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TO	Email Sender and Provider Coalition	DATE	July 1, 2021
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RE	Summary of the FTC’s July Open Commission Meeting		

On July 1, 2021, the Federal Trade Commission (“FTC” or “Commission”) convened an Open Commission Meeting. The meeting’s agenda included: (1) Made in the USA Rule; (2) Section 18 Rulemaking Procedures; (3) “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (2015); (4) Enforcement Investigations; and (5) Public Comments.¹ During the meeting, all items on the agenda were approved, including changes to Section 18 rulemaking procedures, a reversal of a previous statement on enforcement principals regarding “unfair methods of competition,” and approval of enforcement investigations into areas such as online platforms. The public comment portion of the meeting featured comments from the public on data privacy. FTC Chair Lina Khan and the following Commissioners participated in the meeting: (1) Noah Phillips; (2) Rohit Chopra; (3) Rebecca Kelly Slaughter; and Christine Wilson. A summary of the meeting follows below.

I. Opening Remarks

Lina Khan, Chair, FTC, highlighted that this meeting was the FTC’s first Open Commission Meeting in years. She added that she hopes to convene more Open Commission Meetings in the future. Chair Khan noted that the meetings would enable the public to gain insight on the FTC’s actions and establish a forum for public comment.

II. Vote on Finalizing Made in the USA Rule

FTC Commissioner Chopra highlighted that consumers are willing to pay more for products that are produced in the United States. He noted that businesses often falsely claim that products are produced in the United States. Commissioner Chopra added that enforcement of truth in advertising laws is “one of the only ways” to discourage abuse of the Made in the USA Rule. He stated that the agenda item was a restatement of the Made in the USA Rule (“Rule”), outlining that the Rule would not establish additional obligations on sellers or manufacturers.² He said that the restatement would: clarify the definition of labels, noting that online labels are subject to the Rule, among other provisions. He noted that the finalized Rule would take effect 30 days after publication in the Federal Register. FTC Commission Noah Phillips expressed

¹ See text of FTC Announces Agenda for July 1 Open Commission Meeting, available at: <https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting>.

² See text of the Made in the USA Labeling Rule, available at: https://www.ftc.gov/system/files/documents/federal_register_notices/2021/07/2021-07-01_clean_musa_finalrule.pdf.

concern that the Rule exceeds FTC authority, adding that the FTC should either wait for Congressional action or issue a separate labeling rule. FTC Commission Christine Wilson echoed Commissioner Phillips' concerns, adding the need for a "more thoughtful" process for such reforms. FTC Commissioner Rebecca Kelly Slaughter stated support for the Rule. The motion to submit a Public Notice in the Federal Register on the Rule was approved by a 3-2 vote with Chair Khan and Commissioners Chopra and Slaughter voting for the Rule and Commissioners Phillips and Wilson voting against it.

III. Vote on Streamlining Section 18 Rulemaking Procedures

Commissioner Slaughter stated that the proposal to streamline Section 18 of the FTC Act ("Section 18") rulemaking procedures would grant the FTC greater accountability and control over unfair or deceptive acts or practices prohibited by Section 18.³ She noted that the changes would enable the FTC Chair to be the presiding officer for the rulemaking process. Commissioner Chopra expressed support for the proposal. Commissioner Wilson noted concern that the proposal could increase the cost of business while decreasing consumer choice. She stated that the presiding officer portion of the proposal could encourage politicization of the FTC. Commissioner Wilson proposed a motion to require that the proposal be submitted for public comment prior to the vote. The motion did not pass. Commissioner Phillips echoed concern about the FTC not receiving public comment on the proposal change prior to voting on it. He noted that, if passed, the proposal would have a "profound" impact on regulations going forward. Commissioner Phillips emphasized that public input is essential for areas such as privacy regulations. He noted that the presiding officer should be neutral and that the requirement to publish a staff report should not be removed. Commissioner Phillips proposed two motions: (1) keep a judge as the presiding officer; and (2) require a staff report for regulations. Both motions were not approved. The original proposal was approved by a 3-2 vote with Chair Khan and Commissioners Chopra and Slaughter voting for the proposal and Commissioners Phillips and Wilson voting against it.

IV. Vote on Rescinding the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015)

Chair Khan proposed a motion to rescind the FTC's "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" ("statement") from 2015.⁴ She stated that Congress granted the FTC the authority to identify and stop anticompetitive practices beyond the Sherman Act. Chair Khan noted that the statement can hinder the FTC's ability to bring cases if the Sherman Act applies. Commission Slaughter expressed support for the rescission. Commissioner Wilson stated opposition to the motion,

³ See text of Proposed Text of Federal Register Notice, available at: https://www.ftc.gov/system/files/documents/federal_register_notices/2021/07/rules_of_practice_parts_0_and_1_proposed_text.pdf.

⁴ See text of Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, available at: https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

adding that it was a bipartisan statement. She highlighted that it would remove “modest constraints” on antitrust enforcement, including the consumer welfare standard. She proposed a motion that the FTC publish the rescission of the statement for public comment first. The motion did not pass. Commissioner Phillips stated that the rescission would reduce clarity. The rescission passed was approved by a 3-2 vote with Chair Khan and Commissioners Chopra and Slaughter voting for it and Commissioners Phillips and Wilson voting against it.

V. Vote on Resolutions Streamlining Enforcement Investigations

Chair Khan issued a proposal that she said would streamline and authorize seven investigations into “key industries,” such as online platforms.^{5 6} She noted the proposal would grant staff with additional resources to examine various aspects of anticompetitive behavior at the same time. Commissioner Wilson expressed concern about the proposal, adding that she wanted to have a dialogue and collaboration prior to any actions. Commissioner Phillips echoed her stated concerns, adding that there should be Commissioner oversight of investigations. Commissioners Slaughter and Chopra expressed support for the motion. The motion was approved by a 3-2 vote with Chair Khan and Commissioners Chopra and Slaughter voting for the Rule and Commissioners Phillips and Wilson voting against it.

VI. Public Comments

The meeting concluded with public comment where members of the public were invited to testify before the Commissioners. A member of the public emphasized that privacy enforcement is necessary. A parent noted that there should be an investigation into student data collection, use, and third party sharing along with ad tech practices. A representative from Consumer Reports called for actions surrounding the “online marketplace,” highlighting that privacy and digital marketing should be priorities. A member of the public commented that biometric surveillance should be classified as an unfair and deceptive practice. Another participant stated that the FTC should examine how data collection and use can lead to discrimination.

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Please contact us with any questions.

⁵ See text of FTC Authorizes Investigations into Key Enforcement Priorities, available at: <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities>.

⁶ Other areas of investigation include “healthcare businesses,” repeat offenders, harms against workers and small businesses, illegal mergers, and COVID-19 related harms.