

# United States Senate

WASHINGTON, DC 20510

July 30, 2021

Hon. Lina Khan  
Chair  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Dear Chair Khan,

Congratulations on your recent appointment to lead the Federal Trade Commission. As you know, this is a critical time for the country's most important industries, from health care to transportation and logistics to manufacturing and technology.

We write to share concerns about the level of openness and transparency at the FTC. In particular, it appears that unprecedented steps have been taken to empower the office of the FTC chair at the expense of the bipartisan, consensus-based decision-making that characterized the FTC under prior administrations. At the Commission's July 1, 2021, open meeting – its first in decades – you noted the importance of transparency to inform the agency's work and create a “robust participatory process.” We agree these are goals the FTC should strive to meet. That said, several changes made at the agency in recent weeks raise questions about your commitment to these ideals.

We ask that you provide more information about the following by August 30, 2021:

1. The FTC recently voted 3-2 on party lines to rescind its policy statement on unfair methods of competition under the FTC Act.
  - a. Why did you choose to proceed with this change without first providing notice and an opportunity for public comment?
  - b. As a general matter, when can the FTC proceed with impactful policy changes outside of the notice-and-comment process in the Administrative Procedure Act?
  - c. In the absence of guidance, how will the agency provide predictability and transparency to businesses on what conduct constitutes an unfair method of competition?
  - d. Is it the agency's intent to discard the “consumer welfare standard” that it previously used to guide antitrust enforcement cases? If so, what will replace it?
2. The FTC voted 3-2 on party lines to eliminate procedural rules related to its Section 18 (“Magnuson-Moss”) rulemaking authority. Many of these rules were implemented in response to congressional action stemming from concerns about unfettered FTC authority.
  - a. Why did you decide these changes were necessary? Are there specific instances where these procedures prevented the FTC from achieving effective results for consumers?

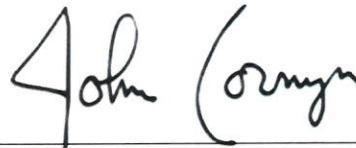
- b. Were these changes intended to make it easier for the FTC to institute new rulemaking proceedings, specifically in the area of consumer privacy?
  - c. Do you believe these changes accord with the limits Congress put on Section 18 rulemaking in the Federal Trade Commission Improvements Act of 1980?
3. As part of the FTC's new open meeting process, you offer members of the public a chance to speak for one minute after all voting is complete. Going forward, will the public have an opportunity to comment on issues the FTC considers prior to votes?
4. According to a July 6, 2021, press report, FTC Chief of Staff Jen Howard put a "moratorium on public events and press outreach."<sup>1</sup>
  - a. Why was that ban imposed and to what, specifically, does it extend?
  - b. Are agency staff permitted to meet with outside parties on rulemaking proceedings or other matters of public interest?
5. Do you plan to recuse yourself from participating in cases where you have expressed public opinions about the specific companies at issue?

We appreciate your attention to these important issues.

Sincerely,



Marsha Blackburn  
Ranking Member, Subcommittee on Consumer  
Protection, Product Safety, and Data Security



John Cornyn  
United States Senator



Thom Tillis  
United States Senator



Cynthia M. Lummis  
United States Senator



Bill Hagerty  
United States Senator

<sup>1</sup> Leah Nysten and Betsy Woodruff Swan, "FTC Staffers told to back out of public appearances," Politico (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386>.