



February 16, 2023

The Honorable Maria Cantwell  
Chair  
Committee on Commerce, Science,  
and Transportation  
United States Senate  
Washington, DC 20510

The Honorable Cathy McMorris Rodgers  
Chair  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Ted Cruz  
Ranking Member  
Committee on Commerce, Science,  
and Transportation  
United States Senate  
Washington, DC 20510

The Honorable Frank Pallone  
Ranking Member  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairs Cantwell and McMorris Rodgers and Ranking Members Cruz and Pallone:

The U.S. Chamber of Commerce has grave concerns about the leadership of Lina Khan, due process, and accountability at the Federal Trade Commission. We strongly urge you to conduct oversight, including hearings, of the current Commissioners regarding agency mismanagement. Additionally, Congress should refrain from granting the Commission any further rulemaking or enforcement authority until it conducts a thorough investigation and oversight and puts forward reasonable guardrails around agency activity.

### **FTC Agency Mismanagement**

Over the last two years, agency management has been a serious concern at the Federal Trade Commission. The recent allegations made by Commissioner Christine Wilson that led to her principled resignation because of agency ethics and mismanagement, including those that her fellow Commissioners redacted her dissent in a matter with “no purpose but to protect Ms. Khan from embarrassment”<sup>1</sup> are disturbing and if confirmed, reflect an even broader trend of FTC impropriety.

While the Commission attempts to effectively micromanage the U.S. economy on shaky authority as described below, the FTC on a smaller level has been mismanaged by leadership over the last two years. For example, the FTC’s Office of Inspector General found that the agency used unpaid experts and consultants in ways that lacked transparency and comprehensive controls. The agency failed to ensure that these experts and consultants were not performing inherently

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<sup>1</sup> <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d>

governmental functions, introducing “operational, legal, compliance, security, and reputational risk” to the agency.<sup>2</sup>

Surveys reveal that morale among FTC staff has plummeted since Chair Khan took over. Among other results, 28.8% of respondents “disagree or strongly disagree” that the agency’s leadership “maintain high standards of honesty and integrity.” In written testimony, a commissioner complains that “procedural irregularities” have precluded robust dialogue within the agency, including “Muzzling staff internally and externally.”<sup>3</sup>

Finally, the Commission allowed the use of “Zombie Votes” that enabled current CFPB Director Rohit Chopra to effectively vote on matters before the FTC, even when he was no longer a commissioner.

### **The FTC’s Unauthorized Regulatory Campaign**

Another symptom of agency mismanagement is the Commission’s recent decision to embark on legally questionable rulemakings and enforcement. Despite the Supreme Court unanimously finding that the Commission had exceeded its enforcement authority,<sup>4</sup> the agency has gone rogue and unilaterally granted itself authority outside those properly delegated by Congress.

Beginning in June 2021, the Khan FTC upended decades long, bipartisan practice by consolidating power to the Chair in Magnuson-Moss Rulemakings in consumer protection matters and ending its application of the consumer welfare standard in competition matters.<sup>5</sup> These actions set the stage for the Commission to make end runs around congressional intent in both rulemakings and enforcement.

Since Chair Khan has risen to leadership at the Commission, the agency has undertaken an unprecedented number of rulemakings since the 1970s when its authority also came into doubt. The Commission has taken upon itself the ability to regulate virtually every industry under the sun on issues like earnings claims and endorsements.

In particular, the Commission has effectively replaced Congress by exploring whether to micromanage the fees companies<sup>6</sup> can charge and data privacy.<sup>7</sup> These rulemakings are troubling in light of the decision by the Supreme Court in *West Virginia v. EPA* in which the Court held that

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<sup>2</sup> [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2022-08-01\\_OIGauditreport\\_unpaidconsultants\\_FINAL.pdf?utm\\_source=sfmc&utm\\_medium=email&utm\\_campaign=&utm\\_term=Comp+EO+Update+October&utm\\_content=10/4/2022](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-08-01_OIGauditreport_unpaidconsultants_FINAL.pdf?utm_source=sfmc&utm_medium=email&utm_campaign=&utm_term=Comp+EO+Update+October&utm_content=10/4/2022)

<sup>3</sup> <https://twitter.com/CSWilsonFTC/status/1519786949476761601>

<sup>4</sup> See *Federal Trade Commission v. AMG Capital Management*, 593 U.S. \_\_\_\_ (2019).

<sup>5</sup> See Dissent of Commissioner Wilson (July 1, 2021) available at [https://www.ftc.gov/system/files/documents/public\\_statements/1591554/p210100wilsoncommnmeetingdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf).

<sup>6</sup> [https://americaninnovators.com/wp-content/uploads/2023/02/230208\\_Comments\\_JunkFeesANPR\\_FTC.pdf](https://americaninnovators.com/wp-content/uploads/2023/02/230208_Comments_JunkFeesANPR_FTC.pdf)

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[https://www.uschamber.com/assets/documents/221121\\_Comments\\_CommercialSurveillanceDataSecurity\\_FTC.pdf](https://www.uschamber.com/assets/documents/221121_Comments_CommercialSurveillanceDataSecurity_FTC.pdf)

agencies must have clear grants of authority when regulating a matter of economic and political significance. Here, Congress has not passed legislation, as noted in the President’s State of the Union Address this month.<sup>8</sup> Former Commissioner Noah Phillips put it best when he stated about the FTC’s privacy rulemaking, “What the ANPR does accomplish is to recast the Commission as a legislature, with virtually limitless rulemaking authority where personal data are concerned.”

Not only has the Commission exceeded its consumer protection authority, but the Commission has determined that it now regulates employer relations in its proposed ban on non-compete clauses under what it claims is authority to make rules against unfair methods of competition. Congress has never granted the authority for the FTC to make competition rules, but only consumer protection regulations under its unfair and deceptive practices authority.

### **Lack of Agency Independence**

Independent agencies like the FTC have been given deference by courts because of their supposed independent expertise.<sup>9</sup> Unfortunately, Chair Khan when opining on the President’s Executive Order on Competition specifically tasking FTC, celebrated the Order, stating that it “recognizes the whole-of-government approach needed to urgently tackle unhealthy concentration and unfair methods of competition across the economy” and commits to expanding interagency collaboration.<sup>10</sup> Much of the same terminology in the Executive Order and other White House products like the A.I. Bill of Rights like the term “commercial surveillance” are used in its current privacy rulemaking. If the FTC cannot maintain its necessary independence, it should not be given deference regarding its actions.

The Chamber appreciates your concern in this matter and stands ready to work with you to ensure agencies are accountable and transparent to the American people. We urge you to conduct immediate oversight and ask that you refrain from granting the agency any new rulemaking authority until such oversight is complete and accountability measures are put in place.

Sincerely,



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

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<sup>8</sup> <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/02/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery/>

<sup>9</sup> [https://www.uschamber.com/assets/documents/211119\\_IndependentAgencyDecisionMaking\\_FederalGovt.pdf](https://www.uschamber.com/assets/documents/211119_IndependentAgencyDecisionMaking_FederalGovt.pdf)

<sup>10</sup> <https://www.ftc.gov/news-events/news/press-releases/2022/07/ftc-marks-one-year-anniversary-government-wide-initiative-promote-competition-american-economy>

cc: Members of the Senate Committee on Commerce, Science, and Transportation

cc: Members of the House Committee on Energy and Commerce

cc: Members of the Senate Committee on the Judiciary

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