

Congress of the United States

Washington, DC 20515

July 29, 2021

The Honorable Lina Khan, Chair
The Honorable Noah J. Phillips, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Rebecca K. Slaughter, Commissioner
The Honorable Christine S. Wilson, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

We write with serious concerns about the partisan actions of the Federal Trade Commission's (FTC) Democratic Commissioners to consolidate agency power, unilaterally assert and expand regulatory authority, and abandon bipartisan and open processes. This ill-advised power grab departs from existing FTC practice and tradition and will make the FTC more powerful and less transparent.¹ These partisan changes will position the Biden FTC to reshape radically the American economy and, ultimately, harm American consumers, workers, small businesses, and traditions of free enterprise.

The Biden Administration moved quickly to empower its FTC to pursue this radical progressive agenda. On June 15, 2021, just hours after the Senate confirmed Lina Khan as President Biden's nominee to be the fifth Commissioner, President Biden named Ms. Khan to serve as the FTC Chair.² The Biden Administration's approach departed from historical practice—traditionally, a president announces before Senate consideration whether a nominee will serve as chair—and prevented the Senate from fully examining Ms. Khan's fitness to serve as FTC Chair and wield the enormous power of this job.³

In just the first weeks of Chair Khan's leadership, the Biden FTC is embarking on a rapid and concerted effort to upend long-standing bipartisan agency policy with little public notice or opportunity to participate. On June 24, the FTC announced a meeting scheduled for July 1, just

¹ *Lina Khan's Power Grab at the FTC*, WALL ST. J. (July 5, 2021) (opinion), <https://www.wsj.com/articles/lina-khans-power-grab-at-the-ftc-11625517819> (describing how “[i]ndependent federal agencies have power over American life that the Founders never imagined, and that reign is about to expand with a vengeance in the Biden era,” and how the FTC is moving toward “stretch[ing] its powers in a way it hasn't done since the 1970s and 1980s before it was rebuked by Congress and the courts”); cf. Editorial Board, *The FTC as National Nanny*, WASHINGTON POST (Mar. 1, 1978) (opinion).

² Leah Nylen & Betsy Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>; Bryan Koenig, *Khan Goes From Commissioner To Chair In Under 6 Hours*, LAW360 (June 16, 2021), <https://www.law360.com/articles/1394715/khan-goes-from-commissioner-to-chair-in-under-6-hours>; *An Antitrust Bait and Switch*, WALL ST. J. (June 16, 2021) (opinion), https://www.wsj.com/articles/an-antitrust-bait-and-switch-11623883196?mod=article_inline.

³ See generally *id.*

seven days later—a move that served only to advance partisan goals.⁴ Of the items considered on July 1, the FTC approved them on a sharply divided basis with no votes from Republican Commissioners appointed by former President Trump.⁵ Instead, the Republican Commissioners wrote separately to note serious deficiencies in the FTC’s actions, including reduced transparency and the potential for the FTC to “unleash unchecked regulatory” powers on the American economy.⁶ The two Republican Commissioners also noted:

- The Democratic Commissioners have imposed new obligations on American businesses that exceed the agency’s authority in statute.⁷ Whether in this context or elsewhere, the FTC may not “completely ignore[e]” the “inconvenient” Congressional mandates and prohibitions.⁸
- The Democratic Commissioners changed FTC rulemaking procedures in ways that will make the agency’s fact-finding partisan and reduce agency transparency.⁹ In the words of Commissioner Phillips and Commissioner Wilson, “bulldozing procedural safeguards”¹⁰ that protect the American people and uphold the rule of law is bad policy. These “changes have the potential to usher in a return to aggressive, unbounded rulemaking efforts that could transform entire industries without clear theories of law violations and empirical foundations for recommended regulatory burdens.”¹¹ These changes are also

⁴ Press Release, FTC Announces Agenda for July 1 Open Commission Meeting (June 24, 2021), <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>.

⁵ Daily Business Briefing, *The first open meeting of the F.T.C. under Lina Khan starts with political sparks.*, NEW YORK TIMES (July 7, 2021), <https://www.nytimes.com/live/2021/07/01/business/economy-stock-market-news> (“Ms. Khan, the agency’s chair, opened with a statement about the importance of transparency, but the two Republican commissioners pushed back on her approach.”); Press Release, Open Commission Meeting, Federal Trade Commission (July 1, 2021), <https://www.ftc.gov/news-events/events-calendar/open-commission-meeting-july-1-2021> (describing series of 3-2 votes).

⁶ See, e.g., Remarks of Commissioner Noah Phillips Regarding the Commission’s Withdrawal of the Section 5 Policy Statement, 2 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591578/phillips_remarks_regarding_withdrawal_of_section_5_policy_statement.pdf.

⁷ See Dissenting Statement of Commissioner Christine Wilson, Open Commission Meeting, 2 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommmnmeetingdissent.pdf (“But the rule presented to us today exceeds our statutory authority.”); Transcript of Open Commission Meeting, 3 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_events/1591478/transcript_open_commission_meeting_7-1-21.pdf (Commissioner Phillips explaining “the final rule presented here today exceeds [statutory] authority”).

⁸ Cf. Dissenting Statement of Commissioners Noah Phillips and Christine 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), 5, https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf.

⁹ See generally Transcript of Open Commission Meeting, 10-11.

¹⁰ Dissenting Statement of Commissioners Christine Wilson and Noah Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures, 3 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf.

¹¹ Dissenting Statement of Commissioner Christine Wilson, Open Commission Meeting, 6; see also Transcript of Open Commission Meeting, 10-11 (Commissioner Phillips explaining how changes “cut against the values we all espouse today when we talk about rulemaking, transparency, inclusivity, making sure we base rules on the best

entirely consistent with the three Democratic Commissioners' past advocacy "for regulation upon regulation, in industry after industry,"¹² and the pursuit of "pet projects" by unelected—and unaccountable—bureaucrats.¹³

- The Democratic Commissioners redirected the Bureau of Competition in ways that reflect an "intention to embark on a sweeping campaign to replace the free market system with [their] own enlightened views of how companies should operate, and to replace the goals of price competition, quality, and efficiency *with subjective and as-yet-unstated goals that are ripe for political manipulation.*"¹⁴
- The Democratic Commissioners rescinded a bipartisan 2015 policy statement that cabined the FTC's approach to investigating allegations of unfair methods of competition. This departure from bipartisan consensus suggests the Democratic Commissioners may attempt to claim new and "terrific regulatory power" that Congress never intended for the agency.¹⁵ As explained by Commissioner Wilson, this change creates the real possibility that Americans "will face higher prices, less innovation and reductions in quality"¹⁶ and no doubt tremendous uncertainty in the near future. With this action, the Democratic Commissioners seek "unbridled authority" to regulate and micromanage the American economy.¹⁷
- The Democratic Commissioners made it much easier for the FTC staff to use compulsory process,¹⁸ like subpoenas and civil investigative demands to harass businesses across the American economy. This approach will reduce oversight of the use of these powerful tools, and in some cases it violates the law.¹⁹ Like the other changes, this step also

information available," and that "all of this streamlining includes a host of measures designed to limit public understanding, limit public input, and take us away from neutral fact finding").

¹² Dissenting Statement of Commissioners Christine Wilson and Noah Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures, 1.

¹³ *See id.* at 3.

¹⁴ *Id.* at 1 (emphasis added).

¹⁵ Remarks of Commissioner Noah Phillips Regarding the Commission's Withdrawal of the Section 5 Policy Statement, 1; *see generally* Dissenting Statement of Commissioners Noah Phillips and Christine 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".

¹⁶ Dissenting Statement of Commissioner Christine Wilson, Open Commission Meeting, 8. The Democrat Commissioners even voted down a motion to solicit comments on whether or not to rescind the policy. *See* Transcript of Open Commission Meeting, 16-17.

¹⁷ *See* Dissenting Statement of Commissioners Noah Phillips and Christine 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", 2-3, 5.

¹⁸ *See* Transcript of Open Commission Meeting, 19; *see generally id.* at 22 (Commissioner Phillips explaining how "[u]nder the current process, staff working on an antitrust investigation need a commission resolution before they may issue compulsory requests for documents, information, or testimony").

¹⁹ *Id.* ("[The proposed resolutions] would allow the chair or one commissioner that the chair selects unilaterally to initiate a large number of full phase investigations across the economy. That means less room for input and oversight from all commissioners and more room for mistakes, overreach, cost overruns, and even politically motivated decision making regardless of whether the majority consists of Democrats or Republicans. And when

appears designed for strong partisan objectives—and will doubtless be used to advance partisan goals of certain Commissioners.²⁰

In addition to these dangerous shifts in policy, the FTC is aggressively undercutting the agency’s deliberative processes and commitment to transparency. The public and Commissioners received little advance notice of the July 1 meeting and inadequate time to consider relevant measures fully.²¹ Although votes and limited discussion took place in an *open* meeting, the FTC only accepted public comments *after* the Commission’s votes—making this so-called opportunity for public input a sham.²² In addition, in an apparent attempt to control the flow of information out of the Commission, Chair Khan directed all FTC employees to cancel scheduled public events and imposed a gag order.²³ Reports suggest radical changes at the FTC may be damaging morale and having significant negative effects on experienced FTC staff.²⁴

As Commissioner Phillips noted, “[t]he need for certainty and predictability are basic tenets of good government.”²⁵ The Biden FTC, however, has abandoned these tenets of good government to expand regulatory power.²⁶ The FTC’s decisions have real-world consequences to American consumers and the American economy,²⁷ and these actions will fundamentally change the agency’s mission and undermine the rule of law. It is essential that Congress fully understand the scope and nature of the FTC’s actions, and the extent to which any of the actions have been unduly influenced by the White House. As our Committees continue their oversight of the FTC and consider legislation relating to the FTC’s scope and authority, please provide the following information:

things go wrong there will be less accountability.”); *id.* at 23-24 (certain resolutions exceed statutory authorization, and seeking amendment, with all Democrat Commissioners rejecting amendment); *see also* Dissenting Statement of Commissioner Christine Wilson, Open Commission Meeting, 10.

²⁰ *See, e.g.*, Rebecca Kelly Slaughter (@RKSlaughterFTC), Twitter (Sept. 9, 2020), <https://twitter.com/RKSlaughterFTC/status/1303762122019688449>.

²¹ *See, e.g.* Transcript of Open Commission Meeting, 20.

²² Remarks of Commissioner Noah Phillips Regarding the Commission’s Withdrawal of the Section 5 Policy Statement, 1 (“[M]embers of the public . . . will speak after the vote, so that the FTC cannot consider their views. That is inconsistent with rhetoric we have heard about opening up the policy-making process.”).

²³ *See* Leah Nysten & Betsy Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>.

²⁴ *See, e.g.*, Bruce Love, ‘A Real Disquiet’: FTC Staff Attorneys Are Job Hunting, NATIONAL LAW JOURNAL (July 13, 2021), <https://www.law.com/nationallawjournal/2021/07/13/a-real-disquiet-ftc-staff-attorneys-are-job-hunting/>.

²⁵ Remarks of Commissioner Noah Phillips Regarding the Commission’s Withdrawal of the Section 5 Policy Statement, 2.

²⁶ *See, e.g.*, Dissenting Statement of Commissioner Christine Wilson, Final Rule related to Made in U.S.A. Claims, 3 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591494/2021-07-01_commissioner_wilson_statement_musa_final_rule.pdf (expressing concern “that [the] Commission’s desire to promulgate or utilize our regulatory authority in ways that exceed the boundaries of underlying statutes and corresponding Congressional intent will continue”); Dissenting Statement of Commissioners Noah Phillips and Christine 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”, 3 (criticizing a failure to “cite any sound basis to support [the Democrat Commissioners] apparent proposition that Congress intended to give a few unelected commissioners of a federal agency limitless authority to enjoin business practices”).


²⁷ *Id.* at 8.


1. All documents and communications referring or relating to the July 1, 2021, Commission meeting, including but not limited to the development, consideration and adoption of the actions taken at that meeting and the rationale for the meeting's rushed timeline or the hearing of comments by the Commission *after* votes were taken;
2. All documents and communications referring or relating to instructions, directives, or commands given to FTC staff since June 15, 2021, to cancel public engagements or events;
3. A timeline for the FTC's issuance of any rulemaking or guidance to replace the 2015 policy statement concerning unfair methods of competition, including an explanation for whether the public will have opportunity to submit written comments on a draft of that document and how the FTC will ensure its position reflects concerns or facts generated through public comments;
4. All documents and communications referring or related to the FTC's proposal, development or implementation of policies or actions called for by or under the authority of Executive Order 14036;
5. All documents and communications between or among employees or officials of the Federal Trade Commission and employees or officials of the Executive Office of the President concerning items 1-4, above.
6. As similarly requested of Attorney General Garland on May 17, 2021, copies of all written communications between the Department of Justice (DOJ) and the FTC concerning H.R. 2668 or any drafts of the legislation since March 11, 2021.

Please produce this information as soon as possible but no later than 5:00 p.m. on August 12, 2021. If you have any questions about this request, please contact Committee staff at (202) 225-6906 and (202) 225-3641. Thank you for your prompt attention to this matter.


Jim Jordan
Ranking Member
Committee on the Judiciary

Sincerely,


Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce


James Comer
Ranking Member
Committee on Oversight and Reform

The Honorable Lina Khan et al.

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cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary
The Honorable Frank Pallone, Chairman, Committee on Energy and Commerce
The Honorable Carolyn Maloney, Chairwoman, Committee on Oversight and Reform