

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY
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June 1, 2023

The Honorable Lina M. Khan, Chair
The Honorable Rebecca K. Slaughter, Commissioner
The Honorable Alvaro Bedoya, Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, D.C. 20580

Dear Chair Khan and Commissioners Slaughter and Bedoya,

The Committee on Oversight and Accountability is investigating matters raised by Commissioner Christine S. Wilson’s February 14, 2023, announcement of her unexpected resignation from the Federal Trade Commission (Commission or FTC). Commissioner Wilson declared her intent to resign over deep concerns that the Commission, under current Chair Lina M. Khan’s leadership, is abusing its power and disregarding the rule of law, due process, and federal ethics laws.¹ We seek documents and information to shed light on Commissioner Wilson’s allegations and determine the extent to which the Commission has deviated from its mission to protect America’s consumers.

Commissioner Wilson highlighted several key matters related to her resignation. First, she pointed to Chair Khan’s refusal to recuse herself from review of Meta’s proposed merger with Within Unlimited, even though Chair Khan had stated publicly before joining the Commission that Meta should never be allowed to merge with any company.² Commissioner Wilson, the Commission’s sole Republican commissioner, challenged this refusal on due process and federal ethics grounds, detailing her concerns in a dissenting opinion.³ Her Democrat co-commissioners, however, “imposed heavy redactions” on her dissent, preventing the details from reaching the public.⁴ According to Commissioner Wilson, these redactions “served no purpose but to protect Ms. Khan from embarrassment.”⁵

¹ Christine S. Wilson, *Why I’m Resigning as an FTC Commissioner: Lina Khan’s Disregard for the Rule of Law and Due Process Make It Impossible for Me to Continue Serving*, Wall Street Journal (Feb. 14, 2023) (*Why I’m Resigning*).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

In addition to Chair Khan’s conduct in the Meta-Within merger, Commissioner Wilson recounted three other examples fueling her concerns:

- the Commission’s issuance of a controversial November 2022 “antitrust enforcement policy statement asserting that the FTC could ignore decades of court rulings and condemn essentially any business conduct that three unelected commissioners find distasteful;”
- the Commission’s launch in January 2023 of a rulemaking to ban under the FTC Act “nearly all noncompete clauses in employee contracts”—which, Commissioner Wilson argued, defied fresh Supreme Court precedent that “an agency can’t claim ‘to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority;” and,
- the Commission’s apparently routine abuses of the merger review process to chill “all mergers, not only those that hinder competition.”⁶

These matters raise questions whether the FTC under Chair Khan has become a rogue agency—particularly given Chair Khan’s drive at the beginning of her tenure to “bulldoz[e] procedural safeguards,” “consolidate agency power,” “unilaterally assert and expand regulatory authority,” and “abandon bipartisan and open processes.”⁷ We also are concerned whether departures from prior norms under Chair Khan are due to White House influence. President Biden, after all, called upon Chair Khan to play a leading role in implementation of his Executive Order 14036 on “Promoting Competition in the American Economy.”⁸

Many of these concerns are discussed in more detail in numerous speeches, dissents and other statements by Commissioner Wilson over the course of Chair Khan’s tenure.⁹ Former

⁶ *Id.*

⁷ Letter from Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. Cathy McMorris Rodgers, Ranking Member, H. Comm. on Energy and Commerce, and Hon. James Comer, Ranking Member, H. Comm. on Oversight and Reform, to Hon. Lina Khan, Chair, Hon. Noah Phillips, Commissioner, Hon. Rohit Chopra, Commissioner, Hon. Rebecca K. Slaughter, Commissioner, and Hon. Christine S. Wilson, Commissioner, U.S. Fed’l Trade Comm’n (July 29, 2021).

⁸ 86 Fed. Reg. 36,987 (July 24, 2021).

⁹ See, e.g., U.S. Fed’l Trade Comm’n, *Statement of Christine S. Wilson: Regarding the Announcement of Pre-Consummation Warning Letters* (Aug. 9, 2021); U.S. Fed’l Trade Comm’n, *Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson: Regarding the Commission’s Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement* (Sept. 15, 2021); H. Comm. on the Judiciary, Subcomm. on Antitrust, Comm’l and Admin. Law, *Hearing on Reviving Competition Part 4: 21st Century Antitrust Reforms and the American Worker, Testimony of Christine S. Wilson* (Sept. 28, 2021); U.S. Fed’l Trade Comm’n, *Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips: Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders* (Oct. 29, 2021); Christine S. Wilson, *The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC*, U.S. Fed’l Trade Comm’n (Nov. 9, 2021); Christine S. Wilson, *Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Legal Neo-Brandeisians*, U.S. Fed’l Trade Comm’n (April 8, 2022); U.S. Fed’l Trade Comm’n, *Dissenting Statement of Commissioner Christine S. Wilson: Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act,”*

commissioners and other experts and observers have echoed Commissioner Wilson's concerns. At a recent forum on developments at the FTC, former commissioner Joshua D. Wright suggested the Commission during Chair Khan's tenure is routinely abusing merger review processes, holding parties in lengthy suspense without any clarity over whether their mergers ultimately will be challenged.¹⁰ He also decried the Commission's troubling policy of requiring merging parties to waive judicial review of future mergers as the price of the Commission's willingness to settle a current case.¹¹ George Washington University Law School Professor Richard J. Pierce pointed to recent empirical research, finding the Commission is "not acting in accordance with any . . . prior published [Commission] guidelines," "no one has any idea what they are doing," and "there is a tremendous range of uncertainty."¹² Bilal Sayyed, former director of the Commission's Office of Policy Planning, suggested "uncertainty has become the crux of [the Commission's] merger policy . . . uncertainty and delay."¹³

Over the many decades since Congress created it, the FTC has played a leading role in assuring the protection of American consumers and the integrity of the American marketplace. We are concerned that the developments at the Commission catalogued by Commissioner Wilson and others could undermine consumers' and markets' confidence in the Commission's ability to perform its functions effectively and with integrity.

To assist the Committee in conducting oversight of whether the FTC is indeed failing to show due regard for the rule of law, due process and federal ethics standards, please provide the following documents and information, covering the time period January 20, 2021 to the present unless otherwise indicated, as soon as possible but not later than June 15, 2023:

1. An unredacted copy of Commissioner Wilson's dissent from Chair Khan's refusal to recuse herself from review of the proposed Meta-Within Unlimited merger;
2. An unredacted copy of each opinion received by Chair Khan from the Commission's Office of the General Counsel or any component or official thereof regarding whether the Chair should recuse or should have recused herself from participation in review of the Meta-Within Unlimited merger;

Comm'n File No. P221202 (Nov. 10, 2022); U.S. Fed'l Trade Comm'n, *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, Comm'n File No. P201200-1 (Jan. 5, 2023); U.S. Fed'l Trade Comm'n, *Statement of Commissioner Christine S. Wilson: In the Matter of HSR Premerger Notification, Commission File No. P110014* (Feb. 7, 2023); Christine S. Wilson, *Rule-A-Palooza: Realities and Repercussions* (Feb. 24, 2023).

¹⁰ The Federalist Society, *A Roundtable on Recent Developments at the FTC* (Mar. 6, 2023), online at [A Roundtable on Recent Developments at the FTC - Regulatory Transparency Project \(fedsoc.org\)](https://www.fedsoc.org/publications/roundtable-on-recent-developments-at-the-ftc).

¹¹ *Id.*

¹² *Id.* (citing D. Daniel Sokol, Marissa Grimm, Robert Calzaretta, and Marcello Santana, *Antitrust Mergers and Regulatory Uncertainty* (Draft) (Dec. 11, 2022), online at <https://ssrn.com/abstract=4295283>).

¹³ *Id.*

3. All documents or communications by or for, or sent to or from, current or former Commission officials, including former commissioner Rohit Chopra, discussing whether the Commission's current policy on enforcement of Section 5 of the Federal Trade Commission Act is inconsistent with the terms of that Act, due process, judicial precedent, or any opinion of the Commission's Office of the General Counsel, Bureau of Competition or Bureau of Consumer Protection;
4. All documents or communications by or for, or sent to or from, current or former Commission officials, including former commissioner Rohit Chopra, discussing the impacts on potential merging parties or Commission staff of increased delay or uncertainty in the merger review process, including whether such delay or uncertainty could be used instead of judicial or administrative litigation to deter or stop merger activity or whether such delay or uncertainty raises issues concerning due process, fidelity to the rule of law, inconsistency with any opinion of the Commission's Office of the General Counsel or Bureau of Competition, or waste of agency or proposed merging parties' resources;
5. All documents or communications by or for, or sent to or from, current or former Commission officials, including former commissioner Rohit Chopra, discussing whether the Commission's current policy of seeking prior approval concessions from merging parties in merger settlement agreements is inconsistent with any statute administered by the Commission, due process, judicial precedent, or any opinion of the Commission's Office of the General Counsel or Bureau of Competition;
6. All documents or communications by or for, or sent to or from, current or former Commission officials, including former commissioner Rohit Chopra, discussing whether any rule proposed by the Commission in a rulemaking proceeding is inconsistent with any statute administered by the Commission, due process, judicial precedent, or any opinion of the Commission's Office of the General Counsel, Bureau of Competition or Bureau of Consumer Protection;
7. All documents or communications by or for, or sent to or from, current or former Commission officials, including former commissioner Rohit Chopra, discussing whether the Commission's departures from prior Commission policy, practice or procedure, or collusion with foreign antitrust authorities to impede mergers of U.S. companies, raise issues concerning fidelity to the rule of law, including statutes administered by the Commission, due process, judicial precedent, or federal ethics standards, or inconsistency with any opinion of the Commission's Office of the General Counsel or Bureau of Competition;
8. All documents or communications by or for, or sent to or from, current or former Commission officials, including Chair Khan prior to her confirmation as a commissioner or chair or former Commissioner Rohit Chopra, discussing the preparation, terms or implementation of Executive Order 14036 or matters addressed within it; and

9. All documents or communications by or for, or sent to or from, current or former Commission officials, including Chair Khan prior to her confirmation as a commissioner or chair or former commissioner Rohit Chopra, that reflect involvement or views of White House officials or other non-Commission officials in or on changes in Commission policy, practice or procedure or discuss whether such involvement or views threatened to or did compromise the Commission's independence.

Further, we request that you preserve all documents and communications that are related to the above requests, including any documents and communications in your custody or control. If it is the routine practice of any employee or contractor to destroy or otherwise alter such documents or electronic records, either halt such practices or arrange for the preservation of complete and accurate duplicates or copies of such records, suitable for production if requested. If, pursuant to routine practice or otherwise, any such documents or communications have already been destroyed, we request that you provide a detailed log of all such documents and communications and specify the date and manner of their destruction.

To arrange for the delivery of responsive documents or ask any related follow-up questions, please contact Committee on Oversight and Accountability Majority Staff at (202) 225-5074. Attached are instructions for producing the documents and information to the Committee.

The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate, "any matter" at "any time" under House Rule X. Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink that reads "James Comer". The signature is written in a cursive, slightly slanted style.

James Comer

Chairman

Committee on Oversight and Accountability

cc: The Honorable Jamie Raskin, Ranking Member
Committee on Oversight and Accountability