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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Remarks of Commissioner Noah Joshua Phillips

Regarding the Commission's Issuance of Seven Omnibus Resolutions

July 1, 2021

The seven resolutions on the table will reduce Commission oversight and accountability over some of our biggest—and most expensive—investigations, for example breaking up companies across the economy that consummated mergers years ago. These kinds of things deserve serious consideration.

Under the current process, staff working on an antitrust investigation need a Commission resolution before they may issue compulsory requests for documents, information, or testimony. Congress gave the Commission, not a single commissioner or staff, the authority to bless compulsory process in its investigations.¹ It envisioned an informed and deliberated decision by all commissioners before unleashing the FTC's considerable investigative power.²

For what are likely to be our most prominent and expensive investigations, the proposed resolutions undermine all that. They would allow the chair, or one commissioner they select, unilaterally to initiate a large number of full-phase investigations across the economy. That means less room for input and oversight from all commissioners and more room for mistakes, overreach, cost overruns, and even politically-motivated decision making, regardless of whether the majority consists of Democrats or Republicans. And when things go wrong, there will be less accountability.

Given the negative impact these resolutions may have, it's disappointing that the public had just one week's notice; that we have not made public what we are voting on; and that we are adopting seven different resolutions—on broad and diverse topics—in one vote.

The resolutions' proponents are not persuasive that there is a problem that needs fixing in the first place. That commissioners can make sure an investigation is appropriate is what Congress wanted, not a defect. And in my experience, the Commission almost always authorizes use of compulsory

¹ 15 U.S.C. § 57b-1(i) (“Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information, under authority of this subchapter or any other provision of law, unless such subpoena or demand for information is signed by a Commissioner acting *pursuant to a Commission resolution*.”) (emphasis added).

² In upholding the constitutionality of their removal protections, for example, the Supreme Court observed that FTC commissioners “are called upon to exercise *the trained judgment of a body of experts* ‘appointed by law and informed by experience.’” *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (emphasis added, citations omitted).

process. The only exception I can think of during my tenure involved an unusual request raising serious questions about the Commission's authority, which just proves why Commission oversight is good.

My colleagues argue that the Commission has already undertaken similar delegations with respect to certain consumer protection issues. That is a false equivalence.

First, the subject matter and wording of those prior delegations was generally much narrower.

Second, unlike the prior ones, all of the proposed delegations also cover antitrust investigations, which are more complex than many consumer protection investigations. Antitrust investigations entail lengthy and detailed demands for voluminous quantities of confidential documents and data, from both targets and other market participants that possess important information. These requests impose substantial costs on their recipients, and also on the FTC.

The Commission has a duty to avoid needless burdens on the American economy and to manage its resources wisely, which is why Commission permission has always been necessary before costly antitrust investigations move forward. The proposed authorizations will prevent us from fulfilling that duty. That is particularly alarming at a time of media reports and public statements before Congress about the Commission's need for additional taxpayer dollars to pay for more investigations.

Finally, I believe that, by their terms, the resolutions we consider today overstep our authority. Our statute proscribes "unfair methods of competition . . . and unfair or deceptive acts or practices",³ and that is what we should be investigating. Our consumer protection omnibus resolutions don't include language outside our statute. Therefore, Madam Chair, I am introducing the following topping motion:

I move to amend the resolutions relating to the COVID-19 public health emergency, labor or small business operators, healthcare markets, persons subject to prior Commission orders, and digital platforms, to replace "unfair, deceptive, anticompetitive, collusive, coercive, predatory, exploitative, or exclusionary acts of practices", with "unfair or deceptive acts or practices, or unfair methods of competition", to be consistent with the statutory language of Section 5 of the FTC Act.

³ 15 U.S.C. 45(a)(1).