that benefit manufacturers, workers, and consumers throughout the economy.

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The NAM respectfully encourages the FTC to reconsider the policy statements on the agenda for its July 21 open meeting, and instead to focus on issues that will promote a "fair, open, and competitive marketplace" that supports "broad and sustained prosperity."[11] We look forward to working with you to bolster pro-competitive actions by manufacturers across the country, which lead to job creation, investment in research and development, and economies of scale and scope that produce lower prices and create greater choice for consumers.

Sincerely,

Chris Netram
Vice President, Tax and Domestic Economic Policy

[10] *NPRM: Premerger Notification; Reporting and Waiting Period Requirements*, 85 Fed. Reg. 77053 (1 December 2020). RIN 3084-AB46, *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21753.pdf.

[11] Competition EO, *supra* note 1, at 36987.