

LINA KHAN: Good afternoon. This meeting will come to order. We're meeting in open session today to vote on several items before the commission. This meeting is the first open business meeting of the commission in more than 20 years, and we will be taking a final vote on several matters. Please note, however, that it will not be a deliberative meeting. Following the meeting we will remain online for an open session during which we will hear from members of the public on their thoughts regarding the work of the commission.

Going forward we intend to hold these types of open meetings on a regular basis. As a democratic institution we have a vital responsibility to conduct our work to the people we serve. Open meetings allow the public to gain insight into the work and priorities of the agency, and establishing a regular public forum can allow us to learn from the consumers, workers, and honest business owners we have a legislative mandate to protect.

By developing a robust participatory process, I hope to ensure that our work to promote a fair and thriving economy is representative of all Americans. I want to thank my fellow commissioners for their participation today and the commission staff for their heroic work to help us execute this virtual meeting. Turning now to the business of the commission, the first item on the agenda is the finalization of a Made in USA labeling bill that the commission first proposed in a notice of proposed rule making published in the Federal Register in July 2020. I will turn it to Commissioner Chopra to introduce the matter and make the motion. Commissioner Chopra.

ROHIT CHOPRA: Thank you, Chair Khan, and thank you to all of my colleagues for this first effort in decades public meeting. When businesses decide where to produce their goods, more and more of them are looking to produce here in the United States so that they can sell those goods with a Made in USA label. Studies show that consumers prefer many types of goods that are made in America, and are often willing to pay a premium for it.

During my time as a commissioner these past several years, I've had the chance to hear from many honest businesses that produce their products in the United States but who face an unfair competitive environment and lose out to those who lie on their labels. Enforcement of our truth in advertising laws backed by the threat of penalties and other sanctions, where appropriate, is one of the only ways to stop this rampant abuse. But for decades, there has been a bipartisan consensus among FTC commissioners that Made in USA fraud should not be penalized.

In 1994 shortly after NAFTA took effect, Congress enacted legislation that explicitly authorized the FTC to take action to trigger penalties and other relief for Made in USA fraud but only after formally codifying a rule. However, past commissioners spanning multiple administrations never even proposed one. Instead, over this past quarter century commissioners implemented a highly permissive Made in USA fraud policy where violators faced essentially no consequences whatsoever. Even in cases of egregious abuse commissioners routinely voted to allow wrongdoers to settle for no money, no admission or findings of liability, and no notice to victims. In my view this policy was misguided and in direct contravention of both the letter and spirit of the law Congress enacted.

In 2019 Tina.org, an advertising watchdog, submitted a petition requesting that the FTC finally implement the 1994 statute. In 2020, the commission issued its proposal and then analyzed over 700 comments from manufacturers, retailers, farmers and ranchers, consumers, and even foreign governments. After considering these comments the commission has adopted-- is seeking to adopt a rule consistent with the authority granted by Congress.

A few points of note about the final rule. First the commission will codify the all or virtually all standard in this rule consistent with the FTC's long standing enforcement policy statement on US origin claims. This standard covers unqualified claims, but it is not a mandatory labeling requirement.

Importantly, this is a restatement rule which affirms longstanding guidance and legal precedent with respect to Made in USA labels, therefore, imposing no new obligations on manufacturers and sellers. Because of the stricter sanctions they trigger, restatement rules such as this one can increase fraud deterrence and ensure that victims can be made whole.

Second, the commission has outlined the definition of label consistent with the commission's statutory authority and expertise on labeling. While the commission declines to adopt a definition of label in the final rule that includes a list of specific examples such as restaurant menus, the rules definition of label does extend beyond labels that are physically affixed to a product. In certain circumstances labels appearing online may also be subject to the rule depending on the circumstances. The commission in the final rule has proposed to decline to cover advertising more broadly as this is inconsistent with the specific authority granted by Congress.

Third it's worth noting the large number of comments regarding agricultural products that we received, including with respect to beef and other retail sales of meat. The rule declines to grant a blanket exemption sought by the meatpacking industry. This would be inappropriate given the commission's authority prescribed by Congress under the Packers and Stockyards Act. However, it is important to recognize our interagency partner here. Today the US Department of Agriculture has announced that it will be conducting a top to bottom review of its own labeling standard which allows a product of USA designation even for certain imported beef processed in America.

I'm extremely grateful to Secretary Tom Vilsack and USDA staff for the action they are taking, and I'm especially pleased that the USDA has acknowledged that its product of USA designation may be misleading. I hope the USDA will study the FTC's rulemaking record carefully and perhaps come to the same conclusion I have. The USDA's product of USA standard is deceptive, and distorts competition in the retail market for beef.

I also believe that unqualified product of USA claims for beef are only appropriate when the animal was born, raised, and slaughtered in the United States. Given our shared jurisdiction I expect that the commission will carefully coordinate with the USDA on any enforcement proceeding as it relates to retail sales of meat. In some the FTC's final Made in USA rule provides substantial benefits to the public by protecting businesses from losing sales to dishonest competitors and protecting families seeking to purchase American made goods. The rule will definitely, in my mind, benefit small businesses that rely on the Made in USA label but who lack the resources to defend themselves from imitators.

More broadly this long overdue role is an important reminder that the commission must do more to use the authorities explicitly authorized by Congress rather than ignoring them. I want to thank everyone who contributed to the development of this final rule to protect the Made in USA brand and guard against abuse. With all this in mind, having published a notice of proposed rulemaking in the Federal Register, and having given all interested persons an opportunity to participate in the rulemaking through the public comment and submission process in accordance with Section 553 A the Administrative Procedure Act I move that the commission publish the circulated notice in the Federal Register issuing a final rule related to Made in USA and other unqualified US origin claims to take effect 30 days after its publication in the Federal Register.

LINA KHAN: I second the motion. I will now turn to my other fellow commissioners to share any remarks before this item is moved for a vote. As we have a full agenda, I would ask each commissioner to please limit their remarks to no more than five minutes. Commissioner Phillips.

NOAH JOSHUA PHILLIPS: Thank you, madam chair and thank you Commissioner Chopra. I'll be brief. The FTC has clear statutory authority to issue a Made in the USA rule. And if we had fashioned a rule that came within the bounds of that authority I would support it. But I believe that the final rule presented here today exceeds that authority.

In 1994, Congress codified Section 5A titled Labels on Products. As that title makes clear section applies to quote, a product with a Made in the USA or Made in America label, end quote. It requires that any such label representing that the product was in whole or in substantial part of domestic origin be consistent with decisions and orders of the FTC issued pursuant to our Section 5 unfairness and deception authority.

The final rule put forth today instead will regulate not only labels but will include advertising claims appearing in catalogs and online. As I have said before, when entrusted with APA rulemaking authority it is imperative that the commission work to effectuate congressional intent. Commission regulatory overreach in decades past led Congress to impose special restrictions on our ability to make rules with respect to unfairness and deception, requiring absent a specific congressional directive that the FTC use the more stringent rulemaking procedures outlined in the Magnusson-moss Warranty and Federal Trade Commission Improvements Act.

Congress has proposed to expand our made in the USA rulemaking authority. And if that bill becomes a law we will be able to reach beyond the labels contemplated in Section 5A. But not yet. I believe that we should either hew to the language of Section 5A and issue a labeling rule, or if we wish to cover a broader swath of made in the USA claims wait for Congress to act or instead use Mag-Moss rulemaking procedures to do so. Our job is not to regulate beyond the lines that Congress has drawn.

One final note. I am not sure as I sit here what the motion says we are voting on. Commissioner Chopra referred to the circulated notice. A version was formally circulated by the office of the secretary which was not-- which was followed by subsequent revisions delivered informally by email that did not include the secretary's office as a recipient. So some clarity on that would be helpful. Thank you.

LINA KHAN: Right. Commissioner Slaughter.

REBECCA SLAUGHTER: Thank you, Chair Khan. Excuse me. I don't actually have anything to add to the discussion other than to thank Commissioner Chopra for his leadership on this important issue and indicate my support for the motion. Commissioner Wilson.

CHRISTINE S. WILSON: Thank you, Chair Khan. Good afternoon, everyone and good afternoon to the commission. The remarks that I make during the meeting will be posted later today. I'd like to start with just a couple of general remarks. I support greater transparency in government decision making generally and in federal antitrust and consumer protection enforcement specifically. With sufficient notice, advanced planning, input from our knowledgeable staff, and a robust dialogue among my fellow commissioners, open commission meetings could facilitate that goal.

Unfortunately today's meeting falls short on all accounts. In fact, I only learned last Thursday of the chair's intention to hold this meeting, and at the same time I was informed of her intention to hold votes to rescind the Section 5 policy statement and to pass several omnibus resolutions that would remove from commission oversight large swathes of commission business.

American consumers are best served when policy decisions are made with input from a variety of stakeholders. FTC has a laudable history of seeking input by putting out draft policy statements and other initiatives for notice in comment, holding workshops and hearings on policy issues, and issuing thoughtful interim reports. Our staff who host these proceedings and who work each day to fulfill our mission, have developed significant expertise.

The work of the commission is enhanced when staff is available to present recommendations and answer questions, and I benefit from staff recommendations prepared by career professionals who have thought deeply about the issues and who'll be tasked with implementing the initiatives on which we're voting. I'm certainly better equipped to opine on matters for which I have received SNAP analysis. And I also benefit from the opportunity to have a dialogue with my fellow commissioners each of whom brings different experiences and skill sets to the table.

Unfortunately, the format the chair has chosen for this meeting omits our knowledgeable staff and precludes a dialogue among the commissioners. A bipartisan and collaborative approach has been a hallmark of the FTC for years and would be welcomed today, particularly given the importance of the matters being considered. We have arrived at all of the outcomes that we're going to discuss today. The consumer welfare standard, our rulemaking process that respects objectivity and public input, and an appreciation for our limited jurisdiction for very specific reasons those reasons are worth discussing, but that requires a thoughtful process. And when we have chaos instead of a thoughtful process it is the American consumer who will suffer.

With respect to the Made in USA motion made by Commissioner Chopra, I am a strong supporter of the commission's Made in USA program. In contrast to Commissioners Chopra and Slaughter, I have voted yes on every Made in USA enforcement action since my arrival at the commission, but I will reiterate the points that my colleague Commissioner Phillips made. Congress authorized us to pass a rule that governs labeling for Made in USA claims and I fully supported consideration of a Made in USA labeling rule. But the rule presented to us today exceeds our statutory authority. It isn't limited to labeling. It overstepped our congressional mandate by including essentially all online claims.

Now the Senate recently passed the Country of Origin Labeling Act, called the COOL Act that goes much further in terms of allowing us to regulate all forms of advertising with respect to Made in USA claims, and the COOL Act shows that Congress is aware of the differences between labeling and broader forms of advertising. I am deeply concerned about the proliferation of deceptive Made in USA claims. I want to engage with staff and my colleagues to explore ways to address these claims that fall within our statutory authority.

Commissioner Philips has identified two of those. If we were able to engage in a dialogue at this meeting it would have been constructive to discuss whether we should undertake a full rulemaking proceeding under Section 18 to cover all advertising as some commenters urged us to do. Alternatively, we could have discussed whether to pass a rule limited to Made in USA labeling now or await further authorization from Congress through the COOL Act to address all media advertising.

But it is ill advised to proceed with the rule before us today, which clearly exceeds our congressional authorization. We've been reprimanded for acting outside our congressional authority. In the AMJ case decided just this year, the Supreme Court ruled unanimously the commission has exceeded its authority to seek monetary relief under Section 13B of the FTC Act. I am puzzled about why we're making the same mistake again on the heels of that reprimand. I will issue a written dissent that explains my concerns more fully.

LINA KHAN: Great. Thanks Commissioner Wilson, and I'm sure we can all appreciate the guidance we received from the general counsel to ensure that we're avoiding disclosure of the deliberative process privilege. Secretary Tabor, would you like to clarify based on the question that Commissioner Philips asked?

APRIL TABOR: Yes. Thank you, Madam Chair. Commissioner Chopra, as Commissioner Phillips has raised there is ambiguity as to which version of the notice your motion references. I seek to clarify were you referring to the latest version of the Federal Register notice that has been circulated informally to the commission.

ROHIT CHOPRA: Yes. And just to clarify, Commissioner Phillips, as I understand there was a typographical error that staff identified that they have updated the secretary's notes with. So that is the motion that the recent staff update including fixing of a typographical error is the motion I seek a vote for.

APRIL TABOR: Then to clarify and restate the motion on the record, the motion then is having published a general notice of proposed rulemaking in the Federal Register that having given all interested persons an opportunity to participate in the rulemaking through the public comment and submission process in accordance with Section 553 A of the Administrative Procedure Act, the motion is that the Commission published the latest circulated notice in the Federal Register issuing a final rule related to Made in the USA and other unqualified US origin claims to take effect 30 days after its publication in the Federal Register.

LINA KHAN: OK, the motion being seconded I'm calling for a vote. Commissioner Wilson.

APRIL TABOR: Commissioner Wilson, you're on mute.

LINA KHAN: Commissioner Wilson, you're on mute.

CHRISTINE S. I vote no.

WILSON:

LINA KHAN: OK, Commissioner Slaughter?

REBECCA I vote yes.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA: Yes.

LINA KHAN: Commissioner Phillip?

NOAH JOSHUA No.

PHILLIPS:

LINA KHAN: And I vote yes. The motion passes by a vote of 3 to 2. Next on the agenda are proposed revisions to parts 0 and 1 of the commission's rules of practice. These are the procedural rules of the commission which are codified in part 16 of the Code of Federal Regulations. I will turn it to Commissioner Slaughter to introduce the matter and make a motion on this.

**REBECCA
SLAUGHTER:** Thank you, Chair Khan, for letting me introduce this important work. These revisions to part 0 and 1 of the commission's rules of practice are the culmination of a year's long effort to revitalize the FTC rulemaking procedures to remove self-imposed red tape and to bring those procedures back in line with our statutory obligations. I particularly would like to thank my former advisor Austin King, now leading our rulemaking office, and also Kenny Wright and Josephine Lew for their work on this package and for helping to bring the commission into this new era.

Congress's passage of Mag-Moss or Section 18 Rulemaking Authority in 1975 was a clear directive to the FTC to promulgate trade rules to protect consumers in a dynamic and changing economic landscape. The FTC of that era was dedicated to acting on that congressional directive, and soon initiated a dozen rulemakings. The broad deregulatory wave of the 1980s, however, undid much of that work, including by imposing bureaucratic hurdles in the form of commission procedure that impeded our ability to fulfill our statutory responsibilities. But we want to signal that today's FTC is ready to take on the challenges of the modern economy.

These changes we are considering today will bring commission rules in line with the statutory directives, and provide the commission with greater accountability and control over our Section 18 rulemaking proceedings, including deciding the final list of disputed material facts to be resolved and deciding who will make oral presentations to the commission and who will cross-examine or present rebuttal submissions. The chair will now either serve as or designate the chief presiding officer, and the commission will ensure orderly conduct for those rulemakings.

Previously, the rules had designated the chief administrative law-- administrative law judge as that presiding officer would reinforce the myth that these rule makings required elaborate and interminable judicial processes instead of straightforward public participation. These procedures will also enhance commission transparency by requiring that records of both written and oral communications to a commissioner or their advisors during a rulemaking proceeding will be placed in the rulemaking record and available to the public.

To be more faithful to Congress's original design, we will eliminate the self-imposed requirements for a staff report on the hearing record and eliminate additional self-imposed comment periods including on the presiding officer's report. The revised rules respect the statutory requirements of Section 18 that provide ample transparency and opportunity for public participation in the rulemaking process. These requirements include the publication of an advance notice of proposed rulemaking for comment, the advance submission of that ANPRM to our congressional oversight committees, the publication of a notice of proposed rulemaking for public comment, the advance submission of that notice of proposed rulemaking to the Congressional Oversight Committees an informal hearing to resolve any disputed issue of material fact, and publication of a final rule accompanied by a statement of basis and purpose.

These statutory guidelines provide for substantially greater public engagement and congressional oversight than the Administrative Procedure Act under which most federal rulemaking is conducted. Indeed nothing about these changes prevent the commission for calling for additional comment periods or procedures should they be necessary. The commission's rules of practice should, and if this motion passes will, adhere closely to the statutory framework.

Importantly, the commission will be able to exercise its prosecutorial discretion to seek a wide variety of relief in rule violation cases, including redress, civil monetary penalties, reformation of contracts, and other relief against first time violators of these rules under Section 19 of the FTC Act. While rulemaking is not a substitute for a permanent fix to our Section 13B authority to obtain monetary relief in Section 5 cases, trade rules will help ensure that businesses can't take advantage of consumers and cement their market position by engaging in practices that do people real harm until we can catch them and take them to court the first time.

I hope that with these streamlined procedures we can tackle cutting edge issues like data abuses that underpin so many contemporary business models or unfair and deceptive practices in event ticket sales, among others. With the adoption of these streamlined procedures, we wish to signal a change in commission practice and ambition that we intend to fulfill 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. So with that said, I now move that the commission publish the latest circulated Federal Register notice amending parts 0 and 1 of its rules of practice, and that such amendments to the agency's rules of practice take effect immediately upon its publication in the Federal Register in accordance with Section 553 B of the Administrative Procedures Act.

LINA KHAN: And I second that motion. I will now turn to the other commissioners to share in your remarks before calling for a vote. Commissioner Wilson.

CHRISTINE S. WILSON: Thank you, Chair Khan. Regulations, even well-intentioned ones, impose costs that stifle innovation, raise the cost of doing business, limit consumer choice, and increase the prices that consumers must pay, and ultimately undercut America's global competitiveness. Congress empowered the FTC to issue trade regulations when it passed the Magnuson-Moss Act. At the same time it imposed significant procedural obligations on the commission to cabin the agency's broad rulemaking discretion.

In the wake of the Magnuson-Moss Act, the agency engaged in a flurry of rulemaking activity that sought to regulate broad swaths of the economy. The negative reaction from businesses and many in Congress was swift. During this period the Washington Post famously accused the agency of attempting to be the national nanny, and Congress itself found that the agency's rulemaking efforts were filled with quote, excessive ambiguity, confusion, and uncertainty.

Backlash from the agency's sweeping regulatory efforts of the 1970s culminated in the Federal Trade Commission Improvement Act of 1980, which imposed additional procedural obligations on Section 18 rulemaking efforts. In other words, Congress sought to cabin agency's discretion even more in what famed legal scholar Ernest Gellhorn characterized as the wages of zealotry. Considering the backlash to this agency's earlier era of unbounded rulemaking activity, I am gravely concerned about today's proposals to pare down procedural safeguards embedded in our rules of practice related to Section 18 rulemaking.

I want to thank Commissioner Slaughter for her transparency this morning about the materials included in the commission's Section 18 rule proposal. Making such information available to the public helps to foster the public's understanding of our proposal, and also creates an opportunity for more open dialogue. Considering the proposal outlined by Commissioner Slaughter today, if a public dialogue were permitted during this meeting I would find it constructive to discuss a number of questions.

First, with respect to the objective management of the rulemaking process, the role of a presiding officer is to oversee the fair adjudication of the hearing process and make independent recommendations to the commission based on relevant and material evidence. During the 1970s rulemaking spree, the presiding officer was a puppet of agency management leading to a perception that outcomes were biased and predetermined. To address this issue and build trust in the rulemaking process, Congress imposed obligations designed to ensure the independence of the presiding officer.

The commission heeding Congress's concerns regarding independence, required our chief administrative law judge to serve as the chief presiding officer and empowered the presiding officer to lead the hearing process. In light of these congressional concerns why does today's proposal move from using independent ALJs to serve as presiding officers? How can we avoid the public perception that we're politicizing the rulemaking process if the chair appoints the presiding officer?

And as Commissioner Slaughter mentioned, the revised rules provide the commission, not the presiding officer, with greater accountability and control over the hearing proceedings. So I would want to know how the commission can ensure we get a neutral and fulsome accounting effect instead of a record that serves an agenda. Commissioner Slaughter also mentioned that the commission, not the presiding officer, will determine the list of disputed issues of material fact. How can stakeholders ensure their proposed factual disputes will be part of the rulemaking record if their input is out of step with the majority view of the commission?

Second, limitations that impact public understanding and opportunities for input are concerning. Commissioner Slaughter explained rule revisions remove self-imposed restrictions and hew more closely to the statute as drafted. Where some on the commission may see restrictions, I see deliberate choice by this agency to comply not just with the letter of our congressional mandate but the spirit of the law. Following our rulemaking spree in the 1970s, the FTC was stripped of funding, stripped of legal authority, and required to institute new and substantial rulemaking steps to foster public trust in our trade rules.

Recognizing that this agency was on the brink of being shuttered, our rules of practice adopted a number of additional rulemaking procedures that provide for additional public comment period, publication of a staff report, and multiple opportunities for the public to weigh in on disputed issues of material fact. If the agency is prepared to remove discretionary steps from our rulemaking process, are we concerned that the more limited process will fail to identify unintended consequences of proposed rules, particularly those that could harm small businesses in marginalized communities? Is the commission concerned that the public or that Congress will view more limited rulemaking procedures as running counter to the democratic ideas for rulemaking that my colleagues themselves have previously espoused?

The commission's proposal to revise its rules of practice is not a small adjustment enacted to improve efficiency. To be clear, these changes have the potential to usher in a return to aggressive unbounded rulemaking efforts that Commissioner Slaughter herself characterized as ambitious. These rules could transform entire industries without clear theories of law violations and empirical foundations for recommended regulatory burdens.

Right now Congress is considering bills that run the gamut from giving the FTC expansive new authority and resources to eliminating the agency's jurisdiction. In the midst of so much criticism and scrutiny from so many angles regarding so many aspects of our jurisdiction, why are we embarking on this path of revisiting an era that led to such significant constraints on our jurisdiction? I find it striking as an example that the House Judiciary Committee's majority staff report 12 different times to railroad regulation as a model for big tech, but in a stunning omission nowhere in 450 pages or 2,500 footnotes does the report mention the fact of the repeal, the bipartisan repeal, of both the existence of the ICC and all of those railroad regulations, and the benefits that came from deregulation. It was harm to consumers and limited innovation that brought about the repeal. And that is just a great example.

If we don't acknowledge the mistakes of the past we are doomed to repeat them. There are many at the FTC who lived through the 1970s and 1980s and experienced both the public and the congressional backlash following those dark days of the FTCs history. And there are many others at the FTC who work with and learn from those who lived through that period. Current management would be wise to seek their guidance.

So I would like to offer a topping motion in the interest of facilitating transparency and ensuring our rulemaking procedures are as efficient and effective as possible. I move that the commission publish the proposed changes to part 0 and 1 of the commission's rules of practice in the Federal Register to allow for public comment for 45 days and to have the proposed changes to parts 0 and 1 of the commission's rules of practice become final only after consideration of comments submitted in response to the Federal Register notice.

NOAH JOSHUA I second the motion.

PHILLIPS:

LINA KHAN: OK, is there a second? OK, great. I will call for a vote on the topping motion. Commissioner Wilson?

CHRISTINE S. I vote yes.

WILSON:

LINA KHAN: Commissioner Slaughter?

REBECCA I vote no.

SLAUGHTER:

LINA KHAN: Commissioner Chopra?

ROHIT CHOPRA:No.

LINA KHAN: Commissioner Phillips.

NOAH JOSHUA Yes.

PHILLIPS:

LINA KHAN: And I vote no. The topping motion has failed. So we'll resume the discussion and turn it over to Commissioner Chopra.

ROHIT CHOPRA: Thank you, Chair Khan. I don't have too much to add. I also want to thank Commissioner Slaughter and all of her team's work in helping put together this proposal to adhere to the statute that Congress enacted that explicitly authorized rulemaking under Section 18. These types of rules sometimes can simply restate legal precedent and longstanding guidance that can trigger new sanctions against bad actors and help us make victims whole.

I'm also so glad that we're doing this in an open forum giving the ability for those who disagree to be able to share their point of view in addition to written statements, and I'm glad that we're all having the opportunity to hear from the public as well as we move past the agency's era of perceived powerlessness and move on to actually protect competition and families in this country. Thank you, Chair Khan.

LINA KHAN: OK, Commissioner Phillips.

NOAH JOSHUA PHILLIPS: Thank you, Madam Chair. I'd like to start by thanking Commissioner Slaughter for her commitment to transparency and her willingness to include information in her opening statement on this matter that allows other commissioners to share their thoughts on the specifics of the proposal. I agree, transparency is important, but I don't think the commission is living up to that ideal with this.

We are voting on these rule revisions without seeking public comment as we have on rule revisions in the past, and the public comment of today's meeting is taking place after the business portion, which means the commission will not consider what we hear from the public. So the way we have chosen to proceed the public is getting zero input on what we are doing.

The pitch for the Section 18 rule changes is to streamline rulemaking, that is to say regulation. This desire to make regulating easier, easier not better, coupled with public statements from my colleagues over the last few years make very clear that the FTC is about to embark on a raft of regulation not seen since the 1970s. For those not familiar with the history Commissioner Wilson spoke eloquently about it, that did not end well.

Not all of the proposed changes are bad. But a number cut against the values we all espouse today when we talk about rulemaking, transparency, inclusivity, making sure we base rules on the best information available, and so on. For example, the proposal today would eliminate the requirement for a staff report analyzing the rulemaking proceedings. These reports provide essential information to the public, to Congress, to businesses, on the evidence we have collected, the process in which we have engaged, and the logic behind the proposed rules. They allow our work to be checked and help ensure that regulation is not just the product of favored special interests or ideology.

That kind of transparency and accountability is always good, but it's even more important if you think about the profound nature of the regulations my colleagues have said they want to adopt. If we are talking about say, fashioning a national privacy regulation, a complex policy question with important trade offs that has bedeviled Congress for years, I would imagine that the impacted consumers and businesses alike would benefit from more information, and the ability to examine whether we have a sound basis for the proposals we are adopting. Leaving it to a majority of five unelected individuals who no longer have to show their work to the public doesn't seem like a good idea to me.

Today's proposal would also transfer the position of the chief presiding officer from an administrative law judge to the chair. This is a little wonky, but the chief presiding officer gets to pick the person who oversees the rulemaking hearing process. That person conducts the hearing, compiles the record, resolves disputes, and makes recommendations to the commission. It's about determining the facts based on which we, the commission, should make our policy calls. And we want the best account of the fact, not just hearing what serves our agenda.

If we want good regulation that person should be as neutral as we can make them, which is why today it's the judge that picked them or serves in the role. That gives the public and all commissioners some assurance that the proceedings will be unbiased, and that all points of view will be heard and considered. But today's proposal takes it out of the judge's hands and gives it to one commissioner, in this case, the chair. No matter who is the chair that creates the concern that the fact finding process, not the policy wing, will be biased toward the chair's viewpoint. That's why we've left it with the judge until now.

There are other issues too like limiting the time people have to comment on our work and having the commission rather than the public decide which issues we're going to think about. But the point is that all of this streamlining includes a host of measures designed to limit public understanding, limit public input, and take us away from neutral fact finding. One final point similar to the one I made earlier, I just want to clarify what we mean in terms of the latest circulated Federal Register notice. A version was formally circulated by the secretaries office, but then it was followed by a series of informal emails on which the secretary was not copied. So before we vote if I could get clarity on that. It's not our usual process.

To address some of the problems with the rules changes I will offer to topping motions, one to keep the judge as the presiding officer for hearings and another to keep the requirement that staff publish a report. Can I proceed--

LINA KHAN: Is there a second on the topping motion?

NOAH JOSHUA I haven't made the motion. May I proceed--

PHILLIPS:

CHRISTINE S. Yeah, Madam Chair, please allow him--

WILSON:

LINA KHAN: Sorry.

CHRISTINE S. --him to make the motion. Thank you.

WILSON:

LINA KHAN: Great.

NOAH JOSHUA Thank you, Madam Chair. To preserve the authority of the chief administrative law judge to serve as a neutral, unbiased, arbiter, and the chief presiding officer in rule making proceedings I move to strike the proposed addition of the sentence in section 0.8 that begins quote, in rule making proceedings under section 18 A1 B, end quote and to retain the current section 0.14 in its entirety.

LINA KHAN: Is there a second on that topping motion.

CHRISTINE S. I second the motion.

WILSON:

LINA KHAN: OK, I will call for a vote on the top motion. Commissioner Wilson.

CHRISTINE S. Yes.

WILSON:

LINA KHAN: Commissioner Slaughter.

REBECCA No.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:No.

LINA KHAN: Commissioner Phillips.

NOAH JOSHUA Yes.

PHILLIPS:

LINA KHAN: And I vote no. So the topping motion has failed.

NOAH JOSHUA Another topping motion Madam Chair?

PHILLIPS:

LINA KHAN: Go ahead.

NOAH JOSHUA Madam Chair, I'm introducing a topic motion. I move to retain the current language of section 1.13 F, G and H

PHILLIPS: which permits public recommendations by staff and the presiding officer and provides public comment opportunities and to authorize staff to revise the Federal Register notice as necessary to be consistent with this topping motion.

LINA KHAN: Is there a second on the topping motion.

CHRISTINE S. Yes, I second the motion.

WILSON:

LINA KHAN: OK, I will call for a vote on the topping motion. Commissioner Wilson?

CHRISTINE S. I vote yes.

WILSON:

LINA KHAN: Commissioner Slaughter.

REBECCA No.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:No.

LINA KHAN: Commissioner Philips.

NOAH JOSHUA Yes.

PHILLIPS:

LINA KHAN: And I vote no. The topping motion has failed. Resuming the vote on the underlying motion, I will start from the top again. Commissioner Wilson.

CHRISTINE S. I vote--

WILSON:

LINA KHAN: Before we proceed--

APRIL TABOR: Excuse me--

LINA KHAN: --with that I will invite Secretary Tabor to clarify based on Commissioner Phillips' question just make sure.

APRIL TABOR: Yes, thank you, Madam Chair. Commissioner Phillips asked a question regarding which version of the notice. I want to clarify that Commissioner Slaughter's motion did reference the latest circulated version. I shall also share that the secretary has received that latest circulated version that has also been shared with all of the commissioners.

LINA KHAN: OK. Proceeding to a vote on the underlying motion. Commissioner Wilson?

CHRISTINE S. I vote no.

WILSON:

LINA KHAN: Commissioner Slaughter?

REBECCA I vote yes.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:Yes.

LINA KHAN: Commissioner Philips.

NOAH JOSHUA No.

PHILLIPS:

LINA KHAN: And I vote yes. The motion passes by a vote of 3 to 2. The third item on the agenda is the rescission of the agency's 2015 statement of enforcement principles regarding unfair methods of competition under Section 5 of the FTC Act. The 2015 statement states that the commission will apply its standalone authority using a framework similar to the rule of reason under the Sherman and Clayton Acts, but signals that the commission will typically avoid exercising this authority in cases where those other statutes apply.

In practice, the 2015 statement has doubled down on the agency's longstanding failure to investigate and pursue unfair methods of competition. Apart from invitations to collude, which the agency has long treated as a violation of Section 5, the commission has pledged a standalone section 5 violation just once since publishing the statement. In my view because the 2015 statement ties by Section 5 to the Sherman Act framework, it contravenes the FTC Act text, structure, and history.

Congress directed the commission to identify and combat unfair methods of competition even if they do not violate the Sherman Act, and I intend to help restore the agency to this critical mission. In 1914, Congress enacted the FTC Act partially in response to the Supreme Court's decision in *Standard Oil*, which announced that it would subject restraints of trade to a rule of reason standard under the Sherman Act. Congress feared that this approach would produce inconsistent and unpredictable results and give unchecked power to the court. Responding to this concern lawmakers created the FTC to police unlawful business practices with greater expertise and democratic accountability than courts provided.

Consistent with this history Section 5 of the FTC Act prohibits unfair methods of competition, which was a new standard broader than the Sherman Act. Unlike the Sherman Act, however, the FTC Act does not feature criminal penalties or private remedies. The FTC's institutional design therefore reflects a basic trade off. Section 5 gives the commission extensive authority to shape doctrine and reach conduct not prohibited by the Sherman Act but provides a more limited set of remedies.

The 2015 statement is at odds with this institutional design because it declares that the commission's authority under Section 5 is largely coterminous with the Sherman Act. In effect the statement surrenders the FTC's unique advantages as an expert body with the power to adjudicate cases, issue rules, and guidance and conduct marketplace studies. The commission's efforts to constrain Section 5 in this way have only hindered the agency's enforcement efforts. Courts have bound the FTC to liability standards created by generalist judges and private treble damages actions under the Sherman Act despite the striking difference in institutional context.

The commission's approach also raises significant administerability concerns given that the rule of reason has resulted in soaring enforcement costs. Scholars have also shown that the defendant has prevailed in nearly all rule of reason cases in recent decades. The 2015 statement is also rife with internal contradictions that may effectively read the commission's standalone Section 5 authority out of the statute.

First, although the 2015 statement recognizes that Section 5 prohibits conduct that would violate the Sherman Act if allowed to mature or complete, it then requires the commission to prove likely anticompetitive effects under the rule of reason. Importing the rule of reason's likelihood requirement would prevent the commission from combating insipient wrongdoing before it becomes likely to harm competition. Second, although the 2015 statement declares that the commission will apply a framework similar to the rule of reason, it then suggests that the commission will typically refrain from bringing a standalone Section 5 case where the Sherman Act applies.

By those wedding Section 5 to the Sherman Act's legal standards and signaling that Section 5 won't be pursued if the Sherman Act already applies, the 2015 statement largely turned standalone Section 5 into a dead letter. More generally, the 2015 statement assumes the case by case approach to unfair methods of competition despite widespread recognition that an adjudication only approach often fails to deliver clear guidance. Withdrawing the 2015 statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's market. Section 5 is one of the commission's core statutory authorities and competition cases. The agency must use it to fulfill Congress's directives to prohibit unfair methods of competition.

In the coming months, the commission will consider whether to issue new guidance or to propose rules further clarifying the types of practices that warrant scrutiny under this provision. The task will require careful and serious work, but it is one that our enabling statute expected and required. Accordingly, I move that the commission rescind the statement of enforcement principles regarding unfair methods of competition under Section 5 of the FTC Act that it issued in 2015. Do I have a second?

REBECCA I'll second the motion.

SLAUGHTER:

LINA KHAN: I will now open it up to my fellow commissioners to share any remarks before I call for a vote. Commissioner Wilson.

CHRISTINE S. WILSON: Thank you, Chair Khan. I oppose rescinding the 2015 Section 5 policy statement. It was issued during the Obama administration on a bipartisan basis. As the majority of commissioners in 2015 explained, the principles espoused in the Section 5 policy statement are ones on which there is a broad consensus. They reflect more than a century of judicial precedent and the input of scholars in the bar.

The policy statement provides that the commission will be guided by the public policy of promoting consumer welfare, that conduct will be evaluated considering both likely harm to competition and pro-competitive justifications and that a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts. When these enforcement principles were issued, most people in the antitrust community concluded that the policy statement actually imposed very few limits on the use of Section 5. But today's vote to rescind the 2015 policy statement appears to be an effort to remove even the modest constraint that the commission will be guided by the public policy of promoting consumer welfare, and that the full effect of conduct will be considered.

The consumer welfare standard is premised on evolving economic analysis. It promotes predictability, administerability, and credibility in antitrust enforcement. Without it we can expect that antitrust enforcement will reflect political motivations rather than reasoned and objective assessment of benefits and harms to consumers. Enforcement based on political motivations rather than economic analysis would produce outcomes that are unpredictable and lack credibility. Decades of antitrust enforcement guided by the consumer welfare standard demonstrate the standard is administerable.

I've said before that what you measure is what you get. If the commission is no longer measuring consumer welfare, then by definition consumers will be harmed by the commission's change of direction to prioritize other interests. Consumers will face higher prices, less innovation, and reduction in quality because contrary to popular assertion, the consumer welfare standard does take into account price, quality, choice, and innovation. If staff were here today I would ask them what cases would they have recommended bringing but thought were precluded by the constraints of the Section 5 enforcement principles? And if dialogue with my fellow commissioners were permitted it would be constructive to discuss additional questions. If we rescind the policy statement with what do we plan to replace it?

Next, when Chairman Leibowitz announced a plan to use Section 5 expansively I was in private practice. I spent a great deal of time counseling concerned clients about what types of conduct could possibly run afoul of Section 5. In my experience, businesses want to follow the law but they need to know what the law is. Are we concerned with the lack of clarity that we will create for the business community if we rescind the policy statement?

Next, if promoting consumer welfare is no longer the guide for Section 5 enforcement what principle will guide commission actions? If the commission will not be guided by protecting consumer interests, whose interests will guide? Whose interests will guide the commission's enforcement of Section 5? Complaining inefficient competitors? In the interests of transparency, do my colleagues plan to inform the public of the types of cases they intend to bring that were precluded by the policy statement?

At a time when Senator Lee has introduced legislation that would eliminate the commission's antitrust enforcement because of divergence between the antitrust agencies, are my colleagues concerned that divorcing the use of Section 5 from the accepted antitrust principle of protecting consumers will further separate the commission's enforcement of the antitrust laws from enforcement by the Department of Justice, which in fact, provides fodder to those who would eliminate the FTC's antitrust jurisdiction.

I acknowledge that the commission may be able to identify language in court decisions that appears to allow a broad use of Section 5, but prudence dictates that the commission's limited use of stand alone Section 5 cases to the public policies underlying the antitrust laws and the conduct that harms consumers. In the 1980s, the commission lost three cases when it attempted to push Section 5 beyond the bounds of accepted antitrust principles. The commission needs to acknowledge the commission's losses in those cases, Ethel, Boise Cascade, and the Official Airlines Guide case. And as I mentioned previously, the commission was just admonished by a unanimous Supreme Court in AMG for exceeding its authority. The response to that decision should not be a new concerted effort by the commission to exceed the FTC authority regarding the use of Section 5 of the FTC Act.

A decision to rescind the 2015 enforcement principles regarding the use of Section 5 appears to be the unfortunate first step toward that end. And for these reasons I move that the commission publish a notice in the Federal Register to solicit public comment for a 45 day period, and consider the comments submitted in response to the Federal Register notice before rescinding the statement of enforcement principles regarding unfair methods of competition under Section 5 of the FTC Act. This step will enhance transparency, which is the purported goal of our very new chair.

LINA KHAN: Thanks, Commissioner Wilson. I will note that there was no public comment period when the 2015 statement was adopted. Is there a second floor for the topping motion?

NOAH JOSHUA I second the motion.

PHILLIPS:

LINA KHAN: OK. I will call for a vote on the topping motion. Commissioner Wilson.

CHRISTINE S. WILSON: I vote yes, noting that there were public comment periods for all of our recent horizontal merger guidelines, vertical merger guidelines, and various other policy initiatives. The section 5 statement was potentially the lone exception.

LINA KHAN: Commissioner Slaughter.

REBECCA No.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:No, and neither the unfairness policy statement nor the deception policy statement nor many, many others were subject to that.

NOAH JOSHUA Commissioner Phillips.

PHILLIPS:

NOAH JOSHUA Yes.

PHILLIPS:

LINA KHAN: And I vote no. The topping motion has failed. We will resume to the underlying motion, and I will turn it over to Commissioner Slaughter for any comments.

REBECCA SLAUGHTER: Thank you, Madam Chair. I don't have extensive comments other than to thank you for your leadership on this important issue and raising it for the commission. I think this is a really clear and important signal that the commission intends to hew closely to its statutory mandates, live up to our statutory responsibilities and obligations, and to be constrained by exactly what Congress intended us to be constrained by which is the text of our enabling statute, their structure, their history. So I think that your statement laid that out very well, and I'm pleased to support the motion.

LINA KHAN: OK, Commissioner Chopra.

ROHIT CHOPRA:Thank you so much. I just want to agree with the sentiment Commissioner Slaughter has articulated. For too long our predecessors on the commission thought they had the ability to repeal laws that Congress has passed. And this is a law that is an important one that there is clear text for wanting to do more and define that through guidance rules and others, and I really want to make sure I think all of the staff working at the commission who have really thought hard about this issue and will help take us forward and again, move past this period of perceived powerlessness Thank you.

LINA KHAN: Commissioner Phillips.

NOAH JOSHUA PHILLIPS: Thank you, Madam Chair. The majority's decision today to rescind the commission's bipartisan 2015 section policy statement reduces clarity in the application of the law, and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected officials at the FTC. This policy proposal was announced just a week ago, the bare minimum notice permitted by law, diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote so that the FTC cannot consider their views. That is inconsistent with the rhetoric we have heard today about opening up the policymaking process.

On the proposal, I still do not know what aspects of the bipartisan policy my colleagues object to. Perhaps it is the first principle that the public policy underlying the antitrust laws is the promotion of consumer welfare. That has been black letter Supreme Court law for almost my entire life. Maybe they object to the second, applying the rule of reason, which means we look carefully at the facts to determine the effect of a company's conduct. That has been the law for over a century as a unanimous Supreme Court reminded us just days ago ruling for the plaintiff, by the way, in NCAA versus All-star.

The policy statement we are rescinding was based on court decisions limiting Section 5. Will we follow those? I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it is the majority's view that the principles outlined in the statement no longer reflect the commission's enforcement practices, that the commission no longer plans to abide by legal precedent or that Section 5 is a law without limit, they should say so and how on the record. Here we are at a public hearing with a chance to add transparency, but instead we are doing the opposite by removing guidance and adding uncertainty.

This is not consistent with public statements my colleagues have made. Chair Khan alluded to this earlier. She and Commissioner Chopra previously wrote, for example, that clear rules help deliver consistent enforcement and predictable results. So why is one of their first initiatives to reduce clarity as to the commission's interpretation of Section 5. They could offer a replacement. That would add clarity. But they declined to do so. Reducing clarity in how the commission will approach antitrust enforcement is bad enough, but it is particularly troubling in light of my colleague's publicly stated desire to fashion antitrust regulations. Not only are they refusing to articulate limits to the commission's ability to declare conduct illegal after investigating, they are also refusing to articulate limits on their view of what they can regulate.

Today in effect the majority is asserting broad authority to regulate the economy. They mean, in other words, for just a handful of people to answer major policy questions with no intelligible principle from Congress to guide us. My view is that our laws permit no such thing. But leaving that aside, if the majority believe they have that power I believe it is incumbent upon them to explain its limits. I am deeply concerned that the commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about what conduct is lawful and what conduct is unlawful. And we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. I regret that today the commission came up short

LINA KHAN: Thank you, Commissioner Phillips. I should note I've submitted a written statement for the record that elaborates and builds on some of the comments I made earlier associated with this motion. I will now call for a vote. Commissioner Wilson.

CHRISTINE S. I vote no.

WILSON:

LINA KHAN: Commissioner Slaughter.

REBECCA Yes.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:Yes.

LINA KHAN: Commissioner Philips.

NOAH JOSHUA No.

PHILLIPS:

LINA KHAN: And I vote yes. The motion passes by a vote of 3 to 2. The final item on the agenda are a series of resolutions authorizing staff use of the commission's authority to compel production of documents, information, and testimony in certain types of investigation. With this motion the commission is considering a series of enforcement resolutions that would authorize staff to use what is known as compulsory process such as civil investigative demands and subpoenas.

For many years, the commission has routinely adopted compulsory process resolutions on a wide range of topics. For example, in 1980 the commission voted on a resolution to authorize staff to investigate violations of the FTC's franchise rule. This resolution is still in effect today, over 40 years later. Many of these resolutions cover specific industries like the automobile industry or the post-secondary education industry while others involve business practices that cut across sectors like privacy, or the targeting of older Americans.

The commission sometimes authorizes these resolutions without expiration until later rescinded, and sometimes authorizes them for a specific period of time. The reforms we are considering in this motion are designed to ensure that our staff can comprehensively investigate unlawful business practices across the economy. The proposed resolutions authorize compulsory process for investigations in key industries, including technology platforms, health care, and pharmaceuticals. Several of these industries are concentrated and there is widespread concern about unfair methods of competition or unfair or deceptive practices.

One resolution authorizes investigations relating to business practices that target workers and operators of small businesses, while another proposal allows staff to use compulsory process to investigate potential infractions of FTC administered statutes as they relate to COVID-19. These targeted resolutions would streamline investigations to fall within these subject errors enabling more expeditious investigatory process. This is particularly important given that we are in the midst of a massive merger boom.

The proposed resolution package also includes a general resolution authorizing the use of compulsory process when investigating mergers. Over the past several years, the commission has regularly and unanimously voted on such merger resolutions, but extra bureaucratic hurdles slow down and hobble investigations unnecessarily. Our reform package would streamline this so that we can be more nimble and comprehensive.

Finally, the package also authorizes greater use of compulsory process when investigating repeat offenders. While lawbreaking firms under a commission order often have certain reporting requirements, the reforms would give staff additional tools to investigate adjacent law violations. The resolution provides for compulsory process authorization in these areas for 10 years unless rescinded by the commission at an earlier point. Individual commissioners will continue to be required to sign compulsory process documents prior to issuing.

These resolutions will help relieve unnecessary burdens on staff and cut back delays and red tape bureaucracy when it comes to advancing our commission's law enforcement priorities while ensuring commissioner involvement. Accordingly, I urge my colleagues to adopt this package. I move that the commission approves the investigatory resolution circulated in file number P2101000 regarding investigations related to the COVID-19 public health emergency, conduct targeting labor and small business operators, conduct relating to technology platform markets, conduct relating to health care market, violators of FTC orders, transactions subject to pre-merger notification requirements and consummated mergers. Is there a second?

ROHIT CHOPRA:I second.

LINA KHAN: I will now open it up to my fellow commissioners to share any remarks on these resolutions. I'll start in reverse order security again, Commissioner Wilson.

CHRISTINE S. WILSON: Thank you, Chair Khan. Today we are asked to approve 7 omnibus resolutions authorizing the use of compulsory process. I received a set of resolutions last Friday, giving me fewer than five business days to assess their scope, content, and interaction with other existing commission resolutions and initiatives, and I've not had the benefit of expert staff input on the legal and economic rationales for undertaking these sweeping measures let alone their potential impact and consequences.

While some of these omnibus resolutions may have merit, I am being asked to vote on them as a package. I am concerned that in the aggregate, these 7 omnibus resolutions remove significant swathes of commission oversight from our investigations without adequate justification. My colleagues may try to paint this is an issue of whether I trust staff. That's not the issue. As a political appointee nominated by the White House and confirmed by the Senate, I am obligated to exercise due oversight of commission business.

I have great respect for the FTC as an institution. My respect for the FTC is largely due to the hard work and thoughtful input of career staff as well as the open deliberation and debate among commissioners. If our expert staff were present I would have asked them for their opinions on several issues. How will these resolutions add any clarity or insight to our mission? Will these resolutions help staff in either bureau conduct more efficient investigations? Have investigations been delayed by commission review of compulsory process recommendations on a case by case basis?

And to facilitate a bipartisan and collaborative dialogue there are a number of questions I would have asked of my fellow commissioners. What were my colleague's thoughts on the limits, if any, of many of the broad and vague terms in the resolution? Are we concerned that authorizing investigations into quote, exploitative, collusive, coercive, or predatory acts of practices will lead to investigations outside the bounds of judicially recognized antitrust principles?

Recall the three cases from the 1980s that I mentioned previously. When many of our resolutions run for five years what's the rationale for making these resolutions run for 10 years? How do my colleagues envision investigations being closed under this process? Could staff close more investigations of transactions or conduct without commission approval? At bottom, I cannot understand why the commission would abrogate so much of its authority at such a critical time for both consumer protection and antitrust enforcement.

On February-- In February of 2018, the Senate Commerce Committee held a confirmation hearing for Joe Simmons, Noah Phillips, Rohit Chopra, and me. Each of us was asked to reiterate our commitment to a collaborative and bipartisan process. Indeed the Senate Commerce Committee emphasized that it expected the FTC to continue its legacy of bipartisan cooperation. This is my third stint at the Federal Trade Commission, and I know that the Senate Commerce Committee was correct to seek this commitment from us. Collaboration makes the FTC stronger, improves our enforcement, and is a characteristic to be nurtured not abandoned. Process matters.

I welcome a dialogue with our new chair and my fellow commissioners on substance, but I encourage our chair to conduct that dialogue with thought and care. Thank you.

LINA KHAN: Thank you, Commissioner Wilson. And I'll echo the tremendous praise for the commission staff and avoid getting into a deliberative process but will note that staff worked tirelessly this week to respond to commissioner questions on this motion. Commissioner Slaughter.

REBECCA SLAUGHTER: Thank you, Madam Chair. I'll keep my remarks brief and just to say that I really appreciate you bringing forward these important motions. I will just observe that it has never made sense to me that we had broad and sweeping omnibus resolutions largely on the consumer protection side of our mission area and not the equivalent on the competition side. And so I have long been in favor of harmonizing our approach across our mission areas. And these resolutions I think are an important part of that and reflect the complicated economic realities of the markets with which we are dealing and that we need to be investigating. So I'm pleased to support them. And I thank you for keying them up for a vote.

LINA KHAN: Great. Commissioner Chopra.

ROHIT CHOPRA: Thank you, Chair Khan. I will vote in favor of the package of commission investigative resolutions to authorize the use of civil investigative [INAUDIBLE] subpoenas and other compulsory process to allow FTC staff to detect unlawful activity in the economy as it relates to COVID-19, health care digital platforms, mergers, and more. Our vote today relieves our overworked prosecutors and investigators of significant burdens and delays when seeking to conduct a thorough investigation. And I know this will empower and relieve them.

For decades, as Commissioner Slaughter mentioned, the commission has issued a substantial number of resolutions to authorize the use of compulsory process and to help detect unlawful activity as it pertains to certain conduct industries and vulnerable populations. Overwhelmingly, these resolutions have been approved unanimously, including by many of my colleagues in recent years in support of our mission and our staff. The resolutions are crafted to ascertain violations of law enforced by the Federal Trade Commission including Section 5 of the FTC Act among others.

Congress and the courts have generally described Section 5 as prohibiting conduct that is unfair, deceptive, anti-competitive, collusive, coercive, predatory, exploitative, and exclusionary, among others. One enforcement resolution particularly stands out and I strongly support making clear that commissioners will turn the page on our approach to repeat offenders. FTC orders are not suggestions, but many bad actors see them as such.

After the FTC voted to finalize an order in 2012 barring Facebook from engaging in certain unlawful acts with respect to privacy and data protection, the company appeared to have violated that order almost immediately over and over and over again. The FTC's failure to enforce this order and quickly investigate potential violations had devastating consequences, the most well-known being the Cambridge Analytica privacy breach. Commissioners spanning multiple administrations have long been quick to bring down the hammer on small businesses when they violate orders, but when it comes to large dominant firms, commissioners have deprived of staff of the tools and resources to properly protect the public. The repeat offender enforcement resolution authorizes commission staff to use compulsory process to investigate companies subject to commission orders.

While past commission orders allow our staff to request certain types of information from the company itself to determine whether it is complying with the order, commissioners may have had not previously authorized agency staff to compel information from third parties. In addition commissioners have not given our staff the explicit authorization to investigate other potential misconduct, including those adjacent to the original violation. Today's reforms will increase the capacity for agency staff to protect the public from repeat offenders, and is another step forward to restore the agency's legitimacy and credibility.

LINA KHAN: Thank you, Commissioner Chopra. Commissioner Phillips.

NOAH JOSHUA PHILLIPS: Thank you, Madam Chair. The 7 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 in my view, 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. It envisioned an informed and deliberative decision by all commissioners before unleashing the FTC's considerable investigative power.

For what are likely to be all of our most prominent and expensive investigations, the proposed resolutions undermine all of that. They would allow the chair or one commissioner that the chair selects 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 7 different resolutions on broad and diverse topics in one vote. The majority is not persuasive that there is a problem that needs fixing in the first place. The commissioners can make sure-- 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 the use of compulsory process. The only exception that I can think of during my tenure involved an unusual request raising serious questions about our authority, which just proves why oversight is good.

My colleagues argue that the commission has already undertaken similar delegations with respect to consumer protection issues. That is a false equivalence. First, the subject matter and wording of those prior delegations was generally much narrower. The public of course can't see that. Second, unlike our 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 have relevant information.

Those requests impose substantial costs on the recipients and also on the FTC. The commission has a duty to avoid needless burden on the economy and to manage its resources wisely, which is why commission permission has always been necessary before costly antitrust investigations before. The proposed authorizations will prevent us from fulfilling that duty. This 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 prescribes unfair methods of competition and unfair or deceptive acts and practices. And that is what we should investigate. Our consumer protection omnibus resolutions don't include language outside our statute. To remedy this, Madam Chair, I would like to make a topping motion.

LINA KHAN: OK, please go ahead.

LINA KHAN: Thank you. I move to amend the resolutions relating to the COVID-19 public health emergency, labor or small business operators, health care markets, person subject to prior commission orders, and digital platforms to replace unfair, deceptive, anti-competitive, collusive, coercive, predatory, exploitative, or exclusionary acts or practices with the text of our statute, unfair or deceptive acts or practices or unfair methods of competition, end quote, to be consistent with the statutory language of Section 5 of the FTC Act.

LINA KHAN: Is there a second?

CHRISTINE S. I second the motion.

WILSON:

LINA KHAN: OK. I will call for a vote on the topping motion. Commissioner Wilson.

CHRISTINE S. Yes.

WILSON:

LINA KHAN: Commissioner Slaughter.

REBECCA No.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:No.

LINA KHAN: Commissioner Phillips.

NOAH JOSHUA Yes.

PHILLIPS:

LINA KHAN: And I vote no. The topping motion has failed. I will now resume for a vote on the underlying motion.
Commissioner Wilson.

CHRISTINE S. I vote no.

WILSON:

LINA KHAN: Commissioner Slaughter.

REBECCA I vote yes.

SLAUGHTER:

LINA KHAN: Commissioner Chopra.

ROHIT CHOPRA:Yes.

LINA KHAN: Commissioner Philips.

NOAH JOSHUA No.

PHILLIPS:

LINA KHAN: And I vote yes. The motion passes 3 to 2. With that final vote this concludes the official agency business of the commission that we are disposing of today under the Sunshine Act. I'm adjourning the meeting and we will now turn to the receipt of statements from members of the public. The commission invited members of the public to share feedback on the commission's work generally, and to bring relevant matters to the commission's attention. I want to thank each of you in advance for sharing your feedback. The commission takes your input seriously.

Today over 30 members of the public have signed up to address the commission virtually via webcast. To ensure that each person has a chance to be heard, we've asked each person to limit their remarks to 1 minute. With that I will turn it over to Lindsay Kryzak to open it up to the public.

LINDSAY KRYZAK: Thank you, Chair Khan. Before we could begin please note that the FTC is recording this event, which may be maintained, used, and disclosed to the extent authorized or required by applicable law, regulation, or order, and it may be made available in whole or part in the public record in accordance with the commission's rules. Each member of the public will be given one minute to address the commission today. Our first speaker is Kristen Corral.

**KRISTEN
CORRAL:**

Hello. My name is Kristen. I am a restaurant owner in Las Vegas, Nevada. I wanted to speak today on the impact that large scale third party delivery companies like Uber Eats have on independent restaurants. Predatory and unethical practices like menu stealing, charging for phone calls that don't result in orders, zero billing transparency, data stealing, and dummy websites have yet to be investigated but there are part of most restaurants everyday life. These tech companies have existed for far too long with absolutely no oversight.

Here in Nevada we recently passed SB 320, which is an important bill that restricts and finds Grubhub, DoorDash, and Uber if they steal our menus and illegally place them on their platform. It also deals with billing transparency. While sb 320 is an important step in paving the way to regulating these billion dollar tech companies, it's simply not enough. Restaurants need help, consumers need awareness, and these issues need to be pushed into the spotlight. We can no longer sit by and let these companies bulldoze their way to a monopoly at the expense of small businesses. I'm asking the FTC today to open a formal investigation into Uber Eats, DoorDash, Grubhub, and any of their subsidiaries. Thank you so much.

**LINDSAY
KRYZAK:**

Thank you, Kristen. Our next speaker is Matthew Seiler. Matthew.

**MATTHEW
SEILER:**

Good afternoon commissioners. NCPA's 21,000 members dispense nearly 40% of the nation's retail prescriptions, and 57% of independent pharmacy service communities that rank high or very high on the CDC social vulnerability index. Despite these impressive numbers, community pharmacies are under attack. The three largest pharmacy benefit managers now control 77% of all prescriptions, and are owned by or have financial affiliations with giant mail-order, specialty, and pharmacy chains. The PDMs are systematically driving community pharmacies out of business through anti-competitive practices such as the low cost reimbursement and patients doing TBM preferred networks.

This is like a pharmacy desert. One in 3 neighborhoods in the 30 most populous cities are pharmacy deserts. NCPA urges this body to take immediate action to curb the PBM's anti-competitive conduct and the effects of consolidation and vertical integration in the pharmacy industry. Thank you.

**KRISTEN
CORRAL:**

Thank you, Matthew. Our next speaker is Andrew Martino.

**ANDREW
MARTINO:**

Good afternoon. I'm also going to be asking the commission to be looking into the predatory and deceitful practices of the major third party delivery apps such as Grubhub, DoorDash, and UberEats. Quick anecdote from my perspective. I'm not partnered with DoorDash in almost two years. 30 days ago I started receiving several DoorDash orders. Drivers were showing up to our restaurant. There was complete confusion and chaos caused for both our restaurant, the consumers placing the meal, the driver picking up the meal.

My only cause to action to fix this was to call them where they proceeded to give me a sales pitch on why I should partner with DoorDash to avoid these situations. I know these-- we've been speaking of menu stealing, data theft, algorithmic displays and how these people are funneling orders away, dominating SEO listings, advertising using restaurant's name so that their names don't come up on restaurant search. The list goes on and on. We really, really need your help to investigate these practices to give independent restaurants a voice so that we can continue to thrive and provide jobs in the future.

KRISTEN Thank you, Andrew. Our next speaker is Todd Achilles. Todd.

CORRAL:

TODD
ACHILLES: Chair Khan and commissioners, thank you for the opportunity to speak. I'm Todd Achilles, the CEO of Evoca, a next gen television broadcaster based in Boise, Idaho. We are using the FCC's latest broadcast standard called ATSC 3.0 to bring an exciting, new, competitive TV service to chronically underserved markets across the US. Evoca seeks to license must have content from major media companies. Most are enthusiastic to work with us. However, a few companies that control both broadcast and non broadcast programming dislike our innovative use of 3.0 because it challenges entrenched industry economics.

These companies refuse to license the programming we need for competitive service which would save US consumers an estimated \$18 billion annually. I've submitted an economic analysis of consumer harm caused by these anti-competitive practices. We ask the FTC to help consumers in underserved communities by clarifying the obligations of content owners to licensed programming to industry innovators on reasonable terms and conditions. Thank you.

KRISTEN Thank you, Todd. Our next speaker is Neil Chilson.

CORRAL:

NEIL CHILSON: Chair Khan and commissioners, my name is Neil Chilson. I spent four years at the FTC as an attorney advisor to acting chairman Maureen Ohlhausen and as the acting chief technologist. Two quick points, on transparency the public has few details about today's items and you have already voted to adopt them. If this is transparency, it looks a lot like the transparency of the emperor without clothes who bears all knowing no one will or can stop them. Increased transparency should seek to improve the agency's decisions not merely to enable a monthly Festivus style airing of grievances.

On substance, the FTC is a highly functional enforcement agency staffed by very talented people. Today's process changes weaken this strong institution by eroding consensus building and quality assurance procedures. Such changes may strengthen the chair's ability to push through controversial actions. But I believe that will undermine the quality of noncontroversial enforcement which formed the bulk of the FTC's enforcement actions. Thank you.

KRISTEN Thank you, Neil. Our next speaker is Jeff Chester. Jeff.

CORRAL:

JEFF CHESTER: Thank you. 25 years ago, the FTC claimed its place as the key federal agency to address crucial internet policy issues, which it then called the National and Global Information Infrastructure. We supported the agency that time. However, since that time and now the commission has allowed the online industries to define and set the terms for privacy. It has enabled corporations to merge without any kind of meaningful oversight especially in the big data digital marketing system. It has failed to really define what constitutes fairness, and has ignored issues to ensure non-discrimination, equity, and the need for robust civil rights protections online.

Today we have a pervasive surveillance marketing apparatus dominated by a handful of giants and interlocking companies. Even in the one area where advocates specifically went to Congress to give you rulemaking authority, that was COPPA in 1998, the commission has failed to even enforce that statute and protect children. Today we are at a critical crossroads, and indeed I hope it is true as Commissioner Slaughter said, new era.

KRISTEN Thank you, Jeff.

CORRAL:

JEFF CHESTER: I apologize.

KRISTEN Thank you.

CORRAL:

JEFF CHESTER: Thank you.

KRISTEN OK, Moving on to Pam. Dixon Pam.

CORRAL:

PAM DIXON: Yes. Chair Khan and commissioners, thank you for the opportunity to comment. The health breach notification rule implements the American Recovery and Reinvestment Act of 2009. Congress asked the FTC to craft the rule applicable to a vendor of PHRs or to a PHR-related entity in connection with a product or service offered by that entity. The FTC crafted an excellent rule consistent with the quite significant limits provided by Congress.

15 years ago, PHR technology was clunky, and data transfers could be challenging. Today, there is significant expansion in health data ecosystems outside of HIPAA and include apps, smartwatches, mobile devices, and personal health records, among others. The ecosystem has escaped the boundaries of the original rule. The World Privacy Forum request that the commission re-examine the health breach notification rule to update it. The impacts of the global pandemic have put an exclamation point on this issue. Thank you for your work.

LINDSAY Thank you, Pam. Our next speaker is Keith Miller. Keith.

KRYZAK:

KEITH MILLER: Keith Miller, Franchisee Advocacy Consulting. Minorities, immigrants, and women disproportionately buy into franchising as a way to realize the American dream, but the dream can often turn into a nightmare. The franchise rule requires disclosure, but the FTC doesn't even collect the document. And the industry is well aware there's really no enforcement.

And this is just part of the equation. It never acts against franchise companies upon complaints of unfair or deceptive acts or practices. After filing complaints, franchisees either get no response or are given recommended material on the website titled thinking about buying a franchise. Because personal who guarantees, most franchisees are putting all their assets at risk including their retirement savings and home.

Take complaints seriously. It may be costing those impacted hundreds of thousands of dollars. Better yet, take a deep dive into the unequal power and balance in the industry and use your authority to do a 6P study. Thank you, commissioners.

LINDSAY Thank you, Keith. Our next speaker is Benjamin Jolley. Benjamin.

KRYZAK:

**BENJAMIN
JOLLEY:**

Thank you, Chair Khan and commissioners. My name is Benjamin Jolley. I'm a third generation pharmacist at a family-owned pharmacy. I call on you to thoroughly investigate the entire pharmacy supply chain, which is choked at every level by monopolies. If you examine the Fortune 500, you'll find that 11 of the top 17 companies are involved at some level of the pharmacy supply chain as pharmacists, wholesalers, pharmacy benefits managers. And insurers.

The impact of their combined market power can be seen in this week's release of ReliOn NovoLog. Because of the rebates that PBM extract, I can purchase at our pharmacy NovoLog for \$535 wholesale. While Walmart can sell an identical product for \$86 retail. I ask you to use your statutory authority, as your predecessors have, to restructure our economy starting with my industry in favor of the mother in my state, who, quote, "Would give anything just to be able to pick up my son's prescription from our local pharmacy." Thank you.

**LINDSAY
KRYZAK:**

Thank you, Benjamin. Our next speaker is Chris Jones. Chris.

CHRIS JONES:

Good afternoon, I'm Chris Jones with the National Grocers Association. Remember how hard it was to buy supplies during the pandemic at your local independent grocer? It wasn't an accident. For years, dominant food retailers have rigged the game. They cut sweetheart deals that forced independents to pay higher prices.

Some put so much pressure on suppliers that they're forced to cut out independence entirely. Sometimes your local store can only get key products from their competitors. How backwards is that? At the end of the day, consumers are left with worse fewer and less healthy choices, especially those in urban and rural communities.

It's economic discrimination. It's illegal. And it's time for the FTC to enforce the Robinson-Patman Act. Independents compete to offer low prices, higher quality food, more accessible locations, and good jobs. If regulators don't act and power buyers continue to strangle their suppliers, America's Food desert crisis will only worsen. But you have a choice. Choose to level the playing field for the health of our economy and for the health of our families. Thank you.

**LINDSAY
KRYZAK:**

Thank you, Chris. Our next speaker is Lillian Salerno. Lillian.

**LILLIAN
SALERNO:**

Thank you Chair Khan and commissioners. My name is Lillian Salerno. And I am an attorney and advocate for competition and was a co-founder of a medical device manufacturing company that invented the world's first retractable syringe.

Because of the pandemic, it has become exposed of how fragile our health care system is. And I had a front row seat for the last 25 years watching as more and more medical device manufacturers were run out of business because of the dominant manufacturers and the inaction of the Federal Trade Commission and Congress to investigate the dominant manufacturers stranglehold on the health system.

It has increased health care costs. And it had made it, during the pandemic, where the US government had to go hat in hand to China to find out how to get a hold of essential health care supplies to vaccinate ordinary Americans. We are at risk every day. Our children are at risk if we do not enforce antitrust laws and make it so small medical device manufacturers can compete and manufacture in this country.

LINDSAY KRYZAK: Thank you, Lillian. I'm sorry to cut you off. Thank you for speaking. Our next speaker is Joan Moriarity. Joan. Joan, I think you're on mute.

JOAN MORIARITY: Well, thank you. Good afternoon. The Strategic Organizing Center is a democratic coalition of four labor unions, SEIU, the Teamsters, the CWA, and the Farmworkers, that together represent \$4 million workers. In order to address the well-documented increases in corporate concentration, a power that harm American consumers, small businesses, and workers, we ask that the FTC to prioritize, one, engaging in aggressive investigations and enforcement actions of employers who abuse labor market power. Relatedly, all murderers, we believe should be reviewed for their impact on labor market concentration.

Two, the FTC should use its regulatory power to prohibit outright anti-competitive work or restraints that does not compete restrictions and no-poach agreements. Third, the FTC should reconsider taking antitrust enforcement action against independent contractors who attempt to improve their working conditions, reorganizing. Restricting these rights simply hands greater power to employers, especially for workers without the protections of traditional employees.

And lastly, the FTC should address the anti-competitive practices unique to big tech including threats posed by vertical integration. They're just self-preferencing in various forms of exclusionary conduct, as well as address the outsized power such firms can exercise over workers when they become dominant economic actors. Thank you.

LINDSAY KRYZAK: Thank you, Joan. Our next speaker is Emily Miller. Emily.

EMILY MILLER: Thank you. I'm representing Family Farm Action Alliance. And we are thankful for this opportunity and encourage the commission to take action on the following issues. First, we encourage FTC to amend their merger and acquisition guidelines to include bright-line market share limits modeled after the 1968 merger guidelines and the use of the failed efficiency rule regarding consumer welfare standards.

Second, in November 2020, we joined other groups in filing a complaint requesting the FTC investigate Cargill Incorporated's deceptive marketing practices of their Honeysuckle White and Shady Brook Farms turkey brand products. The labels claim they're raised by independent family farmers, implying benefits for workers, animals, and the environment. When, in fact, the turkeys are produced on large corporate controlled factory farms.

Third, we applaud the finalized Made in USA labeling rule with meat and meat products being 100% born, raised, and harvested in the US and the MUSA rule including the all or virtually all guidance. We appreciate this opportunity to raise the issues before the Commission and look forward to attending future commission meetings.

LINDSAY KRYZAK: Thank you, Emily. Our next speaker is Todd Bone. Todd. Todd, I think you're on mute. Sorry about that.

TODD BONE: Can you hear me now?

LINDSAY KRYZAK: Yes, we can. Thanks, Todd. Go ahead.

TODD BONE: I'm Todd Bone, founder of a 30-year-old IT services company. I'm also the chairman of the ASCDI association and board member of the Service Industry Association, representing over 400 companies that provide break-fix repair and maintenance on critical IT infrastructure after the OEMs have stopped supporting clients legacy models. As an example of critical infrastructure, my company maintains the legacy supercomputers that run the United States missile defense program and only because the equipment was deemed end of the support by the OEM.

Unfortunately, exclusionary tactics by the OEMs prevent my company and our association members from bidding on far less critical equipment support. Why? Clients would love to have us provide these services. We need the help from the FTC and right to repair legislation to level the playing field. Thank you.

LINDSAY Thank you, Todd. Our next speaker is Cheri Kiesecker. Cheri.

KRYZAK:

CHERI Hello. I'm here as a parent and a member of the Parent Coalition for Student Privacy. The use of edtech in
KIESECKER: schools is often required, but there is little to no accountability or transparency on how student data are used or shared with third parties or data brokers. With schools consenting on parents' behalf, students are a captive class.

When parents ask edtech operators for transparency on data collection, use, and sharing, their questions often go unanswered. This includes edtech companies who are signatories of the student privacy pledge and who have agreed to be transparent and not sell student data. We ask the FTC to use your 6P and 5P rulemaking authority to investigate deceptive and unfair practices of edtech and require transparency on the collection and use of student data including metadata, algorithmic fairness and accuracy, transparency on third party use and sharing of student data. Thank you for today, and thank you for protecting students.

LINDSAY Thank you, Cheri. Our next speaker is Greg Gunthorp. Greg.

KRYZAK:

GREG Hello. I'm Greg Gunthorp of pastured pig and poultry and sheep farmer as well as processor in Indiana. I'm on the
GUNTHERP: board of the American Grassfed Association. I'm encouraged the FTC is holding public meetings and rulemaking on Made in the USA. I'm discouraged that this has been turned into a bipartisan issue. Lots of us believe the FTC's role of an independent, neutral organization to oversee fair and competitive markets have been neutered since the 1970s.

Made in the USA or product of USA on foreign beef put in a package in the US is an egregious abuse of unfair competition. Voluntary Made in the USA on meat and poultry should be born, raised, and processed in the USA. In rural America, this isn't a Republican or a Democratic issue. It's an issue of, is the FTC for Americans or for the multinational corporations? Thank you.

LINDSAY Thank you, Greg. Our next speaker is Dr. John Borzilleri. John.

KRYZAK:

JOHN BORZILLERI: You unmute me. Hi. I'm a physician, an MBA, and a 30-year health care professional investment analyst. In 2013, I uncovered the very simple scheme behind the massive increase in US brand drug prices over the last 15 years. It's a very simple scheme in which drug companies have been under secret contracts paying money tied to massive increases in list prices to the four insurance companies that control Medicare Part D where the scheme began and across the insurance landscape.

Unfortunately, a big factor in this has been the endless horizontal and vertical mergers that has resulted in this. These cases are active in the court. The Justice Department has been trying to block them under our directive. Courts have allowed it without looking at the evidence. I hope the FTC will look at the information. It's on our website www.drugpricetruth.org. We welcome the opportunity to speak to anyone. Thank you very much. Please protect consumers and patients.

LINDSAY KRYZAK: Thank you, John. Our next speaker is James Haynes. James.

JAMES HAYNES: Good afternoon. My name is James Haynes, and I'm here today on behalf of Veterans Education Success. Student veterans have long been subjected to deceptive and misleading recruiting and enrollment by predatory for-profit colleges and their lead generators. We applaud the Commission for taking action against predatory for-profit colleges including University of Phoenix and DeVry University and for shutting down several lead generator websites including army.com and airforce.com for, quote, "pretending to be US military recruiters or affiliated with the military," unquote.

These websites interfered with military recruitment and patriotic Americans desire to enlist. We thank the Commission for taking action against Career Education Corporation for its use of these deceptive lead generators. And we urge the Commission to act against the other colleges that paid for and partner with these pernicious websites as well as address other lead generators that we outlined in our petitions to the Commission dated June 19, 2020. Finally, we strongly urge the commission to proactively enforce the FTC Act including using the long-dormant Penalty Offense Authority against offenders in higher education. Thank you for your time.

LINDSAY KRYZAK: Thank you, James. Our next speaker is Misty Chally. Misty.

MISTY CHALLY: Thank you. My name is Misty Chally. I'm the executive director of the Coalition of Franchisee Associations. By way of background, CFA is the largest franchisee-only trade association in the United States representing more than 40,000 franchisees employing over 1.5 million individuals. Many franchisees are reassured when they are informed that the FTC handles oversight of the franchise rule, a rule which defines acts or practices that are unfair or deceptive in the franchise industry.

Unfortunately, it does not appear that FTC has the resources to adequately oversee this rule including a review process for franchise documents, a complaint handling process, or enforcement for violations of the rule. Because of this, franchisees rely on misleading, incomplete, and sometimes deceptive information. And they invest their life savings in a franchise that may not be what it seems. CFA would respectfully request that the FTC invest substantial resources in the franchise rule review, complaint handling, and enforcement. Thank you, and we look forward to working with you.

LINDSAY Thank you, Misty. Our next speaker is Conor Healy. Conor.

KRYZAK:

CONOR HEALY: Hi. Good afternoon. I'm Conor Healy, IPVM's government director. A forthcoming investigation by our team has found federally banned China-made surveillance products are being sold to federal agencies as made in the USA through the government's own online procurement marketplace, GSA Advantage. This includes numerous examples of secretly relabeled [INAUDIBLE] dollar products. To manufacturers, Congress has banned for posing risk the national security. And both are sanctioned as key operators and designers of state surveillance systems used to track figures in [INAUDIBLE].

Frauds like these do not care about undermining US national security. They occur because sellers willing to lie online stand to profit, masking cheaper foreign-made products with dubious origins as made in USA. And they know the FTC has a history of doing nothing while honest American businesses lose out. Clear risks of real FTC enforcement can change that. And that's why we support expanding the FTC's ability to take swift action against made in USA violators. Thank you.

LINDSAY Thank you, Conor. Our next speaker is Jon. Taets. Jon.

KRYZAK:

JON TAETS: Thank you for the opportunity to speak today. My name is Jon Taets. I'm the director of Government Relations at the National Association of Convenience Stores. Over the years, our industry has been the victim of price discrimination behavior exhibited by many members of the supplier community. Most notably, our industry often pays higher prices in the grocery channels. Suppliers won't sell our members products in certain sizes in packaging.

Our industries often charge higher wholesale prices on many products than competitors and grocery based in box stores sell those products at retail. The problem is an even more pervasive than just charging higher prices on just occasion. Some cases, some manufacturer supplier companies actively sought to [INAUDIBLE] retailers are finding alternative and cheaper supply options.

Our retailers have also often found that they cannot purchase the same kind of product packaging as some competitors. For example, where they can purchase individual 20 ounce sort of products, they are often unable to purchase a multipack at the same 20 ounce for resale. Certain product sizes are also often restricted.

We've been told of [INAUDIBLE] examples where our channels offer 28-ounce options for grocery, and big box competitors are able to get 32-ounce options often for an even cheaper price. These findings are pervasive throughout the country, at least in respect to the average sales. We urge the FTC to investigate these [INAUDIBLE] issues. Thank you for your time.

LINDSAY Thank you, Jon. Our next speaker is Carmen Scurato. Carmen.

KRYZAK:

CARMEN SCURATO: Thanks. Chair Khan, commissioners, I'm here representing Free Press, an internet advocacy organization fighting for racial justice. And we'd like to acknowledge the steps that the Commission has taken today in rescinding the 2015 unfair methods of competition guidance and streamlining its procedures under Section 18. These are critical steps to addressing the damaging business models, privacy abuses, and civil rights abuses of large tech companies.

How people's data is collected and used affects our economic opportunities. And this disproportionately impacts and makes discrimination against people of color, women, members of the LGBTQIA community, religious minorities, people with disabilities, and other especially impacted groups. We've seen algorithms that can facilitate age, racial, and sex discrimination in employment, housing, lending, commerce, and voting. The Commission must use this opportunity to construct new frameworks to prevent discriminatory outcomes in data collection and algorithmic decision. Thank you.

LINDSAY KRYZAK: Thank you, Carmen. Our next speaker is Laura Smith. Laura.

LAURA SMITH: Thank you commissioners and Chair Khan for this opportunity. I'm Laura Smith, legal director of Truthinadvertising.org. As the consumer advocacy organization that filed the petition for rulemaking to promulgate regulations for made in USA claims, we believe the Commission's vote to finalize the rule will benefit not only consumers but also ensure that honest companies have an even playing field when it comes to made in USA marketing.

FTC rules provide clarity and guidance for businesses seeking to follow the law and provide protection for consumers. Rules substantially increase deterrence in whole industries and effectively punish wrongdoers. Now more than ever, with rising numbers of schemes taking advantage of seniors, veterans, and communities of color, we need rules that will protect these susceptible groups and all American consumers. For these reasons, TINA.org supports the Commission's review of its rulemaking procedure and intends to file additional petitions in the future. Thank you for your time.

LINDSAY KRYZAK: Thank you, Laura. Our next speaker is Sagar Golla. Sagar.

SAGAR GOLLA: Hi. Thank you. Hello. Can you hear me?

LINDSAY KRYZAK: We can. Thank you.

SAGAR GOLLA: OK. Thank you for giving me this opportunity. My name is Sagar Golla, founder and CEO of HostBuddy. We provide omnichannel commerce for restaurant owners that includes both online ordering and voice ordering. For example, HostBuddy was one of the top five in the food ordering in the Google Assistant app market until Google released later on a food ordering app.

And this app has super powers. So every invocation of order food by the consumer are controlled and ordered by Google to their select partners including their delivery partners. Some of the participants commented on say this choice actually belongs to the consumers and the restaurants. And besides the super app, Google also published hundreds of assistant apps connecting assistance to all the major food brands.

So these are simply web apps, not duplex apps Google promised. I included the demo links. Similarly, in the GMB search listing, our restaurant owners should have a choice to pick their online ordering partner. So I request your immediate attention and swift action--

LINDSAY KRYZAK: Thank you, Sagar. [INAUDIBLE]. Thank you for speaking. Our next speaker is Brian Scarpelli. Brian.

BRIAN SCARPELLI: Can you hear me?

LINDSAY KRYZAK: We can. Thank you.

BRIAN SCARPELLI: Thank you. Thank you. ACT, The App Association appreciates the opportunity to provide its views as part of the FTC's July open meeting. We are a not-for-profit trade association representing thousands of small business software application development companies and technology firms located across every state in America. Several areas on the FTC's agenda today certainly affect our members. But today, we speak specifically to urge the FTC to take action to protect competition and innovation in the context of standard essential patent abuse.

Consensus technical standards drive the development of the internet of things. And small businesses like our members need a successful standards environment to take part in the next wave of the digital economy. Countless small business innovators rely on SEP holders voluntary promises to license their standard essential patents on fair, reasonable, and non-discriminatory terms for certainty in the research and development phases and in other business planning.

We believe the FTC has a critical role in providing this certainty and promoting competition for everyone in the standards ecosystem and those who rely on it including consumers. We further offer detailed views on a range of issue areas and developments related to agenda items, particularly those related to unfair methods of competition under Section 5, as well as enforcement investigation in our written comments and urge consideration of those. Thank you.

LINDSAY KRYZAK: Thank you, Brian. Our next speaker is Drew Figdor. Drew. I apologize. Drew might have dropped off. Our next speaker is Jane Chung. Jane.

JANE CHUNG: I'm an advocate at Public Citizen here representing Athena Coalition fighting the unfettered corporate power of Amazon. We at Athena believe the continuous digital and biometric surveillance conducted by tech monopolies like Amazon constitute an unfair and deceptive practice. And we urge the FTC to ban it immediately. Continuous digital surveillance through devices like Amazon Alexa and Ring is unfair as it surveils community members including children without consent.

Biometric surveillance like facial and voice recognition are unfair as they do not work on people of color and women, causing substantial injury even including the wrongful arrest of several Black men across the country. We've submitted comments further detailing why we believe this surveillance is also deceptive as well as an unfair method of competition. And we look forward to further dialogue on this important issue. Thank you.

LINDSAY KRYZAK: Thank you, Jane. Our next speaker is Dare Bakst. Daren.

DAREN BAKST: I'm Daren Bakst, a senior research fellow at the Heritage Foundation, [INAUDIBLE] show in my own. There are only six days to provide written comments before this open meeting. Is this an enough time, especially when addressing this epidemic extreme proposal setting the Section 5 statement?

By not knowing why the proposed rescission was on the agenda, it was difficult for the public to provide any meaningful public feedback. The public couldn't comment on aspects of the rescission because critical information wasn't provided to the public and still hasn't such as what are the concerns about the statement. Also, these oral comments are being provided after the business meeting.

The 2015 statement was a bipartisan framework crafted during the Obama administration and supported by 3 Democrat commission members. The statement list of widely agreed upon principles in writing antitrust law at Section 5 enforcement. This included the promotion of consumer welfare. The FTC shouldn't have move away from this focus on consumer welfare and harm to the competitive process. To do so will hurt consumers, competition, innovation, and the economy. Thank you.

LINDSAY Thank you, Daren. Our next speaker is Kyle Wiens. Kyle.

KRYZAK:

KYLE WIENS: Thanks for having me. I'm Kyle with The Repair Association. And I'm here primarily just to say thank you to the commissioners and particularly to the staff at the FTC for the phenomenal work that you've done over the last two years working on the Nixing the Fix workshop and report.

We were really encouraged by a validation of some of the challenges that we've seen in the repair industry in the balances of the market. And we're really looking forward to working with the agency, whether it's on rulemaking or whether [INAUDIBLE] going forward. So thank you very much.

LINDSAY Thank you, Kyle. Our next speaker is David Barclay. David.

KRYZAK:

DAVID My name is David Barclay. I'm legal counsel at the American Economic Liberties Project. Thank you for this opportunity. My comment today concerns the FTC's historic failure to enforce the antitrust laws against the pharmaceutical industry. Specifically, the FTC has historically failed to bring action seeking injunctive relief against ongoing pharma antitrust violations until years after the fact and patients have already been harmed.

BARCLAY:

For example, the FTC recently filed an amicus brief in the Humira antitrust litigation that recognized the possibility of a pay for delay or market allocation scheme regarding that drug. While an amicus brief might be helpful, it doesn't stop the ongoing harm to patients from price fixed drugs like Humira, which is still not expected to face competition until 2023 and which Americans continue to spend \$20 billion on per year. I encourage the FTC to use its full range of authorities including actions for injunctive relief to address ongoing pharma antitrust violations. Thank you.

LINDSAY Thank you, David. Our next speaker is Maureen Mahoney. Maureen.

KRYZAK:

MAUREEN Thank you. Chair Khan, commissioners, my name is Maureen Mahoney. I'm a senior policy analyst at Consumer Reports. Very much appreciate the opportunity to speak today and looking forward to working with you.

MAHONEY:

We urge you to take prompt and aggressive action to protect consumers in the online marketplace. FTC rules to interpret and prohibit unfair methods of competition to address persistent market dominance and abuses are long overdue. Privacy must also be a top priority for the FTC. It should begin work on privacy rules, which would not put the burden on consumers to protect their privacy and would prioritize substantive restrictions and protections over the process and accountability programs that form the heart of current settlement agreements.

And the FTC, through rulemaking or enforcement, should expand upon its precedents to clarify that evading platform level privacy settings such as the global privacy control is unfair and deceptive. Third, we urge you to expedite the release of strengthened endorsement guides. Social media and influencer advertising have outpaced the existing rules, and the market needs bright-line guidance. And finally, the FTC needs far more resources to do the massive job with which it is tasked. And we urge you in the future to request a substantial increase in agency funding. Thank you.

**LINDSAY
KRYZAK:**

Thank you, Maureen. Our final speaker today will be Kerry Sheehan. Kerry .

**KERRY
SHEEHAN:**

Hi. I'm here on behalf of iFixit. I'm the head of US policy there. We provide a free international open source repair guide for everything. And we also sell spare parts and tools to help people fix their electronic devices. Over the last 20 years, we've seen an explosion in the use of repair restrictions by the electronics manufacturers that serve to lock people out of their devices and monopolize the repair market.

First, I want to thank the Commission for all of your work on the Nixing the Fix report, the unanimous report. We're really very grateful for all of the hard work that all of the commissioners and staff put into that report. And I want to urge you to follow up on that report by prioritizing enforcing the law against companies who use unfair and deceptive repair restrictions, who violate the Magnuson-Moss Warranty Act, and to use your rulemaking power to promulgate new rules expressly prohibiting repair restrictions that hurt consumers by driving up prices and restricting choice, that restrict competition in the repair market and that employ unfair terms in end-user license agreement that aim to control downstream uses of electronic devices. Thank you.

LINA KHAN:

This concludes the open session and today's event. Thank you so much for joining us. And we really forward to hearing more at future events.