

# Chopra, Khan, Slaughter Take Control of the Federal Trade Commission

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*Commissioners Cut Procedures, Rescind Policy, Empower Staff, Target Tech*

With an unprecedented attack on policies the Federal Trade Commission had long embraced, the new majority of Democratic Commissioners revealed a bold enforcement agenda that would circumvent Supreme Court decisions and avoid Congressional limits.

It was a meeting like none the Federal Trade Commission has ever held. On one week's notice, the Commission adopted new rules to impose civil penalties on substandard Made-in-USA claims, removed judges and safeguards from rulemaking proceedings, rescinded its 2015 enforcement policy statement on unfair methods of competition, and granted staff more authority to issue subpoenas and civil investigative demands. The vote on every issue followed party lines. Republican Commissioners, Noah Phillips and Christine Wilson, voted against all, and the Democratic Commissioners, Chopra, Khan, and Slaughter, rejected all amendments. Chair Khan announced that public meetings will become regular events at the FTC.

## **Made in USA Claims**

Commissioner Chopra took the lead on the Made-in-USA (MUSA) rule, which would impose civil penalties on claims that do not meet FTC standards for domestic content, whether those claims appear on labels or in marketing. He criticized the Commission for years of allegedly allowing deceptive claims to persist and wrongdoers to escape fines. Imposing fines, he said, was one way of recovering the power the Commission was denied in the Supreme Court's decision in [AMG Capital Management v. FTC](#), which held that Section 13(b) of FTC Act did not authorize the Commission to obtain monetary relief.

Phillips opposed the rule, saying that Congress had not given FTC the authority to cover off-label claims; it had authorized MUSA rules only for product labels. Unless and until Congress granted authority for expedited rulemaking on advertising claims, which Congress is now considering, he insisted that the FTC was bound to use the more restrictive Magnusson-Moss procedures. Wilson objected to the short notice announcing the meeting, objected to the exclusion of staff from the meeting, and warned that it was unwise to disregard a unanimous Supreme Court that had just admonished the Commission for exceeding its authority to obtain money in consumer protection cases.

## **Expediting Rulemaking**

Foreshadowing an ambitious regulatory agenda was a motion to streamline new rules under Section

18 of the FTC Act. The motion would remove the chief administrative law judge from the role of presiding officer in rulemakings. The FTC Chair would preside. The motion also proposed eliminating the requirement of a staff report to accompany a rule recommendation. Slaughter said these were unnecessary “self-imposed” limits. Chopra praised the proposal for helping end the era of “perceived powerlessness” at the FTC

Phillips and Wilson objected, citing concerns that removing the judge would threaten the independence of the rulemaking process – an extensive fact-finding exercise – and lend support to challengers who claim that FTC rules are politically motivated. As for staff reports, Phillips remarked that these gave the Commissioners and the public some confidence that a rule would not inflict unnecessary harm on the economy. Wilson reminded her colleagues that zealous rulemaking in the 1970s precipitated an existential crisis for the agency. It closed its doors after public resistance and widespread ridicule prompted Congress to defund the FTC. Not until the Commission promised a return to responsible enforcement was it allowed to reopen. The FTC delivered on that promise with a series of policy statements clarifying unfair acts and practices, illegal deception, and necessary substantiation for advertising claims.

Wilson proposed posting the procedural changes for comment. It failed 3-2. Phillips proposed retaining the chief judge and the staff report. It also failed to attract a Democratic vote. Rulemakings without a judge and without a staff report passed without a Republican vote.

### **Rescinding the Competition Policy Statement**

In a sweeping departure from a bipartisan antitrust policy, the Commission rescinded its 2015 Policy Statement on Unfair Competition. Khan argued that the FTC should not have to show a likelihood of harm to competition in order to declare conduct unfair. In her view, the FTC Act was intended to circumvent the Supreme Court’s adoption of the Rule of Reason in antitrust cases – a requirement that condemned restraints of trade only when their anticompetitive effects outweighed the procompetitive benefits. The Rule of Reason made it too hard to prove violations, said Khan, and the FTC’s policy statement improperly confined the agency to an enforcement policy indistinguishable from the standards that DOJ applied.

Wilson regarded the rescission as an abandonment of the consumer welfare standard, the framework of antitrust analysis for half a century. She expressed fears that if competition policy were not designed to benefit consumers, it could be coopted by special interests. She added that when the FTC had failed to apply a standard consistent with the antitrust laws in the past, its decisions had often been reversed on appeal. (The FTC lost a string of appeals in the 1980s when it attempted to prohibit refusals to deal, price discrimination that might be competitive, supplier-distributor pricing policies, and practices that could facilitate collusion.) Phillips noted that the Supreme Court’s decision in NCAA had just applied the Rule of Reason in holding for plaintiffs, so it was hardly a bar to successful prosecution. Of concern to the Republicans was a proposal in Congress that would eliminate the FTC’s competition authority altogether.

Proposals to seek comment on the rescission were voted down on party lines. Competition policy at the FTC will depend on future Commission actions.

### **Targeting Sectors and Suspects**

Finally the FTC identified seven areas in which it would adopt omnibus resolutions authorizing compulsory process – civil investigative demands and subpoenas enforceable in court. The Commission typically authorizes compulsory process when it identifies specific companies or conduct

- like a merger or a deceptive practice - warranting intensive and urgent investigation. These resolutions covered broad sectors of the economy and authorized investigations under practices any law the FTC enforces. As explained in its press release, the Commission's crosshairs are focused on these sectors and individuals:

Priority targets include repeat offenders; technology companies and digital platforms; and healthcare businesses such as pharmaceutical companies, pharmacy benefits managers, and hospitals. The agency is also prioritizing investigations into harms against workers and small businesses, along with harms related to the COVID-19 pandemic. Finally, at a time when merger filings are surging, the agency is ramping up enforcement against illegal mergers, both proposed and consummated.

<https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>

With these resolutions, the FTC delegated the decision to issue compulsory process to the staff and a single commissioner. In the past, an investigation into a new area could not use compulsory process until the commission voted on the resolution. These omnibus resolutions dispensed with that procedure. Khan hailed the move as cutting "red tape bureaucracy." Wilson countered that the Commissioners were abrogating their sworn responsibilities of supervision. This last comment reveals the import of the change. If Chopra departs to the Consumer Financial Protection Bureau, which he has been nominated to direct, the Democrats will lose their majority. These resolutions will allow staff to open investigations, demand documents, and conduct depositions without the approval of the Commission. All the staff will need is the approval of a commissioner.

### **The Future of FTC Enforcement**

In short, July 1, 2021 was an extraordinary day in the history of the FTC. It is an unmistakable harbinger of a Commission that is aiming to ramp up enforcement beyond the levels it sought to achieve in the 1970s. None of the supporters of the agenda had answers to the dissenters' repeated questions: How will the agency overcome the obstacles that stymied its unbridled ambitions in the past? How will it respond to the resistance it will face from Congress, the courts, and the public it is supposed to serve? The public at this meeting, Phillips noted, was scheduled to comment after the Commission had made its decisions, so that their testimony would not be taken into account before the votes.

How far the Commission can take this agenda will be difficult to predict until the inevitable allegations of unauthorized investigations, arbitrary and capricious rules, unpredictable decisions, and deprivations of due process make their way to higher authorities. Safer predictions: We will see the fruits of yesterday's decisions in the form of CIDs, subpoenas, proposed rules, and new interpretations of a century-old competition statute. Businesses and citizens will face the first engagement. Then Congress and the courts will join the fray. For a preview of potential outcomes, there is no better place to start than the rich literature of FTC history.

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