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Alex Khlopin
Legislative Clerk
Committee on Energy and Commerce
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Washington, DC 20515
Email: alex.khlopin@mail.house.gov

Dear Mr. Khlopin,

Please find attached my responses to the additional questions submitted for the record following my recent testimony before the Subcommittee on Innovation, Data, and Commerce. I appreciate the opportunity to elaborate further on the topics discussed during the hearing, titled “Federal Trade Commission Practices: A Discussion on Past Versus Present.”

As requested, each response includes the full text of the question in bold, followed by my answer in plain text. I trust that these responses will assist the Committee in its review of the Federal Trade Commission’s recent practices and considerations regarding its rulemaking processes.

Thank you again for the opportunity to contribute to this important dialogue. If there are any further questions or requests for clarification, please do not hesitate to contact me.

Sincerely,
Neil Chilson
Head of AI Policy
Abundance Institute

ATTACHMENT: Five (5) pages

Responses to Questions for the Record

Answers for The Honorable Kelly Armstrong

- 1. We have heard concerns from businesses about the FTC skipping important steps in the Magnuson-Moss rulemaking process, sometimes ignoring Administrative Law Judge recommendations in a decision. Are you aware of the FTC taking shortcuts in its current rulemaking process?**

This FTC has played fast and loose with the procedural requirements of Magnuson-Moss rulemaking. One of the earliest acts of Chair Khan was to “streamline” the Commission’s own internal rules implementing the Magnuson-Moss statutory requirements, cutting out key procedural requirements intended to ensure procedural fairness and public comment opportunities.¹ For example, Chair Khan has authorized herself (rather than an independent arbiter) to serve as the Chief Presiding Officer over all FTC rulemakings and eliminated several other due process protections, such as the publication of a staff report analyzing the rulemaking record and offering recommendations as to the final form of the rule. A statement by Chair Khan and the other majority commissioners referred to the eliminated protections as “extraneous and onerous procedures that serve only to delay Commission business.”² But by placing the Chair as the Chief Presiding Officer, the current FTC has subverted Congress’s intent that rulemaking be governed by a decisionmaker with no direct interest in the substance of the rulemaking. The result is that the Chair, who proposed the rule under consideration, now has the power to determine what evidence to permit and exclude from the record, what issues of material fact to pursue, when to permit cross-examination and rebuttal testimony, and other important evidentiary and procedural matters.

As for specific instances, the proceeding for the negative option rule you mention below is a well-documented instance of such shortcutting. A neutral presiding officer would have given serious consideration to dozens of claims of disputed material facts. But the Chair, operating as the Chief Presiding Officer, brushed off such claims, protecting her own proposed rule from scrutiny.³ Other examples of procedural failures in another major rulemaking include: requiring parties to identify “any disputed issues of material fact” in their initial comment submissions, *before* the administrative record is complete; making available for public inspection only a small fraction of the filed comments in a proceeding; issuing “initial” and “final” notices of an informal hearing *simultaneously*, contra the agencies own procedures; and providing inadequate time for written submissions in response to notice of an informal hearing.⁴

¹ FTC, Revisions to Rules of Practice, 86 FR 38542 (2021), <https://www.federalregister.gov/documents/2021/07/22/2021-15313/revisions-to-rules-of-practice>.

² *Id.* at 38551.

³ <https://www.federalregister.gov/d/2023-26946/p-56>.

⁴ See, Submission of the U.S. Chamber of Commerce re: Informal Hearing at 5-7 (Apr. 10, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/r207011uscochrsubmission04102024.pdf.

- 2. Not only has the FTC engaged in more rulemaking activity recently than it has in the last few decades, but many of its proposed rules are more expansive than anything the FTC has advanced in the past and would apply across all industries to impact the entire U.S. economy. Do you believe the issuance of such broad regulations would exceed the FTC’s authority, and should the FTC consider less disruptive alternatives?**

Overly broad rulemakings do exceed the FTC’s statutory authority. The Commission may issue “rules that define with specificity acts or practices that are unfair or deceptive” within the meaning of Section 5(a)(1) of the FTC Act.⁵ Rules that purport to apply across every industry under FTC jurisdiction, and that would govern literally billions of transactions annually, are not “define[d] with specificity.” This FTC has pursued overreaching rules, such as the so-called “negative option rule.”⁶ Such rules reach far beyond any delegation of authority intended by Congress or allowed by the Constitution.

- 3. Earlier this year, the FTC held an informal hearing for the proposed negative option rule, but despite repeated requests from commenters, the Commission did not put forward any witnesses in support of its conclusions or provide any evidence to support its calculations. In addition, numerous stakeholders raised concerns that the Commission would not allow any cross-examination at this hearing. And ultimately, the Commission claimed that there were no disputed material facts despite commenters identifying at least 20.**
 - a. Are you concerned about the approach the FTC has taken with this rulemaking process and its failure to follow the proper legal process?**

I am concerned with the FTC’s disregard for the proper legal process in this rulemaking, especially because it continues a trend of disregard for rule of law at the FTC under the Biden administration.

- b. Does it seem to you that they are cutting corners to avoid information or evidence that contradicts the Chair’s and the majority’s goals? Also, what effect will this FTC’s failure to follow the legal process have on businesses under its jurisdiction and ultimately on consumers?**

It certainly appears that the Commission has put both thumbs on the scales in favor of expediency in pursuit of its pre-determined outcomes, rather than emphasizing careful and legally sustainable rulemaking. Some of the corner-cutting may also be a result of inexperience or disinterest with executing complex rulemakings that can survive future legal challenges in court. Regardless of the cause, the result of skimping on procedure is

⁵ 15 U.S. Code § 57a(a)(1)(B).

⁶ Federal Trade Commission, Negative Option Rule: Final Rule (Oct. 16, 2024), <https://www.ftc.gov/legal-library/browse/federal-register-notices/negative-option-rule-final-rule>.

rules that on substance are not as calibrated as they could have been had the FTC engaged in good faith with concerned stakeholders and affected business. Rushing regulations without adequate stakeholder input can lead to unintended consequences, higher costs, and stifled innovation, as affected parties may find the rules impractical, confusing, an overly restrictive.

Shortcutting the proper process also threatens the FTC's own goals, as it risks eroding public trust, triggering legal challenges of relatively untested rules, and creating regulations that lack flexibility to adapt to future changes. Indeed, the final negative option rule has already been challenged in court.⁷ The ultimate result is unnecessarily expensive for businesses, corrosive to the FTC's mission, and harmful to the consumers the FTC is charged with protecting.

c. How does it affect the public's trust in what should be the world's leading consumer protection agency?

Evading due process protections in agency rulemaking can undermine public trust by signaling that the agency is prioritizing speed, convenience, and short-term political wins over transparency, fairness, legal sustainability, and accountability. This approach can create a perception that the agency disregards due process and stakeholder voices, leading people to question its commitment to act in the public's best interest, ultimately weakening its credibility and authority. Corner-cutting is particularly problematic for a consumer protection agency like the FTC, because it threatens the long-term ability of the agency to serve a critical government function: protecting consumers from force and fraud.

4. Former Commissioner Christine Wilson noted in her dissent to the proposed negative option rule that the proposed rule swept in far more conduct than was the subject of the Anticipated Notice of Proposed Rulemaking (ANPRM), and therefore that the record did not, and could not, support some parts of the rule. In particular, the proposed rule addresses claims on the underlying products, not just the features of the negative option. And because the rule would allow for civil penalties, marketers could be subject to civil penalties for claims about the product, "even if the negative option terms are clearly described, informed consent is obtained, and cancellation is simple." This seems to be yet another instance of the Chair's overreach - in this case, by using the rulemaking process for one topic to sneak in new regulations on another without proper process.

a. What effect will this FTC's failure to follow the legal process have on businesses under its jurisdiction and ultimately on consumers?

⁷ See, *Electronic Security Assoc., Interactive Advertising Bureau, and NCTA – The Internet & Television Association v. FTC*, Petition for Review (5th Cir., Oct. 23, 2024), available at <https://www.consumerfinancialserviceslawmonitor.com/wp-content/uploads/sites/880/2024/10/Electronic-Security-Association-v.-FTC.pdf>

The procedural shortcuts taken by the FTC in pursuit of this sweeping rule puts the FTC on legally shaky ground in a judicial environment that is unlikely to give the agency the benefit of the doubt. The FTC claimed it was seeking to create a negative option rule. Instead, it wrapped that core rule in an expansive penumbra that covers a wide range of legitimate business conduct that has little or nothing to do with how consumers purchase a product or service. This is best interpreted as a direct attempt by the FTC to partially overturn (without any Congressional authorization) the Supreme Court’s decision in *AMG Capital Management, LLC v. Federal Trade Commission*.⁸ As Commissioner Melissa Holyoak explained in her dissent from the adoption of the negative option rule, “the Final Rule effectively transforms Section 5’s broad prohibition on unfair or deceptive practices into a Section 18 rule, allowing the Commission to expand its ability to seek money.”⁹ This move practically dares the Supreme Court to toss the entire rule in the dustbin and simultaneously undermines Congressional support for returning some redress authority to the agency.

In the meantime, Chair Khan will claim a political win for the Biden-Harris administration. But this is a loss for businesses and their consumers, as the rule will make businesses overly wary to use a common payment business model – subscriptions – that many consumers find valuable and convenient.

b. How does it affect the public’s trust in what should be the world's leading consumer protection agency?

This sort of extra-legal rulemaking maneuver undermines the agency’s credibility with the legitimate businesses under its jurisdiction. Businesses that perceive that the agency isn’t itself being honest with them or is playing political games will have little reason to think their efforts for compliance will be evaluated in good faith. And bad faith actors may get off the hook if the FTC brings a case under this rule and is tripped up on its failure to follow the proper procedures. Such situations look like incompetence to consumers hurt by said bad actors and erode credibility. Furthermore, trying to evade court decisions with the help of procedural gimmicks also undermines the agencies’ credibility with the courts that are an essential part of the FTC’s enforcement efforts.

⁸ *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 70 (2021).

⁹ Dissenting Statement of Commissioner Melissa Holyoak, Negative Option Rule, FTC Matter No. P064202 (Oct. 16, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-dissenting-statement-re-negative-option-rule.pdf.

Answers for the Honorable Russ Fulcher

- 1. Under the Federal Trade Commission’s Vehicle Shopping Rule (VSR or “CARS” Rule) auto dealers must capture exceptionally detailed information around the car buying process. They must also document every step of the process, and then store this data for up to two years. If they fail to capture every customer question about a particular feature of a vehicle that could then become part of the pricing of the vehicle, the dealer could be fined up to \$51,744 per violation. A study by the Center for Automotive Research puts the actual cost of the rule at \$24.1 What are the limits of the FTC when it comes to how intrusive it should be in a retail buying process – beyond things like price transparency, fair and honest advertising, and associated rules?**

Good economic thinking is essential to ensuring that FTC enforcement and regulation creates net benefits. All disclosure requirements, document retention requirements, and other intrusions into the sales process for any product should be evaluated for the costs and the benefits such requirements are likely to produce. Importantly, the Commission must consider compliance costs as part of the calculation. Requirements that impose costs on business also impose costs on consumers; the agency ought to be certain that such costs are outweighed by benefits to consumers.