

Dissenting Statement of Commissioner Christine S. Wilson
Annual Regulatory Plan and Semi-Annual Regulatory Agenda
December 10, 2021

Today, the Commission publishes its Annual Regulatory Plan and Semi-Annual Regulatory Agenda.¹ The plan describes the ongoing and proposed rulemaking activities of the agency for the coming year. I applaud the Commission’s regular, systematic review of its rules and guides to ensure that those rules and guides are rescinded or adjusted to reflect changing realities in the marketplace. This plan, though, extends far beyond the systematic review of existing rules (many of which should be abolished in any event) and instead lays the foundation for an avalanche of problematic rulemakings. For the reasons explained below, I dissent.

The context in which the Commission announces this ambitious and resource-intensive rulemaking agenda gives independent cause for concern. The “surge in merger filings” has been a central focus of Chair Khan since her arrival at the agency.² To address the uptick in merger

¹ FED. TRADE COMM’N, Semiannual Regulatory Agenda (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble_3084_FTC.pdf; FED. TRADE COMM’N, Statement of Regulatory Priorities (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf; FED. TRADE COMM’N, Agency Rule List - Fall 2021 Federal Trade Commission, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3084&csrf_token=725F7489E8CE63966A90F47AA96F620D4FF82CF1F33A4B6C36F2FB5309BADA7630A0704DC44C40E535F019F69D2683CDDF58.

² Memo from Chair Lina M. Khan to Commission Staff and Commissioners Regarding the Vision and Priorities for the FTC (Sept. 22, 2021) [hereinafter Chair Khan Memo], https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (“Given the ongoing merger surge, there is a real risk that markets will become only more consolidated absent our vigilance and assertive posture.”); Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter on Actions to Expedite Staff Investigations (Sept. 14, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596260/p859900omnibuslmkrksconcur.pdf (“The current surge in merger filings, with record-setting levels of deal-making, is straining these scarce resources even further.”); Oral Remarks of Chair Lina M. Khan Before the United States Subcommittee on Consumer Protection and Commerce of the Committee on Energy and Commerce, Hearing on Transforming the FTC: Legislation to Modernize Consumer Protection (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592966/oral_remarks_of_chair_lina_khan_on_hearing_re_transforming_the_ftc_legislation_to_modernize_consumer.pdf (“Third, even as the agency tackles the proliferation of unfair or deceptive practices, the current merger boom threatens to make them worse. ... I am deeply concerned that the current merger boom will further exacerbate deep asymmetries of power across our economy, further enabling abuses.”); Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf (“A recent surge in merger filings is stretching these resources even further,

filings, staff from many non-merger divisions throughout the agency have been commandeered to review pre-merger notification materials.³ These filings are subject to statutory timeframes, but the FTC has struggled to meet its timing obligations.⁴ Consequently, the FTC's Bureau of Competition is now sending warning letters to merging parties whose statutory timeframes have expired, warning that the agency's investigations continue and threatening that if they proceed to consummate their transactions, they do so at their own peril.⁵ It is puzzling that we would unleash an avalanche of rulemakings while also confronting a tsunami of merger filings.

Merger wave or no merger wave, my Democrat colleagues have long aspired to a more expansive rulemaking agenda for the agency.⁶ This year, they began taking steps to implement

resulting in an enormous burden on the agency staff.”); Post-Commission Meeting Remarks of Chair Lina M. Khan (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592378/post-commission_meeting_remarks_of_chair_lina_m_khan_0.pdf (“First, given the surge in merger filings, I’d like the Commission in the coming weeks and months to consider additional ways we can address the immense staff burden associated with investigating deals.”); Remarks of Chair Lina M. Khan on the Investigatory Resolutions (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591510/remarks_of_chair_khan_on_the_investigatory_resolutionsjuly_1_2021.pdf (“These targeted resolutions would streamline investigations that fall within these subject areas, enabling more expeditious investigatory process. This is particularly important given that we are in the midst of a massive merger boom.”).

³ Chair Khan Memo, *supra* note 2 (“The current deal volume is imposing huge demands on our staff, and I’m very grateful to the merger shops for the heavy load they are carrying, as well as to the attorneys from OPP and OIA who have graciously stepped up to help.”).

⁴ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), <https://www.ftc.gov/public-statements/2021/08/statement-commissioner-christine-s-wilson-regarding-announcement-pre> (“But one plausibly could wonder if the FTC is struggling to review transactions in a timely manner not only because of filing volume, but also because something else is afoot.”).

⁵ Holly Vedova, Competition Matters Blog, Adjusting merger review to deal with the surge in merger filings (Aug. 3, 2021, 12:28 PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (“Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk.”).

⁶ Remarks of Commissioner Rebecca Kelly Slaughter at the Cybersecurity and Data Privacy Conference, New York University School of Law, FTC Data Privacy Enforcement: A Time of Change at 6 (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_remarks_on_ftc_data_privacy_enforcement_a_time_of_change.pdf; Statement of Commissioner Rohit Chopra Regarding the Report to Congress on the FTC’s Use of Its Authorities to Protect Consumer Privacy and Security, Comm’n File No. P065404 (June 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577067/p065404dpipchoprastatement.pdf; Remarks of Commissioner Rebecca Kelly Slaughter at Silicon Flatirons, The Near Future of U.S. Privacy Law, University of Colorado Law School (Sep. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf; Comment of Commissioner Rohit Chopra on Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), <https://www.ftc.gov/system/>

that goal. Acting Chairwoman Slaughter created a new rulemaking group within the FTC's Office of General Counsel to "help build [the] Commission's rulemaking capacity and agenda for unfair or deceptive practices and unfair methods of competition."⁷ She also launched a review of the Commission's Rules of Practice to "streamline" rulemaking procedures under Section 18 of the FTC Act.⁸ Chair Khan then ushered those changes across the finish line.⁹ While the Annual Regulatory Plan and Semi-Regulatory Agenda characterize those changes to our Rules of Practice as "eliminating extra bureaucratic steps and unnecessary formalities," in reality those changes fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.¹⁰ The Statement of the Commission issued in conjunction with those rule changes confirmed a desire for an ambitious rulemaking agenda,¹¹ which predictably is reflected in this plan.

The regulatory plan identifies many rulemakings that will be launched in the coming months, including a trade regulation rule on commercial surveillance "to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision making does not result in unlawful

[files/documents/public_statements/1408196/chopra - comment to hearing 1 9-6-18.pdf](#); Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020), <https://chicagounbound.uchicago.edu/uclrev/vol87/iss2/4/>.

⁷ Press Release, Fed Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

⁸ Statement of the Commission Regarding Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021) [hereinafter Revised Section 18 Rulemaking Statement], https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf.

⁹ 86 Fed. Reg. 38542 (July 22, 2021), <https://www.federalregister.gov/documents/2021/07/22/2021-15313/revisions-to-rules-of-practice>. I dissented from those changes because they bulldozed existing procedural safeguards that ensured objectivity and vibrant input from all stakeholders. *See* Dissenting Statement of Commissioner Christine S. Wilson on the Open Commission Meeting of July 1, 2021 at 9 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf.

¹⁰ Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf.

¹¹ Revised Section 18 Rulemaking Statement, *supra* note 8 https://www.ftc.gov/system/files/documents/public_statements/1591786/p210100commnstmtsec18rulesofpractice.pdf ("With the adoption of these streamlined procedures we wish to signal a change in Commission practice and ambition: that we intend to fulfil our mission to protect against unfair and deceptive practices in commerce and provide consumers and businesses with due process, clarity, and transparency while crafting the rules to do so.").

discrimination.”¹² This rule may implicate competition as well as consumer protection issues, as the Statement of Regulatory Priorities notes that “surveillance-based business models” impact not just consumers but competition.¹³

And taking a big step into uncharted waters, the plan states that “the Commission will also explore whether rules defining certain ‘unfair methods of competition’ prohibited by Section 5 of the FTC Act would promote competition and provide greater clarity to the market.”¹⁴ In deference to President Biden’s recent Executive Order,¹⁵ the Commission may consider competition rulemakings relating to “non-compete clauses, surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and industry-specific practices that substantially inhibit competition.”¹⁶ As if this list is insufficiently lengthy, the plan observes that “[t]he Commission will explore the benefits and costs of these *and other* competition rulemaking ideas.”¹⁷ In the absence of further detail, the reader is left to daydream about the additional rulemaking adventures that await.

One underlying premise for competition rulemaking concerns the plan’s conclusion that “the case-by-case approach to promoting competition, while necessary, has proved insufficient, leaving behind a hyper-concentrated economy whose harms to American workers, consumers, and small businesses demand new approaches.”¹⁸ The claims of a “hyper-concentrated” economy have been heavily criticized by leading scholars and economists because they rely on flawed data and analysis.¹⁹ But these flawed claims provide a convenient fig leaf for those who wish to

¹² FED. TRADE COMM’N, Trade Regulation Rule on Commercial Surveillance, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3084-AB69>.

¹³ FED. TRADE COMM’N, Statement of Regulatory Priorities at 2 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf (“Among the many pressing issues consumers confront in the modern economy, the abuses stemming from surveillance-based business models are particularly alarming. The Commission is considering whether rulemaking in this area would be effective in curbing lax security practices, limiting intrusive surveillance, and ensuring that algorithmic decision-making does not result in unlawful discrimination. Importantly, it is not only consumers that are threatened by surveillance-based business models but also competition.”).

¹⁴ *Id.*

¹⁵ Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

¹⁶ FED. TRADE COMM’N, Statement of Regulatory Priorities at 2 (Dec. 10, 2021), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf.

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* at 1.

¹⁹ See, e.g., Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust* Jan. 9, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524; Joshua D. Wright, Market Concentration, Note submitted to the Hearing on Market Concentration, DIRECTORATE

supplant our market-based economy with a central planning regime.²⁰ I have been assured that despite the lengthy list of similar failed experiments not just in the U.S. but around the world, today's bureaucrats are going to "do it smartly."²¹ Forgive me for being dubious.

I have long expressed concern about the negative impacts of rulemaking. As a Commissioner, my first dissent was issued in the context of the Energy Labeling Rule; there, I encouraged the Commission to "review its roster of rules with a deregulatory mindset."²² Although the Commission under Chairman Joe Simons did repeal one rule and one guide,²³ I am disappointed that it did not participate more vigorously in the deregulatory agenda of the Trump Administration.²⁴

My general aversion to rulemaking is rooted in historical experience. For example, the disastrous regulatory frameworks in the transportation industry teach the attentive student that rules stifle innovation, increase costs, raise prices, limit choice, and decrease output, frequently harming the very parties they are intended to benefit.²⁵ I am also mindful of our agency's own regulatory zeal

FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Greg Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (Oct. 22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912; Carl Shapiro, *Antitrust in a Time of Populism*, (Oct. 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

²⁰ G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL 1057 (2004) ("Market failures explain a great deal of regulation. But politics explains even more.").

²¹ Christine S. Wilson, Remarks for the Federalist Society at the Future of Rulemaking at the FTC Event, Hey, I've Seen This One: Warnings for Competition Rulemaking at the FTC (June 9, 2021) [hereinafter Wilson Future of Rulemaking Remarks], https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf ("Two authors of the Furman Report for the UK told me that I should not dwell on past failings, though, because 'we are going to do it smartly this time.' This statement is laden with both hubris and a baseless optimism that we have somehow gotten better at predicting the future.").

²² Dissenting Statement of Commissioner Christine S. Wilson, Notice of Proposed Rulemaking: Energy Labeling Rule (Dec. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1433166/2018-12-7_statement_of_c_wilson_energy_labeling.pdf.

²³ Deceptive Advertising as to Sizes of Viewable Pictures Shown By Television Receiving Sets ("The Picture Tube Rule"), 83 Fed. Reg. 50484-87 (Oct. 9, 2018) (Federal Register Notice repealing the Picture Tube Rule); Guides for the Nursery Industry, 84 Fed. Reg. 20776-77 (May 13, 2019) (Federal Register Notice repealing the Nursery Guides).

²⁴ Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.

²⁵ Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF'T 10 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>; Remarks of Commissioner Christine S.

in the 1970s that earned it the sobriquet of the “second most powerful legislature in Washington,”²⁶ together with significant Congressional backlash.

With respect to competition rulemaking specifically, as I have explained in detail elsewhere, historical experience is only the first in a long list of concerns.²⁷ Perhaps most importantly, competition rulemaking will hinder the rational development and refinement of economic and legal analysis.²⁸ Adopting a rules-based approach to competition law will diminish the effects-based analysis built through more than four decades of careful assessment. Improved economic analysis rightly led to the reassessment of per se bans on many vertical restraints and altered merger enforcement.²⁹ But competition rulemaking will freeze the legal and economic analysis of any conduct subject to a rule. This approach is not compatible with today’s sound, fact-specific and evolving approach to antitrust law.

Other reasons to eschew competition rulemaking abound. By their very nature, regulations risk inhibiting innovation.³⁰ Rulemaking must rely on a one-time snapshot of industry dynamics, but industries rapidly evolve. The rulemaking process is unable to adapt quickly to market changes because it is lengthy and cumbersome.³¹

Wilson at British Institute of International and Comparative Law, Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech (June 28, 2019), https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiicl_6-28-19.pdf; Dissenting Statement of Commissioner Christine S. Wilson Energy Labeling Rule, Comm’n Matter No. R611004 (Oct. 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf.

²⁶ See, e.g., J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2159 (2015) (quoting Jean Carper, *The Backlash at the FTC*, WASH. POST, Feb. 6, 1977, at C1).

²⁷ Wilson Future of Rulemaking Remarks, *supra* note 21.

²⁸ *Id.*

²⁹ Remarks of Commissioner Christine S. Wilson at the University of Florida Competition Policy Enforcement Conference, *There’s Nothing New Under the Sun: Why Professor Roger Blair of the University of Florida Is Still Right About Vertical Integration* (Nov. 1, 2019), https://www.ftc.gov/system/files/documents/public_statements/1552631/wilson_remarks_florida_competition_policy_enforcement_conference_11-1-19.pdf.

³⁰ Oral Remarks of Commissioner Christine S. Wilson Open Commission Meeting on July 21, 2021 at 4 (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf (“The inaccuracies in the Care Labeling Rule are not trivial. The failure of the FTC to acknowledge the existence of an emerging rival to dry cleaners known as wet cleaners likely has impacted competition in this industry.”) (citations omitted).

³¹ See Wilson Future of Rulemaking Remarks, *supra* note 21; Wilson & Klovers, *supra* note 25.

In addition, rulemaking presents a smorgasbord of opportunities for incumbents to raise their rivals' costs, inhibit entry, and in other ways insulate themselves from competition—all to the detriment of consumers. Professor G. Richard Shell of the Wharton School, in his book titled *Make the Rules or Your Rivals Will*, asserts that “[f]or every simple, neutral law we pass, there are ten designed to tilt the playing field. In other words, laws and legal institutions can make or break a business—or an entire industry.”³² He then makes this key point:

Laws not only define markets—they set the rules of competition within them. To put it another way, law provides the steel from which we build our economic superstructure. Change even the smallest legal rule in this superstructure and costs, profits, and market share shift by significant amounts in the market itself. By leaving law and legal maneuvering to your rivals, you place the fate of your business in their hands.³³

In other words, petitions for rulemaking and the rulemaking process create a rich environment for maneuvering to gain a competitive advantage.³⁴ Consequently, companies have rulemaking strategies in the same way they have marketing and advertising plans. They know that regulations typically benefit existing market leaders, including by increasing costs (which smaller and newer entrants are less equipped to bear).³⁵ By embarking on this regulatory extravaganza, we encourage companies to shift resources from competition and innovation to

³² SHELL, *supra* note 20, at 92.

³³ *Id.* at 105.

³⁴ Remarks of Commissioner Christine S. Wilson at the Open Commission Meeting on September 15, 2021 at 5 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596380/cw_remarks_open_commission_meeting_9_16_2021.pdf (“When I was in private practice, I saw firsthand how the citizens’ petition process at the Food and Drug Administration was abused by branded drug companies to delay and exclude competition from generic drug companies. For years, I represented the generic drug companies as they fought back against those tactics. The problem got so bad that in 2018, with input from the FTC, the FDA overhauled its citizens’ petition process.”) (citation omitted); *id.* at 7 (“Without funding disclosures, the FTC and the public will be left in the dark about who is seeking to influence our rulemaking efforts, compromising the FTC’s independence. The FDA has a disclosure-of-funding rule, and so should we.”).

³⁵ See Remarks of Commissioner Christine S. Wilson at the Future of Privacy Forum, A Defining Moment for Privacy: The Time is Ripe for Federal Privacy Legislation (Feb. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566337/commissioner_wilson_privacy_forum_speech_02-06-2020.pdf (“Importantly, the legislative framework should also consider competition. Regulations, by their nature, will impact markets and competition. GDPR may have lessons to teach us in this regard. Research indicates that GDPR may have decreased venture capital investment and entrenched dominant players in the digital advertising market”); Oral Statement of Commissioner Christine S. Wilson Before the U.S. House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf (“Reports also indicate that compliance with GDPR is costly and difficult for small businesses and new entrants.”).

rent-seeking and regulatory gamesmanship, to the detriment of the very consumers our agency was created to protect.

In addition to questioning the wisdom of competition rulemaking, I also question its legality. After the passage of Magnuson-Moss, it is unclear whether the FTC even has substantive competition rulemaking powers.³⁶ Even if a court does find that Congress granted the FTC broad substantive competition rulemaking, there is an additional concern that this power is unconstitutional under the non-delegation doctrine. A majority of current Supreme Court Justices have suggested that they are willing to reconsider the non-delegation doctrine, which has not been widely considered in courts for decades.³⁷

For these many reasons, I dissent.

³⁶ Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective*, 48 ANTITRUST L. J. 1561, 1561 (“One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC’s rulemaking powers.”).

³⁷ Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University Law School, Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* 309 (Jan. 9, 2020) (analyzing FTC rulemaking and commenting “let me start with the nondelegation doctrine because I -- there are now five Justices who are on record as saying they are open to the possibility of figuring out a new way of applying it.”); Remarks of Noah Joshua Phillips, Commissioner, Fed. Trade Comm’n, *Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues* at 6-7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf (discussing concerns regarding the non-delegation doctrine as it applies to FTC rulemaking).