June 30, 2021

TECH FREEDOM

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

cc: Commissioners Noah Philips, Rebecca Slaughter, Rohit Chopra and Christine Wilson

Re: Comments for July 1 Open Commission Meeting in re Investigation Process Changes

Dear Madam Chairwoman:

Thank you for the opportunity to comment on the Commission's plan, at its July 1 open meeting, to "provide ongoing authority for a single Commissioner to approve the use of compulsory process in … investigations by Commission staff into specific industries or specific conduct."[1] This would represent a radical change in how the Commission operates, eliminating a vital oversight role long played by commissioners.

First, let us be clear about what this proposal would do: centralize power in the hands of the Chair. While framed innocuously in terms of empowering a "single Commissioner," in reality, that Commissioner will almost certainly be the Chair — or perhaps one of the majority commissioners closely allied with the Chair. Even if minority Commissioners are occasionally designated to make such determinations, the minority Commissioners will probably not oversee the "specific industries or specific conduct" that matter most. The question is thus two-fold: First, does review of compulsory process by all five Commissioners add value, and, second, is review by minority Commissioners especially important? The answer to both questions is undoubtedly yes.

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[1] Federal Trade Commission, FTC Announces Agenda for July 1 Open Commission Meeting, https://bit.ly/2SBcxPT (June 24, 2021). While unspecific in its wording, this proposal appears to apply both to Section 6(b) orders issued to gather information outside of law enforcement contexts, 15 U.S.C. § 46(b), and also to the issuance of subpoenas, 15 U.S.C. § 49, 16 C.F.R. § 2.5, and civil investigative demands, 15 U.S.C. § 57b-1, in law enforcement contexts.

We see little, if any, benefit from denying all five Commissioners the opportunity for review. The efficiency gains would be insignificant. While Commission deliberations are not made public, our conversations with former commissioners indicate clearly that Commissioners almost never challenge the staff's request for compulsory process. There simply is no problem of "obstruction," if that is, indeed, the argument for these changes.

Even if Commissioners rarely raise objections, independent scrutiny of the staff's work can and does add value. Commissioners are, after all, appointed to independent agencies precisely to scrutinize the agency's work. Even at the investigative stage, Commissioners — each chosen for their expertise and advised by four attorney advisors, each themselves a legal leading expert — may well offer helpful suggestions. Sometimes, this may mean identifying additional questions the Commission should ask or ways to frame CIDs that could prove useful to the agency. For example, a number of Ph.D. economists have served as Commissioners. Despite their marked differences in approach, Democratic Commissioner Julie Brill graciously recognized the "valuable perspective" as "a legal scholar" offered by her Republican counterpart, Bill Kovacic, even calling him a "'rock star' when it comes to international antitrust issues."[2] Such collegiality is the FTC at its very best: mutual appreciation of the expertise offered by fellow Commissioners. Their expertise may allow them to identify data that would be valuable to the agency in understanding "specific industries or specific conduct," building analytical models, and using that understanding either to make informed recommendations to Congress or to eventually win the suits it files.

Failing to collect relevant data can have significant costs down the road, jeopardizing the Commission's enforcement actions. The dismissal of the FTC's antitrust suit against Facebook vividly illustrates the point. The judge dismissed the FTC's complaint for failing to cross the low bar of "plausibility" required on motions to dismiss on the threshold question in any antitrust suit: making a prima facie showing that Facebook had market power.[3] The FTC's complaint alleges that Facebook has, since 2011, "maintained a dominant share of the U.S. personal social networking market (in excess of 60%)."[4] Judge Boasberg could not have been less impressed: "It is hard to imagine a market-share allegation that is much more conclusory than the FTC's here."[5]

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[2] Julie Brill, Association of Corporate Counsel, Westchester/Southern Connecticut Chapter (WESFACCA) Lunchtime Keynote Talk: The Role of the Commissioner at the FTC (Mar. 16, 2011) at 4-5, https://bit.ly/3h7k6XP.

[3] FTC v. Facebook, Inc., 2021 U.S. Dist. LEXIS 119540 (D.D.C. Jun. 28, 2021), available at https://bit.ly/3w6FeSn.

[4] *Id.* at *40.

[5] *Id.* at *41.

The judge raised a series of difficult questions about what methodology the agency defined that market share. Perhaps the Commission has already gathered the data necessary to answer such questions. Perhaps the Commission was simply overconfident in thinking that such an "unsupported assertion" would, in Judge Boasberg's words, "(barely) suffice."[6] Perhaps the Commission's mistake was essentially legal: it assumed it would have the opportunity to explain its market definition analysis at later stages of litigation. We will soon see when the Commission re-files its complaint. But we must also consider the possibility that the Commission has failed to collect the data that it needs to explain its case — for example, granular time-usage statistics not only from Facebook but also from other companies in the social networking sector. The point is not precisely what happened in the *Facebook* case, but that the Commission is generally well-served by careful review of its compulsory process demands from the start. In some cases, that review may lead the commission to narrow or focus its demands. In many cases, however, that review may have the opposite result, helping the Commission request the information it needs to win cases.

An "outsider" can bring "a fresh perspective to a moribund or misguided agency," as Kovacic recognized long before being appointed to the Commission.[7] Such an outsider might be an economist like Alfred Kahn, who deregulated air transportation and dismantled the very Civil Aeronautics Board President Carter appointed him to chair.[8] Conversely, an outsider might be someone who urges a radically more aggressive agency, like Lina Khan, the Commission's new chairwoman. Had she been appointed a mere Commissioner, rather than Chair, she, too, would have — under the pending proposal — been denied a significant opportunity to influence the Commission's work by not being able to review the issuance of compulsory process.

Scrutiny by all five Commissioners is most important in the context of investigations of specific companies that lead to enforcement actions — where the stakes are highest. Where dissents are kept confidential for years, and Commissioners cannot comment publicly about pending enforcement actions, a dissent may yet be the only way to sound the alarm about where the Commission is heading, if only inside the building. For example, when the Commission first voted to issue CIDs to LabMD over alleged deficiencies in the small cancer testing lab's data security in 2011, Commissioner Rosch dissented — a dissent that would

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[6] *Id.* at *3.

[7] Wiliam E. Kovacic, *The Quality of Appointments and the Capacity of the Federal Trade Commission*, 49 ADMIN. L. REV. 915, 923 (1997).

[8] *Id.*

become public only years later — warning about Tiversa, the company that had notified the Commission of the alleged data breach:

> Specifically, I am concerned that Tiversa is more than an ordinary witness, informant, or "whistle-blower." It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations. Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD. In my view, while there appears to be nothing per se unlawful about this evidence, the Commission should avoid even the appearance of bias or impropriety by not relying on such evidence or information in this investigation.[9]

Commissioner Rosch's private warnings to the Commission were ultimately vindicated: The Eleventh Circuit explained that "[i]n February 2008, Tiversa Holding Corporation, an entity specializing in data security, used LimeWire to download" a file containing "the personal information of 9,300 consumers, including names, dates of birth, social security numbers, laboratory test codes, and, for some, health insurance company names, addresses, and policy numbers."[10] Months later, "Tiversa began contacting LabMD . . . offering to sell its remediation services[.]"[11] In July 2008, "LabMD instructed Tiversa to direct any further communications to LabMD's lawyer[,]" after which Tiversa reported and delivered the stolen file to the FTC.[12] In its communications with LabMD, Tiversa claimed that the stolen file "was being searched for on peer-to-peer networks" and "had spread across peer-to-peer networks[.]" These representations were, of course, untrue: these "assertions were the 'usual sales pitch' to encourage the purchase of remediation services from Tiversa."[13]

Involving Commissioners in the early stages of investigations is particularly important because, if they are excluded then, by the time the Commission reaches the next stage of litigation — formally filing a complaint — the matter may be all but resolved. In many cases, the staff has effectively completed its investigation, with "pocket settlement" in hand,

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[9] Dissenting Statement of Commissioner J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012), https://bit.ly/3h4k0Aq.

[10] LabMD, Inc. v. FTC, 894 F.3d 1221, 1224-25 (11th Cir. 2018).

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1243 n.6.

presenting the other Commissioners, who may be completely unaware of the case, with both a proposed order and a proposed complaint. At that point, it is simply too late for other Commissioners to do anything but vote the entire package (complaint and settlement) up or down. The kind of warning raised by Commission Rosch will long since have become moot. Such a pattern is even more problematic when one considers that such settlements have become quasi law — what the agency calls a "common law of consent decrees."[14]

Finally, the Commission's rules already greatly disadvantage those subject to compulsory process. Most notably, as we have long warned, the Commission's rules do not guarantee that companies that wish to quash compulsory process can do so confidentially; instead, the Commission retains broad discretion to decide such requests.[15] This creates a powerful disincentive to push back against overly broad compulsory process. Even if the Commission does not make such documents public, publicly traded companies will have to disclose CIDs in their SEC filings, resulting in massive public relations costs associated with investigations.[16] We have long advocated that the Commission, or Congress, make such motions to quash confidential by default. But until that occurs, review by the full Commission remains all the more important to ensure *some* check on excessively broad compulsory process.

For more analysis of these dynamics, we attach hereto a report co-authored by Berin Szóka and Geoff Manne in 2016, and refer particularly to the discussion of the investigative process at 31-38. Here, we note a few key findings. First, "[w]hether issued under an Omnibus Resolution or otherwise, the Commission's CIDs allow the agency to impose enormous costs on potential defendants before even a single Commissioner — let alone the entire Commission or a court of law — determines that there is even a 'reason to believe' that the party being investigated has violated any law."[17] Second, these costs can be enormous, as we noted in a 2013 amicus brief in support of Wyndham Hotels, the first company (other than LabMD) to challenge an FTC data security enforcement action:

> Burdensome as settlements can be, not settling can be even costlier. Wyndham, for example, has already received 47 document requests in this case and spent $5 million responding to these requests. The FTC's compulsory investigative discovery process and administrative litigation both consume

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[14] *Id.* at 1244,

[15] Berin Szóka & Geoffrey Manne, *The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature: An Analysis of Proposed Legislation*, FTC: TECHNOLOGY & REFORM PROJECT: REPORT 2.0, at 21–26 (May 2016) (*2016 Report*), available at http://goo.gl/36K7hM.

[16] *Id*. at 34-35.

[17] *Id*. at 32-33.

> the most valuable resource of any firm: the time and attention of management and key personnel.[18]

Third, "[u]nlike discovery requests in private litigation, reimbursement of costs associated with CID compliance is not available, even if a defendant prevails."[19]

As we noted in our 2016 report, the approval of compulsory process by a single Commissioner under "omnibus resolutions" in the context of consumer protection is itself problematic.[20] Rather than extending the same approach to competition matters, the Commission should reconsider the propriety of such orders across the board.

Enforcement actions are not the only context in which review by all five Commissioners is important. Last December, the Commission voted to require nine technology companies to "compile data concerning the privacy policies, procedures, and practices of [such] providers, including the method and manner in which they collect, use, store, and disclose information about users and their devices."[21] Commissioner Phillips dissented, arguing that the this was an abuse of the Commission's powers under Section 6(b) of the Act: "The breadth of the inquiry, the tangential relationship of its parts, and the dissimilarity of the recipients combine to render these orders unlikely to produce the kind of information the public needs…"[22] Notably, the Commission targeted only nine entities while omitting other obvious competitors in the social networking market. "The only plausible benefit to drawing the lines the Commission has," suggested Phillips, "is targeting a number of high profile companies and, by limiting the number to nine, avoiding the review process required under the Paperwork Reduction Act, which is not triggered if fewer than ten entities are subject to requests."[23] Congress created a multi-member body precisely to ensure that other commissioners could object to such attempts to circumvent its will. Yes, the Commission would have had to do additional paperwork, but the purpose of the Paperwork Reduction Act is to reduce the amount of paperwork imposed on private parties, not government agencies. If anything, Commissioner Phillips was calling for a broader investigation, involving more companies, asking more targeted questions.

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[18] Brief for TechFreedom et al. as Amici Curiae Supporting Defendants, FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602 (D.N.J. 2014) (No. 94-3) at 13, available at https://bit.ly/3hmtXrJ.

[19] *2016 Report* at 34.

[20] *Id.* at 31-32.

[21] Fed. Trade Comm'n, FTC Matter No. P205402, Order to File a Special Report (2020), https://bit.ly/3yf5ZWl.

[22] Dissenting Statement of Commissioner Noah Joshua Phillips, Social Media Service Providers Privacy 6(b), FTC Matter No. P205402 (Dec. 14, 2020), https://bit.ly/363o0ux.

[23] *Id.* at 2-3.

The Commissioners appointed to serve on the FTC are the agency's greatest assets. They are, as Commissioner Brill put it, "a bit like a Board of Directors. Like a Board, Commissioners are responsible for setting the organization's course, exercising oversight of the work of our attorneys and other employees, and acting as final decision makers in all important actions."[24] Whether to order compulsory process is increasingly important. We see no reason to place such power solely in the hands of the Chair.

[24] Julie Brill, Commissioner, Fed. Trade Comm'n, Keynote Talk at WESFACCA: The Role of the Commissioner at the FTC 3 (Mar. 16, 2011) (transcript available at https://bit.ly/3hlkfpJ).