November 30, 2021

The Honorable Lina Khan  
Chairwoman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Dear Chairwoman Khan,

We write to inquire about the Federal Trade Commission’s (FTC) use of “zombie votes” to conduct the Commission’s business.

As you should be aware, Rohit Chopra was confirmed by the Senate on September 30, 2021 to be the Director of the Consumer Financial Protection Bureau (CFPB). It is our understanding that he was sworn in as CFPB Director on October 12, 2021. This means the current composition of the FTC is comprised of four Commissioners, including yourself, as well as Commissioners Phillips, Slaughter, and Wilson.

We noted with great interest that on October 29, 2021, (over two weeks after Chopra was sworn in as the Director of the CFPB), the FTC voted 3-2 to approve a statement on the “Use of Prior Approval Provisions in Merger Orders.”

In their joint dissenting statement, Commissioners Wilson and Phillips noted that this statement passed by having “two sitting commissioners join forces with a zombie vote cast weeks ago by the sitting Director of the Consumer Financial Protection Bureau.” In other words, Rohit Chopra, who was not a member of the Commission at the time the vote was held, was able to cast his vote weeks ago and have it recorded while he was the sitting Director of the CFPB.

We question the legality of permitting a vote from someone who is not currently a member of the Commission, but we are disturbed that you would press forward on controversial items before the FTC that do not have the support of a majority of serving Commissioners while the Senate is actively considering President Biden’s nominee to fill the FTC’s vacant seat.

We request that you respond to the following questions:

(1) In detail, what are the current FTC procedures that permit non-Commission members to vote on FTC proceedings?
(2) In what past instances has the Commission used these procedures to allow former members of the Commission to vote on proceedings after they have left the Commission?
(3) 15 U.S.C. § 41 notes that “No Commissioner shall engage in any other business, vocation, or employment.” How do FTC’s procedures, which may allow non-members to vote, comply with the statutory requirement that Commissioners not hold any other forms of employment while serving as an FTC commissioner?
(4) In Yovino v. Rizo, 586 U.S. ___ (2019), the Supreme Court prohibited a deceased Judge from having his vote counted in an en banc decision after he died. The Court noted “federal judges are appointed for life, not for eternity.” Does the Supreme Court’s case in Yovino v. Rizo have any bearing on the FTC’s practice of allowing non-members to vote in FTC proceedings?
(5) How many “zombie” votes did former Commissioner Chopra provide to the Commission?
(6) Which future FTC proceedings, including any rulemakings or votes to initiate lawsuits, has former Commissioner Chopra provided a proxy? Please be specific.
(7) Do you intend to proxy vote for former Commissioner Chopra in any forthcoming proceedings? Please be specific. And when, in your view, do these proxy requests expire and are no longer eligible for use in an FTC final vote?
(8) Were any of the proceedings and actions specified in your answer to the previous question publicly noticed prior to October 12, 2021?

Please provide answers to these questions by Wednesday, December 8, 2021.

Sincerely,

Michael S. Lee
United States Senator

Cynthia Lummis
United States Senator

Jerry Moran
United States Senator

Thom Tillis
United States Senator

Roy Blunt
United States Senator

Marsha Blackburn
United States Senator
John Thune
United States Senator

Roger Wicker
United States Senator