



April 17, 2023

The Honorable Patty Murray
Chair
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Susan Collins
Ranking Member
Committee on Appropriations
United States Senate
Washington, DC 20510

The Honorable Kay Granger
Chair
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20510

The Honorable Rosa DeLauro
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20510

Dear Chairs Murray and Granger and Ranking Members Collins and DeLauro:

The U.S. Chamber of Commerce writes to express grave concerns about the leadership of Lina Khan at the Federal Trade Commission (FTC), and about the state of due process and accountability at the Commission.

The allegations made by Commissioner Christine Wilson that led to her principled resignation, that her fellow Commissioners redacted her dissent in a matter with “no purpose but to protect Ms. Khan from embarrassment,”¹ are disturbing and if confirmed, reflect an even broader trend of FTC impropriety. Nonetheless, despite these serious allegations and an extensive record of FTC mismanagement and regulatory overreach, the Biden Administration’s Fiscal Year 2024 budget request included a \$160,000,000 increase for FTC.

We strongly urge you to utilize Congress’ power of the purse to conduct robust oversight of the FTC’s activities and practices and reject any budget increase for the FTC for FY 2024. We also encourage you to consider including riders that provide common sense guardrails for the agency’s actions.

The FTC’s Unauthorized Regulatory Campaign

Despite the Supreme Court unanimously finding that the Commission had exceeded its enforcement authority,² the agency has unilaterally granted itself authority outside those properly delegated by Congress.

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

² See *Federal Trade Commission v. AMG Capital Management*, 593 U.S. ____ (2019).

Beginning in June 2021 the FTC under Chair Khan 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.³ These actions set the stage for the Commission to make end runs around Congressional intent in both rulemakings and enforcement.

Under Chair Khan's leadership, the agency has undertaken an unprecedented number of rulemakings, assuming authority to regulate across industry sectors on issues as diverse as like earnings claims and endorsements, unfair or deceptive fees, data privacy and artificial intelligence, and auto dealer sales.

The Commission is clearly claiming authority not granted to them by Congress by exploring whether to micromanage the fees companies⁴ can charge and data privacy.⁵ These rulemakings are troubling in light of the decision by the Supreme Court in *West Virginia v. EPA* in which the Court held that 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 last February.⁶ 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 also 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.

Broader Agency Mismanagement

While the Commission attempts to effectively micromanage the U.S. economy on shaky authority, on a smaller level it 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 governmental

³ See Dissent of Commissioner Wilson (July 1, 2021) *available at* https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

⁴ 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

⁶ <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/>

functions, introducing “operational, legal, compliance, security, and reputational risk” to the agency.⁷

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.”⁸

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

Lack of Agency Independence

Independent agencies like the FTC have been given deference by courts because of their supposed independent expertise. Unfortunately, Chair Khan, when opining on the President’s Executive Order on Competition specifically tasking FTC, celebrated the Order, stating that the Order “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. Since Congress has purposely developed independent agencies to make judgements outside the influence of the executive branch, such statements by the Chair about the Order as well as the use of common and previously unused terminology in Executive Orders, the White House A.I. Bill of Rights, and the “commercial surveillance” and “junk fees” rulemakings raise significant questions about whether FTC should be granted judicial deference.

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 utilize Congress’ power of the purse to ensure accountability at the FTC.

Sincerely,



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

⁷ 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

⁸ <https://twitter.com/CSWilsonFTC/status/1519786949476761601>

cc: Members of the Senate and House Committees on Appropriations
The Honorable Chris Van Hollen, Chairman, and the Honorable Hill Hagerty,
Ranking Member, Subcommittee on Financial Services and General Government,
Senate Committee on Appropriations
The Honorable Steve Womack, Chairman, and the Honorable Steny Hoyer,
Ranking Member, Subcommittee on Financial Services and General Government,
House Committee on Appropriations
Members of the Subcommittees on Financial Services and General Government