



U.S. Chamber of Commerce

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September 13, 2023

April Tabor
Office of the Secretary, Suite CC-5610
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Ms. Tabor,

On behalf of the U.S. Chamber of Commerce, we respectfully submit the attached Petition for Rulemaking, which requests that the Commission initiate a rulemaking to amend its current rule regarding disqualification (1) to formalize legal consultation with ethics experts in the FTC's Office of General Counsel, and (2) to enhance transparency and improve actual and perceived integrity of agency adjudications by requiring Commissioners, including the Commissioner whose disqualification is sought, to provide the public with a written statement outlining the reasons for declining any recusal decisions. The proposal also recommends that the written statement of the Commissioner subject to the recusal petition become part of the record for the Commission's final order resolving any recusal petition. The petition further includes timing obligations and legal standards applicable to the disqualification proceeding.

Please let us know if you require any additional information to begin consideration of this Petition. We thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley".

Neil L. Bradley
Executive Vice President, Chief Policy Officer,
and Head of Strategic Advocacy
U.S. Chamber of Commerce

Enclosure: Petition for Rulemaking



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I. Petition for Rulemaking

The U.S. Chamber of Commerce (the “Chamber”) respectfully petitions the Federal Trade Commission (“FTC”), pursuant to the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §45, and 16 C.F.R. §1.9, to initiate a rulemaking to revise the rule regarding disqualification of Commissioners (16 C.F.R. §4.17). Under the request, the current rule regarding disqualification of Commissioners would be amended (1) to formalize legal consultation with ethics experts in the FTC’s Office of General Counsel and (2) to enhance transparency and improve actual and perceived integrity of agency adjudications by requiring Commissioners, including the Commissioner whose disqualification is sought, to provide the public with a written statement outlining the reasons for declining any recusal decisions. The proposal also recommends that the written statement of the Commissioner subject to the recusal petition become part of the record for the Commission’s final order resolving any recusal petition. The petition further includes timing obligations and legal standards applicable to the disqualification proceeding.

The FTC occupies a powerful position in the federal government, often operating as legislator, prosecutor, and judge in proceedings it brings. Public confidence in the integrity of the administrative process is especially important when all of those responsibilities are collapsed into a single body and worth protecting through recusal in appropriate circumstances.¹ Congress recognized the inherent risks in collapsing these roles into one agency and set forth a specific regime, with standards different from those that apply to Congress or the courts. As such, this petition seeks to encourage more effective enforcement of those existing standards through increased transparency.

The FTC’s current recusal rules leave much about the decision process shrouded and lack defined rules of the road. The FTC’s discretionary recusal standard does not adequately address concerns about perceptions of bias or partiality and leaves agency enforcement decisions vulnerable to judicial challenge. Bolstering recusal rules would improve institutional legitimacy and public confidence in the FTC’s proceedings. The rulemaking petition should be accepted.

¹ Louis J. Virelli, III, Administrative Conference of the United States, Recusal Rules for Administrative Adjudicators (Nov. 30, 2018) at 15 (“[T]he choice by some agencies to include the reasonable appearance standard in their recusal regulations shows that public confidence in the integrity of their adjudications is important to the agency and worth protecting through recusal.”), <https://www.acus.gov/sites/default/files/documents/Recusal-Rules-for-Administrative-Adjudicators-Final-Report-11.30.2018.pdf>.

II. The Petitioner

The Chamber is the world's largest business federation, representing the interests of more than three million enterprises of all sizes and sectors. Most of our members engage in interstate commerce that brings their activities within the ambit of the FTC's jurisdiction with respect to competition, consumer protection, or both.

The Chamber's interest is impacted because the lack of clear rules for recusals for Federal Trade Commissioners undermines trust in agency decisions, policies, enforcement standards, and business guidance. We are concerned that a lack of trust in FTC policy could undermine effective and efficient competition and consumer protection enforcement.

III. Introduction

Because the FTC can affect American lives in the way few other federal agencies can, namely due to the collapse of executive, legislative, and judicial roles into one agency, impartiality and fairness are critical to the FTC's mission. The FTC's authority spans nearly the entire U.S. economy. The agency is tasked with enforcement against unfair methods of competition (antitrust) and unfair and deceptive acts and practices (consumer protection). The FTC has broad authority to investigate, bring case-by-case enforcement matters, and when certain consumer protection matters are prevalent in the marketplace, craft rules that define with specificity unfair and deceptive acts and practices. The FTC brings matters both in federal court and through its own internal adjudicative proceedings. That means the FTC often serves as legislator, prosecutor, judge, and jury. The agency can write the rules it is empowered to enforce. Such a concentration of government power in one set of officials is ripe for abuse, particularly as the administrative process limits the scope of judicial review of agency action. As such, trust in the integrity of the FTC's decision making is paramount to the market accepting the agency's proposed regulations, business guidance, and enforcement standards. Therefore, the FTC's rules of practice must foster trust in agency processes.

Similarly, the integrity of agency action is critically important for the efficacy and legitimacy of administrative government. Recusal is "a time-honored way of protecting the integrity of all manner of quasi-judicial activity, including agency adjudication."² Recusal serves two purposes. First, it protects litigants from partial or biased decision making. Second, it promotes public confidence in the fairness and reliability of government adjudication.³

² *Id.* at 1.

³ *Id.*

As the FTC recently turned to internal procedures to shape policy decisions and legal questions previously left to federal courts, questions have arisen about the independence of the agency from the executive branch and the motivations of individual Commissioners. Steps to enhance the FTC's recusal process will bolster trust in the agency decisions and foster public confidence as the agency embarks on a significant number of new rulemaking efforts pursuant to the Magnuson Moss Warranty Act and increased administrative adjudications under Section 5 of the FTC Act.

We recognize the importance of political appointees serving in both their policy and legal roles as Commissioners. This proposed rulemaking is not about limiting presidentially nominated, congressionally confirmed individuals from actualizing strongly held beliefs about how best to deploy agency resources to fight unfair business practices throughout the economy. But support for FTC rules, legal interpretation, and business guidance only succeeds if honest businesses can trust that the actions of agency decision makers are free of bias or prejudice against specific individuals or entities. Therefore, the Chamber offers moderate revisions to the rules of practice to enhance transparency around recusal. Although Commissioners may have broad policy goals, no one Commissioner's personal bias or prejudgment of an issue concerning a particular party should ever tarnish the integrity or reputation of the agency for which they have the privilege of serving.

The petition will first discuss the current FTC disqualification rule (Part IV). Next, the petition will identify weaknesses in the current rule (Part V). The petition will then recommend revisions to the rules of practice (Part VI) and will conclude with specific edits to rule 4.17 to address the Chamber's proposed revisions (Part VII).

IV. The Current FTC Rule 16 C.F.R. §4.17

The disqualification of FTC Commissioners is currently governed by 16 C.F.R. §4.17, which applies to rulemaking and adjudicative matters. Under the rule, any participant to a proceeding may file a motion to disqualify a Commissioner. The petition is first addressed by the Commissioner in question and moves to the full Commission only if that Commissioner declines to recuse herself. The motion is determined in accordance with the legal standards applicable to the overall proceeding.

The Administrative Conference of the United States ("ACUS") issued a survey of administrative agency recusal standards, published in May 2020, that categorized the FTC's Rule §4.17 as a "discretionary recusal standard."⁴ A discretionary recusal

⁴ Louis J. Virelli, III, Administrative Conference of the United States, Administrative Recusal Rules: A Taxonomy of Existing Recusal Standards for Agency Adjudicators (May 14, 2020) at 11-12, 57,

standard is one that makes recusal optional, leaving it wholly to the adjudicator's election. ACUS notes that a discretionary recusal standard could create the sense that recusal is never objectively necessary, moving recusal from a legal decision to a merely prudential one.⁵

V. The Current Recusal Rule Undermines Trust Through Vague and Insufficient Standards, Lack of Transparency, and No Requirement for Timely Action

§4.17 is lacking in a few critical ways: the recusal process suffers from a lack of clarity around recusal standards, lack of transparency about how Commissioners reach recusal decisions, and the lack of timing obligations.

As part of the petition's discussion of enhanced recusal standards, we will first discuss case law and federal ethics rules relevant to FTC recusal decisions. Next the petition will discuss the value of written decisions and outline past FTC practices highlighting commitments to issuing explanations of recusal determinations. This section will conclude with a discussion around the importance of timing considerations.

a. Lack of Consistent Substantive Standards

The current rule merely specifies that the motion for recusal is determined in accordance with the standards applicable to the overall proceeding but does not specify the source of those standards. The rule contains no discussion of what these standards may be, or requirement that the Commissioners consider any specific factors or tailor their consideration to the circumstances at hand. This skeletal standard suggests that disqualification is an open area where no standards have yet emerged, but that is incorrect. The legal standards governing FTC recusal questions have been extensively developed in case law and addressed in existing rules and regulations. These standards should be clearly spelled out in the FTC's rules.

The FTC has previously had several decisions vacated based on due process violations stemming from the actions of then-Chair Paul Rand Dixon. Recent events have again raised questions about the integrity of the FTC's adjudicative proceedings. Congress recently held two oversight hearings exploring recusal decisions by the Chair of the FTC.⁶ Republican Commissioner Christine Wilson resigned in protest over

<https://www.acus.gov/sites/default/files/documents/Virelli%20ACUS%20Part%20II%20FINAL%20-%20June%202023%20%282nd%20release%2C%20cover%20sheet%29.pdf>.

⁵ *Id* at 14.

⁶ Oversight of the Federal Trade Commission, Hearing before the House Committee on the Judiciary, 118 Cong. (July 13, 2023); Hearing on Fiscal Year 2024 Federal Trade Commission Budget Before the House Committee on Energy and Commerce, Subcommittee on Innovation, Data, & Commerce, 118 Cong. (April 18, 2023).

what she classified as unethical and unconstitutional conduct, including concerns about Chair Khan's participation in the FTC's decision about Meta Platform's acquisition of Within Unlimited. Whether or not Commissioner Wilson's accusations are accurate, they have renewed questions about the FTC's standards for disqualification.

Moreover, Chair Khan broke with longstanding but informal agency norms by not only declining to follow the recusal recommendation of the FTC's designated agency ethics official, but also by failing to issue a written explanation for her recusal decision. When discussing her recusal decision at oversight hearings, Chair Khan focused on her lack of financial conflicts or personal ties that are the basis for recusal under federal ethics laws, avoiding discussion of prejudice or appearance of bias concerns.

Appearances that agency adjudication is not being conducted in a fair and impartial manner could jeopardize the FTC's reputation and create vulnerabilities in court. To enhance transparency and address the full universe of disqualifying principles applicable to FTC proceedings, FTC recusal rules should make clear that a Commissioner should recuse herself from both real and perceived conflicts of interest, including if there are reasons that might give the appearance of an inability to render a fair and impartial decision. We discuss those standards below.

i. Due Process Caselaw

According to relevant cases deciding FTC Commissioner recusal questions related to administrative trials, a Commissioner is required to recuse if their participation would violate due process or federal ethics requirements.

Under questions of due process, the D.C. Circuit held that “[t]he test for disqualification has been succinctly stated as being whether ‘a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’”⁷ The Sixth Circuit has indicated that “[i]t is fundamental that both unfairness and the appearance of unfairness be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.”⁸

⁷ *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), cert. denied, 361 U.S. 896 (1959)); *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965).

⁸ *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966).

The principal cases on FTC recusal from adjudicative procedures – *Texaco*⁹, *American Cyanamid*¹⁰, and *Cinderella Finishing School*¹¹ – all involved questions of appearance and prejudgment. Case law makes clear that FTC Commissioners must recuse themselves from matters for issues of appearance or prejudgment.

Courts also have applied a heightened standard to recusal questions in rulemaking proceedings as compared to adjudicative actions. *Association of National Advertisers, Inc. v. FTC* outlines the relevant standards to determine questions of disqualification in a rulemaking proceeding for due process concerns. The D.C. Circuit stated that it “never intended the *Cinderella* rule to apply to a rulemaking procedure ...”¹² Instead, the consideration for a rulemaking proceeding is “a Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.”¹³

The FTC’s rules of practice could enhance trust in the process by making clear recusal is required for prejudgment and appearance of bias.

ii. Federal Ethics Laws and Other Recusal Rules

Federal ethics rules also provide support for a recusal rule that makes clear that conflicts of interest, bias, and appearance of bias are appropriate recusal considerations.

Federal ethics laws managed by the Office of Government Ethics (“OGE”) cover administrative adjudicators but are limited to disqualification for conflicts that are either financial or are based on the adjudicator’s personal relationships.

The Administrative Procedures Act (“APA”) assures that administrative adjudication “shall be conducted in an impartial manner,” but this language is understood to protect against actual, rather than apparent, adjudicator bias and, only applies to adjudications involving an administrative law judge.¹⁴

A federal statute provides that any federal justice, judge, or magistrate shall recuse “in any proceeding in which his impartiality might reasonably be questioned,”¹⁵ as well as in specific, enumerated circumstances, including financial conflicts of interest, covered relationships, prior representation, and personal knowledge of disputed

⁹ *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965).

¹⁰ *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966).

¹¹ *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

¹² 627 F.2d 1151, 1168 (D.C. Cir. 1979).

¹³ *Id.* at 1170.

¹⁴ Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators, *The Regulatory Review* (May 31, 2019).

¹⁵ 28 U.S.C. §455(a).

facts.¹⁶ The model code of conduct for judges is not legally binding on federal administrative adjudicators.

The FTC’s adjudicative process, however, provides support for the position that APA and federal judicial standards are relevant for FTC Commissioners to consider when deciding disqualification questions. Commissioners serve in a judicial role in administrative trials. ALJs issue recommended decisions that are automatically reviewed by the Commission.¹⁷ During the Commission’s evaluation process, Commissioners can affirm or reject the recommended decision of the ALJ. The Commission “can modify or set aside any aspect of the ALJ’s decision with which it disagrees.”¹⁸ “[A]ll of the ALJ’s findings, rulings, and conclusions are subject to review and modification by the Commission.”¹⁹ Commissioners have recently explained that they are “responsible for every final decision in [an] adjudication.”²⁰

And—as the Commission has made clear—the ALJ decisions that Commissioners review reflect judicial determinations. The ALJ “does not engage in enforcement or policymaking but rather performs adjudicative functions.”²¹ When the FTC engages in adjudicative proceedings it operates in a judicial capacity. Since the Commissioners act as judges in adjudicative proceedings, recusal standards of the APA and judicial codes of conduct should be part of the Commission’s recusal standard.

Indeed, when Commissioners play that judicial role, FTC standards must exceed judicial recusal standards, particularly as it relates to the transparency of recusal decisions. That is because, first, the FTC performs judicial, legislative, and executive roles in a single case. Second, the Executive Branch is constitutionally designed to be politically accountable, and even the decisions of independent agencies are relevant to an informed public’s evaluation of the politically accountable individuals who nominated and confirmed them. In order to be able to hold political actors accountable, transparency surrounding recusal decisions at the FTC is essential. While agency heads are rightly partial in the sense they implement and develop distinct executive branch policies through their decisions, that calls for more, not less, transparency.

A review of case law and federal rules and regulations makes clear that recusal standards applicable to disqualification proceedings includes consideration of conflicts of interest, covered relationships, prior representation, personal knowledge

¹⁶ *Id.* §455(b).

¹⁷ 16 C.F.R. §§ 3.51, 3.53, 3.54.

¹⁸ *In the Matter of Axon Enter., Inc.*, No. 9389, 2020 WL 5406806, at *4 (F.T.C. Sept. 3, 2020).

¹⁹ *Id.*

²⁰ *Id.* at *5.

²¹ *Id.* at *3.

of non-public evidentiary facts forming the basis of the proceeding from a prior employment capacity, bias, and appearance of bias. Outlining the specific instances that require recusal addresses concerns the FTC's recusal standard is discretionary and ensures uniform treatment across recusal petitions. Codifying the recusal standard formalizes what the FTC has acknowledged as applicable to its work in past recusal petitions and builds trust that recusal petitions will be fully reviewed.

b. Limitations on Transparency

The FTC's rules of practice could also be enhanced to incorporate written determinations of recusal decisions. ACUS's survey of administrative recusal rules notes that while "established mechanisms for seeking and processing recusal decisions should promote public faith in the adjudication's integrity, the absence of any requirement that adjudicators explain and document their decisions can have the opposite effect."²² Written recusal decisions, however, can help adjudicators to develop norms and refine standards while also making clear to the public how and when recusal will be used by the agency.²³

In light of the unique role of FTC Commissioners described above, written statements regarding recusal would be appropriate and beneficial. The Commissioner subject to the recusal petition should prepare a written statement outlining the reasons for declining any recusal decisions. A written record will aid the Commission's consideration of the recusal question, demonstrate that Commissioner's willingness to justify her decision, and enhance faith in the recusal process.

In addition to the written statement of the Commissioner subject to the recusal petition, rules of practice should require that the Commission issue an order ruling on the disqualification petition explaining the decision. The Commission imposes a similar requirement to address petitions to limit or quash compulsory process and petitions for rulemaking. Requiring the Commission to make public its recusal determination follows best practices already in place in comparable agency procedures. Clarity around how the Commission determines recusal questions will build trust in the process and help to refine recusal standards.

In order to restore confidence in the agency's interpretation of legal standards around questions of recusal, Commissioners should be required to consult with

²² Louis J. Virelli, III, Administrative Conference of the United States, Administrative Recusal Rules: A Taxonomy of Existing Recusal Standards for Agency Adjudicators (May 14, 2020) at 51, <https://www.acus.gov/sites/default/files/documents/Virelli%20ACUS%20Part%20II%20FINAL%20-%20June%202023%20%282nd%20release%2C%20cover%20sheet%29.pdf>.

²³ *Id.* at 28.

agency ethics experts. Seeking the legal advice of experts will aid any recusal assessment and provide the public and the Commission with comfort that all relevant legal issues were considered before deciding whether to disqualify a Commissioner from an adjudicative proceeding or rulemaking.

These simple measures implement longstanding informal recusal procedures (consultation with ethics officials and a written explanations for following or rejecting ethics advice), providing necessary clarity about the decision-making process without requiring additional investments of agency resources.

c. Lack of Timing Obligations

The current rule does not require the Commissioner in question to respond to a petition seeking disqualification within any specific period of time. Without a specific timeline, Commissioner's subject to recusal requests could theoretically delay adjudicative decisions indefinitely. Simple timing obligations for addressing recusal questions would prevent such a miscarriage of justice.

VI. Recommendations to Enhance Transparency

a. Proposal

Considering the information presented above, the U.S. Chamber respectfully requests that the FTC's current recusal procedures as outlined in 16 C.F.R. §4.17 be amended as follows:

1. Disqualification rules apply to any adjudicative or rulemaking proceeding (rules would apply to consumer protection and competition enforcement and rulemaking matters, not investigations or decisions to prosecute in court).
2. A motion for disqualification should be addressed in the first instance by the Commissioner whose disqualification is sought in a reasonable time frame. The Chamber recommends within 14 days of receipt of the motion but is open to other timelines.
3. The Commissioner in question must consult with the designated agency ethics official.
4. Ethics officials must issue a written determination that states the reasons the disqualification motion should or should not be granted. This written determination should be protected by deliberative process privilege but still subject to review by relevant Congressional oversight committees.
5. If the Commissioner subject to the recusal petition declines to recuse herself from the proceedings, the Commissioner must issue a written statement

outlining the reasons for this decision that is provided to her fellow Commissioners within 14 days of receipt of the motion.

6. The Commission shall determine the recusal motion without the participation of the Commissioner subject to the disqualification request. The Commission should issue an order ruling on the petition, providing the reason or basis for the order within a reasonable time frame. The Chamber recommends within 14 days following receipt of the non-recusing Commissioner's written determination but is open to other timelines.
7. The petition, the statement of the Commissioner subject to the recusal request, and the Commission order should become part of the public records of the Commission.
8. The Commission should also clarify specific instances that require recusal including financial interest, covered relationship, bias or appearance of bias.

b. Prior FTC Recusal Decisions Suggest Proposed Revisions Are Part of Existing Informal Procedures and Workable

A few petitions seeking FTC Commissioner recusals illustrate how additional procedural requirements and clarity around legal standards will not be an impediment to agency objectives.

In 2009, Intel Corporation filed a motion to disqualify Commissioner Rosch from the agency's lawsuit against the chip giant accusing the company of abusing its power over the microprocessor market. Commissioner Rosch issued a statement detailing why disqualification was not warranted.²⁴ The Commission also issued a written opinion denying the motion for disqualification.²⁵ Intel filed the motion for disqualification on December 15, 2009, and the Commission resolved the petition a month later on January 19, 2010.

In 2007, Chairman Majoras addressed a petition for her recusal from the Google-DoubleClick investigation.²⁶ Chairman Majoras issued a written statement two days after receipt of the petition that made clear that she consulted agency ethics officials. Chairman Majoras's statement addressed several inaccurate facts and assumptions

²⁴ Statement of Commissioner J. Thomas Rosch on Respondent's Motion for Disqualification, In the Matter of Intel Corporation, No. 9341 (Dec. 18, 2009), <https://www.ftc.gov/sites/default/files/documents/cases/100119intelstatement.pdf>.

²⁵ In the Matter of Intel Corp., No. 9341, Opinion and Order of the Commission Denying Motion for Disqualification (Jan. 19, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/100119intelstatement.pdf>.

²⁶ Statement of Chairman Deborah Platt Majoras concerning Petition Seeking My Recusal from Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick Inc.) by Google, Inc. (Dec. 14, 2007), <https://www.ftc.gov/news-events/news/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed-acquisition-hellman-friedman#pjj>.

that the recusal petition was based on and provided clarity about how the agency considers financial conflicts of interest. Her written statement helped to avoid future questions about conflicts of interest in the Google-DoubleClick investigation and helped foster trust in the Chairman's decisions to participate in other merger matters. The Commission also issued a statement supporting the legal conclusions and recusal decision of Chairman Majoras.²⁷

In January 2011, the North Carolina State Board of Dental Examiners petitioned the Commission to disqualify and remove itself as the adjudicator of the State Board's Motion to Dismiss. The Commission denied the Board's motion to disqualify the Commission, explaining its reasoning in a detailed order.²⁸ Individual Commissioners did not issue their own statements because the petition sought the disqualification of the entire Commission.

In the highlighted examples, Commissioners subject to the recusal request prepared and made public written statements detailing why they were not recusing themselves from the matter and the Commission issued a written statement explaining the recusal decision. In some instances, the Commission or Commissioner made clear that they consulted agency ethics officials. What is clear is that the FTC's informal processes related to recusal already incorporate the key changes the Chamber is recommending the agency formally adopt.

In the recent recusal decision by the Commission in the Meta/Within merger challenge, Chair Khan admitted during Congressional testimony that she sought the advice of agency ethics officials about the recusal petition. Moreover, Commissioner Wilson's dissent makes clear that Chair Khan prepared a memorandum outlining her reasons for not recusing from the merger challenge. And the Commission, in issuing its decision about recusal, provided written explanations supporting or challenging the recusal decision. But Chair Khan's statement on recusal and reasoning was not made public. What is clear from the outsized attention on Chair Khan's recusal decision is that a public written statement on her recusal decision would have addressed many of the questions about the Chair's considerations and helped to formalize norms and standards around recusal questions. Further, by failing to share

²⁷ Statement of Commissioners Pamela Jones Harbour, Jon Leibowitz, and J. Thomas Rosch regarding petition for Chairman Majoras's Recusal from Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick Inc.) by Google, Inc, <https://www.ftc.gov/news-events/news/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed-acquisition-hellman-friedman#pjj>.

²⁸ In the Matter of The North Carolina State Board of Dental Examiners, No. 9343, Opinion Denying Respondent's Motion to Disqualify the Commission (Feb. 16, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110216northcarolinaopinion.pdf>.

her position on recusal, the Chair opened the agency up to questions of unfairness and even funding reductions.

VII. Text of Proposed Amendments to 16 C.F.R. §4.17

Below is the text of 16 C.F.R. §4.17, with proposed amendments in bold and underlined:

(a) *Applicability.* This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures.*

(1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)

(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought **within 14 days of receipt of the motion.**

(ii) Such Commissioner shall promptly furnish the FTC Ethics Official with a copy of the motion and consult with the FTC Ethics Official regarding the motion. Such Commissioner shall also promptly furnish the Secretary of the Commission with a copy of the motion and the Secretary shall promptly circulate it to the other Commissioners.

(iii) The FTC Ethics Official shall issue a written determination that explains the reasons the disqualification motion should or should not be granted.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, **he or she will issue a written statement outlining the reasons for this decision and promptly provide it to the other Commissioners. Within 14 days of receiving the written statement,** the Commission shall determine the motion without the participation of such Commissioner **and issue an order ruling on the disqualification petition. The Commission order should include the Commission's reasons for the decision.**

(iii) The recusal petition, the statement of the Commissioner subject to the recusal petition, and the Commission order in response to the petition shall become part of the public records of the Commission.

(c) *Standards.* Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed **and should require recusal for conflicts of interest, bias, prejudice, and appearance of bias.**

VIII. Conclusion

Because the FTC serves as a legislator, prosecutor, and judge, maintaining impartiality and avoiding appearances of bias is critical. Transparent recusal standards are important when you consider that the Commission votes to bring a legal case and later rules on whether the FTC's staff has proven the allegations.

In the interest of promoting accountability and transparency at the FTC, the Commission should revise the rules regarding disqualification of Commissioners and establish standards for determining recusal. The petition's proposed rules and guidelines do not unnecessarily hamper the ability of the FTC to conduct its normal duties and the updates to the rules of practice would serve taxpayers, consumers, and businesses alike.