



April 20, 2022

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader
United States Senate
Washington, DC 20510

Dear Majority Leader Schumer and Republican Leader McConnell:

The U.S. Chamber of Commerce urges you to delay consideration of the nomination of Alvaro Bedoya to the Federal Trade Commission until Mr. Bedoya clarifies certain positions on critical issues regarding Commission management and authority.

FTC is at an inflection point; Mr. Bedoya would be the fifth member of the Commission and his vote would break potential deadlocks over changes in policy or an enforcement matter. Current leadership of the FTC has engaged in a pattern of conduct that undermines the confidence of the business community in the agency's willingness to fairly and transparently carry out enforcement and rulemakings within the boundaries of congressional authority.

Since Lina Khan was appointed chair after her confirmation, the Commission has engaged in disturbing process and management changes. During its first "open meeting" in July 2021, the Commission voted to give the chair great power over consumer protection rulemakings and diminished the role of staff reports in Magnuson-Moss rulemakings.¹ The Commission at the same hearing also repealed the longstanding, bipartisan "consumer welfare" standard in competition matters and removed references to supporting the free market. The Commission has also accepted the use of "zombie votes," by which Consumer Financial Protection Bureau Director Rohit Chopra was able to have his vote counted at the FTC despite *no longer serving on the Commission*. This practice is patently unlawful.

Other allegations of maladministration by current FTC leadership exist. Earlier this year, according to *Politico*,² Chair Khan sought to initiate a study into pharmacy benefit managers but hid the proposed study from commissioners until the night before the vote. Her conduct led the FTC's chief economist to resign in protest.

¹https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetindissent.pdf

² See Politico story, at <https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878>.

Despite claiming to bring about greater transparency to the agency, Khan's tenure has in fact provided less clarity. The public has been given only five days' notice of "open meetings" with vague, brief descriptions of items to be considered. During open meetings, the public comment has been taken *after* voting has occurred.

Also under Chair Khan, the FTC has rebuffed other efforts to bring transparency to the agency. Many months ago, the Chamber sought information under the Freedom of Information Act relating to voting procedures, coordination with foreign competition agencies, and other topics. The FTC has yet to respond in a meaningful fashion to any of our requests.

This troubling conduct is occurring as the Commission considers a sweeping agenda that could significantly impair the ability of the American economy to recover from the COVID-19 pandemic and rampant inflation. The FTC is currently considering several initiatives that would impose burdens on business, including bans on exclusive contracts, non-compete clauses, and personalized online advertising. In a recent speech, Chair Khan expressed an interest in substantively limiting the use of online data, irrespective of consumer notice and choice.

The Chamber urges the Senate to demand clarification from Mr. Bedoya regarding his position on transparency, due process, statutory authority, and basic management of the Commission before full Senate consideration of his nomination.

Transparency

- 1) In confirmation testimony and Questions for the Records, Mr. Bedoya was asked whether FTC Commissioners have the legal authority to cast votes that continue to count toward a Commission majority even after they have departed from the agency. In his response, Mr. Bedoya stated "I certainly understand the concern with this practice. If confirmed, I will reach out to the Office of General Counsel to study this issue closely."³ In the event of another impending vacancy at the Commission, does Mr. Bedoya believe that it is appropriate and good governance for such votes to count? Will you commit to refrain from voting and urge your fellow commissioners to do so if such a vote would change the outcome of Commission decision making?
- 2) On December 19, 2021, the Chamber submitted a Freedom of Information Act request asking the Commission for documents pertaining to the FTC's voting and procedures. Initially, the agency's FOIA office denied the request on the grounds that such documents were "deliberative" and "pre-decisional." The Commission late on a Friday released pages from a manual

³ <https://www.commerce.senate.gov/services/files/1DB79D48-B9EB-4870-9202-1DF6E286852B>

on its website.⁴ The Chamber then requested via FOIA the entire manuals.⁵ Initially, the agency denied this request but was overruled by administrative appeal. Despite this ruling, FTC has not released the full manuals to the public in the four months since the Chamber's initial request. Other agencies have released similar manuals in the past in response to FOIAs.⁶ Does Mr. Bedoya believe that the Commission should immediately release the entirety of all agency manuals that include voting procedures of the Commission?

- 3) Credible accusations have been made that the Chair has not provided other Commissioners with data material to Commission activity until the night before a vote. Does Mr. Bedoya believe that all Commissioners should have access to all such data in possession of the Chair more than 24 hours before a vote?
- 4) Agencies like the Federal Communications Commission have exercised a bipartisan practice of posting the text of proposed rules to be voted upon three weeks in advance of an open meeting. Does Mr. Bedoya believe that the Chair has given the public adequate notice of agency business by posting meetings notices 5 days in advance of meetings with little description of what is to be voted upon? Will Mr. Bedoya commit to press for transparency like the FCC's model?

Due Process

- 1) Mr. Bedoya recently stated in Questions for the Record that he agrees with efforts to concentrate power to the Chair under the Commission Section 18 Magnusson-Moss Rulemaking authority. Why does Mr. Bedoya believe that the Chair is better qualified than an Administrative Law Judge to fairly and expeditiously rule on areas of dispute in rulemakings?

Agency Authority

- 1) The Supreme Court unanimously ruled in the *AMG Capital Management v. FTC* case that the Commission had exceeded its authority by seeking equitable remedies under Section 13(b) of the Federal Trade Commission Act. Recently, the Commission issued an Advanced Notice of Proposed Rulemaking citing the Court's ruling as the Commission determines whether

⁴ [Commission Voting Policy | Federal Trade Commission \(ftc.gov\)](https://www.ftc.gov/policy/commission-voting-policy)

⁵ <https://www.uschamber.com/assets/documents/December-2-FOIA-Requests-All.pdf>

⁶ [Federal Communications Commission \(FCC\) Bureau and Office Guide to the Agenda Process, 2012 \(governmentattic.org\)](https://www.governmentattic.org/fcc-bureau-and-office-guide-to-the-agenda-process-2012)

to issue a rule on earnings claims.⁷ This ANPRM does not provide evidence of a widespread practice, which is required to merit a rule. Do you believe that it is appropriate for the agency to make rules for the primary purpose of unlocking enforcement mechanisms, or should agencies make rules solely based on the presence of a widespread consumer harm?

- 2) The Commission recently requested comment on a Petition for Rulemaking made by Accountable Tech, which seeks to ban personalized online advertising. The Petition asks the Commission to promulgate this rule under the prohibition against “unfair methods of competition” in Section 5 of the FTC Act. Does the Commission have the authority to make rules against “unfair methods of competition?”

The Chamber looks forward to Mr. Bedoya sharing important information regarding how he would conduct his official responsibilities as a member of FTC. The Senate should not rush to confirm Mr. Bedoya until these issues are addressed.

Sincerely,



Neil L. Bradley
Executive Vice President, Chief Policy Officer
and Head of Strategic Advocacy
U.S. Chamber of Commerce

cc: Members of the United States Senate

⁷ <https://www.federalregister.gov/documents/2022/03/11/2022-04679/deceptive-or-unfair-earnings-claims>