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U.S. CHAMBER OF COMMERCE

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Washington, DC 20062-2000  
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June 29, 2021

The Honorable Lina Khan  
Chair  
Federal Trade Commission  
Washington, DC 20580

**Re: July 1, 2021 FTC Open Commission Meeting**

Dear Chair Khan:

The U.S. Chamber of Commerce writes to express our concerns with the Open Meeting scheduled for July 1, 2021 that was noticed on June 24, 2021.<sup>1</sup> Although the Federal Trade Commission (“FTC” or “Commission”) has expressed its intention to “open the work of the Commission” to the public, the FTC has failed to provide meaningful notice or adequate opportunity to comment on the pending items to be voted upon on July 1.

In the Notice, the Commission provides vague and brief summaries of significant FTC rulemakings, process, and policy changes that fail to provide the public with adequate notice of the proposals. For example, regarding Section 18 rulemaking procedures, the Notice merely states “The Commission will vote on whether to streamline the procedures for section 18 rules prohibiting unfair or deceptive trade practices. Section 18 rules allow the Commission to seek redress for defrauded consumers and penalties against firms that cheat.”<sup>2</sup>

The descriptions of the proposal fail to describe the scope or subject matter of potential rules as well as the proposed streamlined Section 18 rules themselves. A Section 18 streamlining could impact a wide range of conduct. In light of the recent 9 to 0 decision by the Supreme Court that held the Commission has already exceeded its statutory authority in consumer redress cases<sup>3</sup>, it would benefit the Commission to seek meaningful public input and establish a robust record that achieves the best and legally durable public policy result.

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<sup>1</sup> Federal Trade Commission Announces Agenda for July 1 Open Commission Meeting (June 24, 2021) available at <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>. (“Notice”)

<sup>2</sup> *Id.*

<sup>3</sup> *AMG Capital Management, LLC v. Fed. Trade Comm’n*, No. 19-508 (Apr. 22, 2021).

The Chamber recommends that if the Commission seeks to conduct open meetings to vote upon policy or significant process changes, it should follow the bipartisan example of the Federal Communications Commission (“FCC”) which notices meetings months in advance.<sup>4</sup> The FCC, beginning with former Chair Ajit Pai in 2017 and continued by Acting Chair Jessica Rosenworcel, publishes the full proposed text of orders and proposed rules to be voted upon three weeks in advance of open meetings. This approach follows the spirit of the Administrative Procedure Act and adequately notifies the public about what the agency intends to consider, therefore enabling meaningful public comment.

We urge the Commission to show good faith and transparency by providing the public with the text of its proposals. The Commission should give the public at least three weeks, as opposed to the *one week* provided by the FTC for the current meeting, before its Open Meeting to comment.

Based upon the limited notice provided by the Commission, the Chamber offers the following substantive concerns about the proposed topics at the Open Meeting:

### **Section 18 Rulemaking Procedures:**

The Supreme Court made it clear that the Commission had been misusing its 13b authority for years whenever it attempted to seek monetary relief under 13b. Congress has already outlined a path for the FTC to seek monetary relief for cases that arise from fraudulent and dishonest conduct in Section 19. Section 18 should not be used to circumvent the Supreme Court ruling, nor should the Commission get out ahead of the pending Congressional debate over when such remedies would be appropriate.

While it is unclear from the posted agenda for the open meeting what is envisioned by the use of the word “streamlining,” it is clear is that the FTC should, for now, use Section 19 to prosecute such cases and not consider writing rules that do an end-run around the Congressional process.

### **“Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (2015):**

The statement of principles was developed on a bipartisan basis that served as a path forward for the agency to bring viable Section 5 Unfair Methods of Competition cases that may not be entirely consistent with the antitrust laws. The statement remains sound because it tethers enforcement both to harm to the consumer and to the rule of reason standard.

The Notice for the open meeting fails to put forward any objective rationale for removing the guidance. Nor does the Notice suggest that the Commission plans to replace such guidance

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<sup>4</sup> See Open Commission Meetings, Federal Trade Commission available at <https://www.ftc.gov/news-events/events/open-commission-meetings>.

with updated guidance. It seems premature to make any decision around the guidance without a more fulsome debate, including FTC workshops with stakeholders. In the end, any removal of existing guidance should only be done when updated guidance is ready for consideration. Finally, without bipartisan support, guidance will fail to stand the test of time and lead to lengthy court challenges brought on by partisan impulses.

**Enforcement Investigations:**

The Federal Trade Commission’s notification of its plans to consider “a series of resolutions” is vague and does not provide any specificity as to what is truly under consideration. Such an approach is counter to the goal of transparency and the purpose of open meetings. As a result, it is difficult for the Chamber to comment.

However, the Notice signals the intent to use omnibus resolutions to empower the staff to launch investigations without seeking a vote from commissioners. The Chamber strongly opposes any such attempt to delegate Commission votes to initiate competition investigations to a staff level decision. Omnibus resolutions lead to “fishing expedition” that circumvents the oversight that comes from the Commission having to approve staff proposed investigations.

Further, the notion that a single commissioner can turn a staff-initiated investigation into a compulsory exercise holds the potential for a gross abuse of power. Yet, this is exactly what the agenda for the open meeting suggests is planned. Strong enforcement does not need to be done in an abusive manner, but these efforts to “streamline” investigations are highly questionable and undermine the confidence and legitimacy of the Commission.

The Chamber stands ready to work with you to address these issues.

Sincerely,



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