

## Dissenting Statement of Commissioner Christine S. Wilson

*Annual Regulatory Agenda*  
Matter No. P072104

January 4, 2023

I dissented from the Commission’s publication of its regulatory agenda in December 2021,<sup>1</sup> given the majority’s plans for an avalanche of rulemaking on both the competition and consumer protection fronts.<sup>2</sup> I can confirm that the FTC’s Rule-a-Palooza is well under way. In 2022, the Commission proposed to issue six new rules,<sup>3</sup> and to expand an existing one.<sup>4</sup>

In my December 2021 dissent, I expressed concern about whether these proposed rules in the consumer protection arena would hew to our Congressionally authorized jurisdiction and remain tethered to the agency’s enforcement experience and subject matter expertise. Those concerns were well-founded. The Commercial Surveillance Advance Notice of Proposed Rulemaking (ANPRM) sought input on 95 questions and stated that the Commission is considering rules that would regulate everything from deceptive privacy promises and lax data security to the use of AI, employment discrimination, and civil rights. And the Junk Fees ANPRM proposes to address how prices are conveyed to consumers across virtually every sector of the economy. But Section 18 of the FTC Act requires the agency to demonstrate the prevalence of deceptive and unfair practices, a significant hurdle to overcome when the topics of these rulemakings wander so far afield from our enforcement experience.

Last year’s Regulatory Agenda and statements from the majority in 2022 foreshadow rulemaking on competition issues, as well. As I have said elsewhere, I question whether the Commission possesses the requisite authority to promulgate substantive rules on “unfair methods of competition.”<sup>5</sup> Moreover, I question the wisdom of doing so.

I have long expressed concerns about the negative impacts of rulemaking. History teaches us that rules stifle innovation, increase costs, raise prices, limit choice, and decrease output, frequently

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<sup>1</sup> FED. TRADE COMM’N, Statement of Regulatory Priorities at 2 (Dec. 10, 2021), [https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement\\_3084\\_FTC.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_3084_FTC.pdf).

<sup>2</sup> Dissenting Statement of Commissioner Christine S. Wilson, Annual Regulatory Plan and Semi-Annual Regulatory Agenda (Dec. 10, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1598839/annual\\_regulatory\\_plan\\_and\\_semi-annual\\_regulatory\\_agenda\\_wilson\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598839/annual_regulatory_plan_and_semi-annual_regulatory_agenda_wilson_final.pdf).

<sup>3</sup> Trade Regulation Rule on Deceptive or Unfair Earnings Claims, 87 FR 13951 (Mar. 11, 2022); Trade Regulation Rule on Commercial Surveillance and Data Security, 87 FR 51273 (Aug. 22, 2022); Motor Vehicle Dealers Trade Regulation Rule, 87 FR 42012 (July 13, 2022); Trade Regulation Rule on Impersonation of Government and Businesses, 87 FR 62741 (Oct. 17, 2022); Trade Regulation Rule on Use of Reviews and Endorsements, 87 FR 67424 (Nov. 8, 2022); Unfair or Deceptive Fees Trade Regulation Rule, 87 FR 67413 (Nov. 8, 2022).

<sup>4</sup> Trade Regulation Rule on the Use Business Opportunities, ANPR, 16 CFR 437, available at: <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-437-trade-regulation-rule-use-business-opportunities-anpr>

<sup>5</sup> See Christine S. Wilson, Hey, I’ve Seen This One: Warnings for Competition Rulemaking at the FTC, Remarks for the Federalist Society “The Future of Rulemaking at the FTC” Event (July 8, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1591666/wilson\\_statement\\_back\\_to\\_the\\_future\\_of\\_rulemaking.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf). My former colleague Commissioner Noah J. Phillips shared this view. Noah Joshua Phillips, Against Antitrust Regulation, AEI (Oct. 2022), <https://www.aei.org/wp-content/uploads/2022/10/Against-Antitrust-Regulation.pdf?x91208>.

harming the very parties they are intended to benefit.<sup>6</sup> In addition to my general concerns about expansive rulemaking, I have grave concerns about *this* administration’s approach to regulation. Recently, I have supported rulemaking initiatives firmly grounded in our law enforcement experience and engagement with stakeholders.<sup>7</sup> These rules address areas in which hundreds of actions have demonstrated a prevalence of deceptive (and typically fraudulent) practices, and in which case-by-case enforcement has not been successful in deterring unlawful conduct.

The Chair’s agenda, however, extends far beyond rules prohibiting blatantly deceptive or unfair conduct. To further complicate matters, her regulatory initiatives all too often are driven not by the extensive enforcement expertise of our accomplished staff, but instead by a flood of advisors drawn from academia<sup>8</sup> or, worse, by narratives emanating from the White House.<sup>9</sup> Staff with relevant expertise – those who will be tasked with implementing these initiatives – are consulted at the eleventh hour, if at all. All too frequently, I have scant time for consultation and review, and receive only limited staff analysis.<sup>10</sup> In short, I do not have sufficient confidence in either the

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<sup>6</sup> Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>; Remarks of Commissioner Christine S. Wilson at British Institute of International and Comparative Law, *Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech* (June 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1531816/wilson\\_remarks\\_biiel\\_6-28-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1531816/wilson_remarks_biiel_6-28-19.pdf); Dissenting Statement of Commissioner Christine S. Wilson Energy Labeling Rule, Comm’n Matter No. R611004 (Oct. 22, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1551786/r611004\\_wilson\\_dissent\\_energy\\_labeling\\_rule.pdf](https://www.ftc.gov/system/files/documents/public_statements/1551786/r611004_wilson_dissent_energy_labeling_rule.pdf).

<sup>7</sup> Christine S. Wilson, Oral Remarks at Open Commission Meeting, Telemarketing Sales Rule (Apr. 28, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/R411001WilsonOpenCommissionMtg.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/R411001WilsonOpenCommissionMtg.pdf); Concurring Statement of Commissioner Christine S. Wilson, Advanced Notice of Proposed Rulemaking Concerning Earnings Claims (Feb. 17, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/20220217\\_-\\_concurring\\_statement\\_of\\_cmmr\\_chrsitne\\_s\\_wilson\\_on\\_anpr\\_re\\_earnings\\_claims\\_r111033.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/20220217_-_concurring_statement_of_cmmr_chrsitne_s_wilson_on_anpr_re_earnings_claims_r111033.pdf). I also recently voted yes on a staff recommendation to seek comment on expansion of the Commission’s existing Business Opportunity Rule to address similarly deceptive earnings claims. Press Release: FTC Explores Changes, Possible Expansion of the Business Opportunity Rule (Nov. 17, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-explores-changes-possible-expansion-its-business-opportunity-rule>

<sup>8</sup> Indeed, the Chair’s hiring practices have been subject to investigation by the FTC’s Inspector General. Office of Inspector General, FTC, “Audit of the Federal Trade Commission Unpaid Consultant and Expert Program,” OIG Report No. A-22-06 (Aug. 1, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2022-08-01\\_OIGauditreport\\_unpaidconsultants\\_FINAL.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2022-08-01_OIGauditreport_unpaidconsultants_FINAL.pdf).

<sup>9</sup> Remarks by President Biden at the Third Meeting of the White House Competition Council (referencing many industries that do not fall within the FTC’s jurisdiction) (Sept. 26, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/26/remarks-by-president-biden-at-the-third-meeting-of-the-white-house-competition-council/>.

<sup>10</sup> See Dissenting Statement of Commissioner Christine S. Wilson, Advance Notice of Proposed Rulemaking – Junk Fees (Oct. 20, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-dissenting-statement-junk-fees-anpr.pdf); Oral Remarks of Commissioner Christine S. Wilson at the Open Commission Meeting on July 21, 2021, 8-11, [https://www.ftc.gov/system/files/documents/public\\_statements/1592366/commissioner\\_christine\\_s\\_wilson\\_oral\\_remarks\\_at\\_open\\_comm\\_mtg\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf); see also Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act” (July 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf](https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf); Press Release, Fed. Trade Comm’n, FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement->

substance of the proposed rules or the processes the Chair will use to craft and launch them, leaving me unable to support her regulatory agenda.

For these reasons, I dissent from the Annual Regulatory Agenda.

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abilityunder; Dissenting Statement of Commissioner Noah Joshua Phillips Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592398/dissenting\\_statement\\_of\\_commissioner\\_phillips\\_regarding\\_the\\_commissions\\_withdrawal\\_of\\_the\\_1995.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf); Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995policy-statement-limited-agencys-ability-deter>; Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1593969/pre-consummation\\_warning\\_letters\\_statement\\_v11.pdf](https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf).