

FRANK PALLONE, JR., NEW JERSEY
CHAIRMAN

CATHY McMORRIS RODGERS, WASHINGTON
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ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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Majority (202) 225-2927

Minority (202) 225-3641

December 8, 2021

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Chairwoman Khan:

We write to you regarding our significant concerns about the trajectory of the Federal Trade Commission (FTC). Historically, the Commission has operated in a bipartisan manner to carry out its responsibility to protect consumers without unduly burdening legitimate business activity. Under your leadership, it appears that is no longer the case.

There have been many partisan FTC decisions this year that followed questionable procedure. This ill-conceived practice not only leaves the FTC vulnerable to legal challenges, but it also undermines the FTC's mission to protect consumers. As the head of the FTC, an independent agency, you are responsible for ensuring that the Commission's decision-making process is legally sufficient. Using unprecedented and questionable procedures to advance the White House's partisan progressive agenda will diminish the FTC and your legacy as Chairwoman.

We also note that the FTC's record has been a failure when it follows a flawed decision-making process in pursuit of a radical agenda. In the 1970s, the Commission "embarked on a vast enterprise to transform entire industries. Over a 15-month period, the Commission issued a rule a month, usually without a clear theory of why there was a law violation, with only a tenuous connection between the perceived problem and the recommended remedy, and with, at best, a shaky empirical foundation."¹ This process of issuing solutions in search of a problem

¹ Howard Beales and Timothy J. Muris *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act* (April 26, 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764456

was an effort “to become the second most powerful legislature in Washington”² and to target companies across America, discouraged them from growing. A better avenue for your leadership is building bipartisan consensus amongst your colleagues and Congress. Through that approach, support for important initiatives is cemented and does not become vulnerable to funding limitations and oversight of improper communications and coordination, which in the end cripples the FTC’s enforcement standing in court review.

In addition, we are concerned by reports that former-FTC Commissioner, and current Director of the Consumer Financial Protection Bureau (CFPB), Rohit Chopra, continued to influence and participate in FTC business after he was no longer a member of the Commission. According to an article in Politico, Director Chopra’s “zombie” vote has continued to be counted in FTC decisions after he was no longer on the Commission.³ The article indicates that as a “former Commissioner,” CFPB Director Chopra cast as many as 20 votes by email on October 8, 2021, his last day at the FTC. The article also suggests that these votes have continued well past Director Chopra’s tenure at the Commission.⁴

The use of these “zombie” votes is just one example of the FTC’s questionable decision-making process and invites legal challenges. It is sloppy process, and it is unnecessary. Even FTC veterans have questioned the necessity of such extreme procedures. Former Chairman William Kovacic stated, “I don’t know what you gain if [FTC nominee Alvaro] Bedoya is coming in. Why push that document out the door? Why is the end of October better than the end of December or January?”⁵

The latest example of questionable judgment is your decision to delete “without unduly burdening legitimate business activity” from the FTC’s draft strategy plan for fiscal years 2022 to 2026.⁶ This language has been included in FTC mission statements for decades, through both Republican and Democrat administrations. Your amendment suggests the FTC is departing from its traditional focus on protecting consumers from fraud, as well as ensuring businesses have clear rules to follow, in favor of an unorthodox interpretation of its antitrust mission to reshape the American economy.

Given our concerns with the deficiency of FTC’s recent decision-making process, we ask that you respond to the following questions no later than December 22, 2021 and provide a copy of all rules relating to the FTC voting process immediately upon receipt of this letter.

1. Did President Biden, or any other members of his senior staff -- such as National Economic Council (NEC) special assistant Tim Wu, who reportedly “asked the FTC to

² *Id.*

³ Leah Nylen, ‘Zombies’ to the rescue: The arcane voting rule that could saves Dems’ antitrust agenda, Politico (November 08, 2021), available at <https://www.politico.com/news/2021/11/08/voting-rule-democrats-antitrust-519767>

⁴ *Id.*

⁵ *Id.*

⁶ Federal Trade Commission, *Draft FTC Strategic Plan for FY2022-2026* (November 12, 2021) available at <https://www.regulations.gov/document/FTC-2021-0061-0001>

see if [you] can craft a rule around data collection”⁷ -- request, influence, or pressure you in any way to hold a vote on any matter before the Commission? If yes, please be specific about what those items are and the nature of the involvement by the White House.

2. Did CFPB Director Rohit Chopra, or any member of his staff, request, influence, or pressure you in any way to allow him to vote on a matter before the Commission after Director Chopra had departed the Commission? If yes, please be specific about what those items are and who were the individuals involved.
3. Was Director Chopra briefed on the matters considered by the Commission on October 25, 2021? If yes, when did that briefing occur, and who was present at that briefing?
4. Have you received any legal guidance from your staff, other Commissioners, the White House, or outside consultants regarding this “zombie” voting practice? If so, please provide copies of such guidance to the Committee.
5. Has the Commission provided briefings to Alvaro Bedoya, President Biden’s FTC nominee, on any matters before the Commission?
6. Are there any staff, on their own or at your request, still communicating with CFPB Director Chopra regarding any matters before the Commission? If so, please provide the Committee with all records of those communications.
7. Has Director Chopra contacted you, directly or indirectly, regarding any matters before the Commission? If so, please provide the Committee with all records of those communications.
8. Would coordination with CFPB Director Chopra on a matter before the FTC or the CFPB raise any procedural concerns, including but not limited to conflicts of interest or ex parte communications?
9. With Director Chopra’s alleged “zombie” votes, please address the details of the Politico report and the discretion you have over how to use former Commissioner Chopra’s votes.
 - a. Will you continue to use “zombie” votes?
 - b. Do you consult with all other Commissioners before using “zombie” voting?
10. Of the alleged 20 “zombie” votes cast by CFPB Director Chopra, the only publicly available vote occurred on October 25, 2021, on a high profile 3 to 2 partisan split to

⁷ Leah Nylen, *White House likely to push for privacy legislation as FTC crafts rules, Wu says Politico* (September 30, 2021) available at <https://subscriber.politicopro.com/article/2021/09/white-house-likely-to-push-for-privacy-legislation-as-ftc-crafts-rules-wu-says-3991475>

approve a policy statement requiring FTC approval before companies may engage in a merger:

- a. Did you consult with CFPB Director Chopra before his vote was used to pass the policy statement? If so, who consulted with Director Chopra, and when did the consultation occur?
 - b. Was CFPB Director Chopra informed of the FTC business before any other Commissioners?
11. Is the use of “zombie” voting consistent with your commitment to openness and transparency at the FTC?
12. Why are you deleting “without unduly burdening legitimate business activity” from the FTC’s strategic plan?
- a. Which FTC Commissioners did you consult with before proposing this amendment?
 - i. Did those Commissioners agree with your decision to delete the language?
 - ii. If you did not consult other Commissioner before proposing such drastic change, why not?
13. Will you direct Commission staff to examine any potential unintended burdens to legitimate business activity that may result from proposed FTC actions?
- a. How does the amended FTC mission statement relate to section 31502 of the Build Back Better Act on first offense penalty authority, which is pending before the Senate?
 - b. What is the policy case for how section 31502 will further protect consumers from unfair or deceptive acts or practices versus current law?
 - c. What will be the Federal budgetary impact of this proposal if no person, partnership, or corporation is determined to have violated the FTC Act’s prohibition of unfair or deceptive acts or practices?
 - d. What additional costs might a person, partnership, or corporation face if section 31502 becomes law?
 - e. Will you initiate any action, including but not limited to an enforcement action, against a person, partnership, or corporation, pursuant to section 31502, if that action will negatively impact legitimate business activity?

We look forward to a timely response to this letter, technical assistance on the comprehensive privacy and data security discussion draft we have previously shared with your team, and your future appearances in front of the Committee on Energy and Commerce. If you or your team have any questions about our request, please contact Tim Kurth and Brannon Rains at the Committee on Energy and Commerce at (202) 225-3641. We appreciate your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Cathy McMorris Rodgers". The signature is written in a cursive style with a horizontal line underneath.

Cathy McMorris Rodgers
Republican Leader

A handwritten signature in blue ink that reads "Gus M. Bilirakis". The signature is written in a cursive style with a horizontal line underneath.

Gus Bilirakis
Republican Leader
Subcommittee on Consumer Protection
and Commerce