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Comments of

TechFreedom

Berin Szóka[i] & Santana Boulton[ii]

In the Matter of

Petition for Rulemaking of the U.S. Chamber of Commerce

Docket No. FTC-2023-0059

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[i] Berin Szóka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org.

[ii] Santana Boulton is a legal fellow at TechFreedom. She can be reached at sboulton@techfreedom.org.

TABLE OF CONTENTS

INTRODUCTION

We support the U.S. Chamber of Commerce's proposed amendments to the Commission's current rule on disqualification of Commissioners.[1] The current rule provides for no transparency regarding motions for disqualification; for example, when the FTC's ethics officer recommended that Chair Lina Khan recuse herself from a high-profile lawsuit, the recommendation became public only because of a leak nearly a year later.[2] Nor does the current rule provide any timeframe within which disqualification motions should be handled.[3] Disqualification is left primarily to the discretion of each Commissioner. The full Commission can review motions,[4] but, absent clarity as to why disqualification should be required, the majority Commissioners bringing an enforcement action will tend to join together to deny such motions without really considering them. In an increasingly partisan era, the rule is effectively a dead letter.

Most critically, the existing FTC rule says nothing about the controlling standard for disqualification, only that each "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed."[5] While it is appropriate to incorporate by reference the various disqualification standards courts have developed for various kinds of "proceeding," failing to mention the *reasons* for disqualification has allowed the Commission to focus only on what the generally applicable federal ethics rule covers—"personal and business relationships"[6]—while ignoring altogether the disqualification issue that is increasingly presented to the Commission: prejudgment of, and bias in, matters in which the Commission sits not merely as rulemaker[7]

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[1] Chamber of Commerce of the United States of America, Petition to Amend Rule 4.17, 88 Fed. Reg. 65865 (Sept. 13, 2023), https://www.uschamber.com/assets/documents/USCC-Rulemaking-Petition-to-Amend-Rule-4.17.pdf (hereinafter "Petition").

[2] Leah Nylen, *Lina Khan Rejected FTC Ethics Recommendation to Recuse in Meta Case*, BLOOMBERG (June 16, 2023, 12:44 PM), https://www.bloomberg.com/news/articles/2023-06-16/ftc-rejected-ethics-advice-for-khan-recusal-on-meta-case?in_source=embedded-checkout-banner#xj4y7vzkg.

[3] 16 C.F.R. § 4.17.

[4] 16 C.F.R. § 4.17(b)(3) ("In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.").

[5] 16 C.F.R. § 4.17(b)(2).

[6] 5 C.F.R. § 2635.502.

[7] A commissioner "may be disqualified from [rulemaking] only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking." Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n, 627 F.2d 1151, 1154 (D.C. Cir. 1979). This standard is "stringent" so that rulemakers can "carry out their proper policy-based functions." *See* Hous. Study Grp. v. Kemp, 736 F. Supp. 321, 332 (D.D.C. 1990); *Ass'n of Nat'l Advertisers*, 627 F.2d at 1170.

or prosecutor,[8] but as judge and jury. While these issues are not addressed by the general conflicts of interest rule, well-established case law requires disqualification in such administrative adjudications: an agency's "reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[9]

I. What the Proposed Amendments Would Do

The proposed amendments address this problem elegantly and simply: recusal should be required for "conflicts of interest, bias, prejudgment, and appearance of bias."[10] This would focus the Commission's attention where it is most needed, without attempting to distill complex case law governing different kinds of proceedings into rules. This is the bare minimum of what the Commission should do. It will help protect the Commission from a significant risk: if a court determines that a Commissioner involved in an administrative adjudication had prejudged the matter, the remedy is severe—the entire action will be voided. Because a challenge to an administrative action can be brought in federal court only after a final agency action[11]—i.e., the conclusion of the entire administrative process—the Commission risks spending considerable resources and time (more than a year) adjudicating a case internally before a court voids the entire effort. The Commission would have to start over from scratch, either by bringing the case in federal court, where prejudgment by a Commissioner may be less of a problem because the Commission acts only as a prosecutor, not as judge and jury, [12] or by recommencing an administrative case without the participation of that Commissioner.

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[8] When the FTC files a case in federal court, the precise standard for disqualification regarding prejudgment or bias is not clear, but it appears to be lower than the standard applicable when the agency judges administrative actions for itself. *See, e.g.*, People ex Rel. Clancy v. Superior Court, 39 Cal.3d 740, 746 (Cal. 1985) (quoting The American Bar Association's Code of Professional Responsibility EC 7-13) ("A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."). Recusal from any proceeding, judicial or otherwise, is required by ethics statutes only where an executive branch employee has a direct financial interest. *See* 18 U.S.C. § 208; Louis J. Virelli, III, Administrative Conference of the United States, Administrative Recusal Rules: A Taxonomy of Existing Recusal Standards for Agency Adjudicators (May 14, 2020) at 11-12, https://www.acus.gov/sites/default/files/documents/Virelli%20ACUS%20Part%20II%20FINAL%20-%20June%2023%20%282nd%20release%2C%20cover%20sheet%29.pdf.

[9] Gilligan, Will Co. v. Sec. Exchange Comm'n, 267 F.2d 461, 468-69 (2nd Cir. 1959).

[10] Petition at 13.

[11] Strausbaugh v. MSPB, 401 Fed. Appx. 524, 526 (Fed. Cir. 2010) ("the rule is well settled that the denial of a motion to disqualify the trial judge is not final"); Sec. Exchange Comm'n v. R. A. Holman & Co., 323 F.2d 284 (D.C. Cir. 1963) (denial of a motion to recuse a Commissioner is not an appealable final order).

[12] *See supra* note 8.

The proposed amendments are long overdue. They should be uncontroversial as a simple matter of good governance. But they are especially necessary now. There is no reason to doubt Chair Lina Khan's personal integrity. Many attacks on her have been personal, partisan, and petty. They also miss the point: the issue is not that she has a conflict of interest in the traditional sense, but that her prejudgment may jeopardize the Commission's "reputation for objectivity and impartiality,"[13] and its ability to successfully enforce the law. More than any Commissioner in the agency's history, Khan came to the Commission with an extensive body of academic scholarship and work for Congress staking out clear positions on the most high-profile cases that she has chosen to bring.[14] This is not, itself, necessarily a problem. If she brought these cases directly in federal court, the court would be less likely to void the complaint; after all, the court would decide the case for itself.[15] The problem is that Khan has chosen to bring such cases in the FTC's administrative process, where the FTC itself decides questions of both law and fact, and thus prejudgment poses the greatest threat to the due process rights of defendants.

Implicitly, the current disqualification rule incorporates the existing case law on disqualification for prejudgment and bias as the "legal standards applicable to the proceeding in which such motion is filed."[16] But because the current rule does not mention prejudgment and bias explicitly, these issues have been ignored. Directly incorporating these into the rule may not change how the Commission rules on disqualification motions, but it would at least mean that Commissioners could no longer insist that only personal or financial conflicts of interest require disqualification. This, in turn, will protect the Commission from wasting scarce time and resources on administrative proceedings that are—after much time and effort—voided in court.

II. The Problem Is the Existing Disqualification Process, Not Any One Commissioner

In August 2022, the FTC's Designated Ethics Agency Official issued a memo advising Chair Lina Khan to recuse herself from voting on an administrative enforcement action because her prior statements about one of the parties "would raise a question in the mind of a

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[13] 267 F.2d at 468-69.

[14] *See, e.g.*, Lina Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 564 (2017); Lina Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L. J. 960 (2018); Lina Khan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017); Lina Khan & Zephyr Teachout, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. OF CONST. L. & PUB. POL'Y 37 (2014); Lina Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2018).

[15] *See supra* note 8.

[16] 16 C.F.R. § 4.17 (b)(3)(c).

reasonable person about Chair Khan's impartiality as an adjudicator."[17] Chair Khan declined to recuse herself because, as she later explained in a congressional hearing, she had no financial conflict of interest.[18] This is why, as the memo itself noted, "there is no per se violation of federal ethics requirements."[19] But this is entirely beside the point, which is why the memo nonetheless recommended recusal. She later conceded that she did not bother to read the memo before making her decision.[20] Had she done so, she might have noticed this caveat from the FTC's ethics officer: "Whether the Chair should participate as an adjudicator in this proceeding may later be reviewed by a federal court."[21]

It would be easy to blame Chair Khan for not reading the memo. We draw a different lesson. Even if she had read the memo, the ethics officer's analysis focused narrowly on personal and financial conflicts of interest, not bias and prejudgment. Under the proposed rule, the ethics officer would be required to "issue a written determination that explains the reasons the disqualification motion should or should not be granted," and the explicit reference to prejudgment and bias in the revised rule would ensure that a similar future memo will address that issue, too.

III. How Courts Assess Prejudgment and Bias

Of course, any Commissioner will bring their own knowledge, opinions, and philosophy to the job.[22] But prejudgment of specific facts violates constitutional principles of due process.[23] Administrative hearings "must be attended, not only with every element of fairness but with the very appearance of complete fairness."[24] Courts have voided agency administrative actions for prejudgment where, for example, a Commissioner had previously

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[17] Memorandum from Lorielle L. Pankey, Agency Ethics Official, to Commissioner Christine S. Wilson at 1 (Aug. 31, 2022), https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rfE9nltMFEH8/v0 (hereinafter "Pankey Memo").

[18] Federal Trade Commission Oversight Hearing, Part I, 20:00, (C-SPAN broadcast July 13, 2023), https://www.c-span.org/video/?529207-1/federal-trade-commission-oversight-hearing-part-1#.

[19] Pankey Memo at 13.

[20] *See supra* note 18.

[21] Pankey Memo at 2.

[22] *See, e.g.*, United States v. Morgan, 313 U.S. 409, 421 (1941) (the Supreme Court refused to disqualify a cabinet officer merely because he "may have an underlying philosophy in approaching a specific case."). "Mere proof that [an official] has taken a public position, or expressed strong views, or holds an underlying philosophy" is not enough to overcome the presumption that agency officials can act objectively. United Steelworkers of Am., AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1208 (D.C. Cir. 1980).

[23] *See generally* Charles H. Koch, Jr., *Prejudgment: An Unavailable Challenge to Official Administrative Action*, 33 FED. BAR J. 218 (1974), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2264&context=facpubs.

[24] Amos Treat Co. v. Sec. Exchange Comm'n, 306 F.2d 260, 267 (D.C. Cir. 1962).

investigated a company he was now judging,[25] or where an appointee had already supported one party in a dispute.[26] Three cases involving Paul Rand Dixon, who chaired the FTC 1961–69, demonstrate how courts address a Commissioner's prejudgment and bias.

Texaco concerned a speech given by Dixon before oil retailers condemning certain practices ("You know the practices—price fixing, price discrimination, and overriding commissions . . .") by specific oil producers ("You know the companies"). The court concluded that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act."[27]

In *Cinderella Finishing School*, the D.C. Circuit voided an administrative order and remanded the proceeding to the Commission to be reviewed without Dixon's participation because the Chair had made a speech appearing to prejudge the case.[28] Unlike in *Texaco*, Dixon's speech did not specifically mention the defendant; it merely alluded to the controversial marketing practices of a finishing school for girls: "Granted, that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough."[29] The court responded, tartly: "It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness."[30] The problem is that such public statements "may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record."[31] Chair Khan now faces much the same problem, as will other Commissioners in the future.

Before becoming Chair, Dixon had served as counsel to a congressional subcommittee and led an investigation of a company later subject to administrative action by the FTC. In *American Cyanamid*, an appeals court held that Dixon "played an active part in the investigation," and that "disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same

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[25] *Amos Treat Co.*, 306 F.2d at 267.

[26] Berkshire Employees Ass'n v. Nat'l Lab. Rel. Board, 121 F.2d 235 (3d Cir. 1941).

[27] Texaco, Inc. v. Fed. Trade Comm'n, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965).

[28] Cinderella Career & Finishing School, Inc. v. Fed. Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970).

[29] *Id.* at 590.

[30] *Id.*

[31] *Id.*

parties."[32] It was not that Dixon's "service . . . as counsel for the subcommittee, standing alone, necessarily would require disqualification"[33] (let alone his "strong conviction" or even his "crystallized point of view"[34]). What disqualified him was "the depth of the investigation and the questions and comments by Mr. Dixon as counsel."[35] The court noted:

> [T]he Commission is a fact-finding body. [The Chairman] sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.[36]

The court erred on the side of caution: "Wherever there may be reasonable suspicion of unfairness, it is best to disqualify."[37]

Collectively, these cases make clear that both an individual Commissioner's prejudgment as to specific facts and the *appearance* of bias will lead courts to void agency adjudications.

IV. Agency Adjudication Is Costly and Time-Consuming

The Commission should *want* to avoid any hint of prejudgment, especially given its already strained resources. Agency adjudications are expensive and take years. Voiding agency adjudication for prejudgment would waste that time and money.[38]

One study estimates that an administrative adjudication of an antitrust case may take, from the filing of a complaint to a Commission decision, two years or more to complete.[39] An investigation may take six months to a year or even longer before a complaint is issued. After the complaint is issued, an evidentiary hearing with an administrative law judge is set for eight months later. The ALJ typically issues its findings about six months after that hearing. Appellate briefs and oral arguments begin two to four months later. The final decision from the Commission can be issued about twenty-two months after the initial complaint was filed.

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[32] American Cyanamid Co. v. Fed. Trade Comm'n, 363 F.2d 757, 768 (6th Cir. 1966).

[33] *Id.*

[34] *Id.* at 764.

[35] *Id.* at 768.

[36] *Id.* at 767.

[37] *Id.*

[38] FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION at 9 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf ("The FTC is requesting $590,000,000 and 1,690 [full time employees]".).

[39] Trevor Kupfer, *What is the FTC Administrative Process in Antitrust Litigation?*, SUPER LAWYERS (May 17, 2022), https://www.superlawyers.com/resources/antitrust-litigation/what-is-the-ftc-administrative-process-in-antitrust-litigation/.

Only after all of this is complete, and an agency has issued a final action, would a court address a defendant's arguments about disqualification. Thus, the Commission risks wasting at least two years of effort (or more, counting the investigation) if a court decides, months later, that the entire process was void because of a Commissioner's prejudgment or bias.

Administrative adjudications are also costly, especially including climbing expert witness fees.[40] When agency adjudications are voided, courts remand the adjudication back to the agency for completion without the prejudiced agency member.[41] The Commission would thus spend even *more* time and *more* money to re-do its adjudication. Or, alternatively, the Commission could abandon the whole proceeding. Either outcome is undesirable for the Commission and the public. The proposed amendments to the disqualification rule significantly mitigate these risks because they require recusal where a Commissioner meets the legal standard for prejudgment.

CONCLUSION

We urge the Commission to adopt the proposed amendments.

Respectfully submitted,

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Berin Szóka
President
TechFreedom
bszoka@techfreedom.org

Santana Boulton
Legal Fellow
TechFreedom
sboulton@techfreedom.org

1500 K Street NW
Floor 2
Washington, DC 20005

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[40] FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION at 10-11 (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p859900fy24cbj.pdf (requesting $15 million for expert competition witnesses).

[41] *See, e.g.*, notes 27-37 and associated text.