



U.S. Chamber of Commerce
Litigation Center

November 19, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
Washington, DC 20580

Dear Chair Khan:

I write to express the views of the U.S. Chamber of Commerce regarding the Commission's practice of counting "zombie votes" cast more than a month ago by former Commissioner Rohit Chopra shortly before his October 8 resignation to lead the Consumer Financial Protection Bureau. Allowing him to continue exercising the voting powers of his former office – particularly with respect to contested matters – is not only bad government, it is patently unlawful.

It is troubling that the Commission has concealed from public scrutiny the voting rules at the heart of this controversy. What little the public knows about this situation comes mainly from a *Politico* article published earlier this month. According to the article, "the agency would not provide [the reporter] a copy of the rules that govern [zombie] votes," and the reporter relied on accounts from "FTC staffers" who spoke "on condition of anonymity to discuss procedures *the agency considers confidential.*"¹ The Commission has no right to "consider confidential" the voting rules that govern how it wields its significant powers over private companies and individuals. Congress directed the Commission, like every federal agency, to publish its "rules of procedure" in the Federal Register "for the guidance of the public." 5 U.S.C. § 552(a)(1)(C). No "rule of procedure" is more fundamental to a multi-member agency than how it counts its members' votes in disputed cases. Yet, the Commission refuses to say what those rules are.

In any event, the Commission's zombie-voting practice is unlawful no matter what its secret rules say. The FTC Act delegates certain powers to a majority of five sitting Commissioners, each with a defined term of office. See 15 U.S.C. § 41. For all matters requiring a Commission vote, the Commission cannot lawfully take any action

¹ Leah Nylen, "*Zombies to the Rescue: The Arcane Voting Rule that Could Save Dems' Antitrust Agenda*," *Politico* (Nov. 8, 2021) (emphasis added).

unless a majority of Commissioners *then in office* has actually approved it. The Commission's own published regulations make this point abundantly clear. They confirm (1) that "[a] majority of the members of the Commission *in office* and not recused from participating in a matter constitutes a quorum for the transaction of business" and (2) that "[a]ny Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners." 16 C.F.R. § 4.14(b) & (c). Mr. Chopra is no longer "in office," and he is thus not one of "the participating Commissioners" whose vote can count towards a majority in pending matters.

The Supreme Court recently reached a similar conclusion in highly analogous circumstances and, in the process, confirmed the illegality of the Commission's zombie-voting practice. In *Yovino v. Rizo*, 139 S. Ct. 706 (2019), the Supreme Court concluded that it was unlawful for the Ninth Circuit to count the vote of a judge who drafted the nominal majority opinion in a closely divided case but who died before the full vote was taken and the case was decided. The Supreme Court ruled that the judge's vote could not be counted, and his opinion therefore could not be deemed the majority opinion, because in fact "it was not endorsed by a majority of the living judges *at the time of its issuance*." *Id.* at 708 (emphasis added). The Ninth Circuit's contrary approach, the Court explained, impermissibly "allowed a deceased judge to exercise the judicial power of the United States after his death." *Id.* at 710.

The parallels to zombie voting are striking. As in *Yovino*, the Commission's practice of counting ex-Commissioner Chopra's votes in yet-undecided matters allows him to "exercise the ... power" of his former office (*id.*) after his departure. Just as the Constitution does not authorize judges to vote from beyond the grave, Congress did not authorize Commissioners to linger in office after their official departures by having their votes count in matters still pending when they left. To the contrary, Mr. Chopra's dual roles as CFPB Director and *de facto* FTC Commissioner for the pending matters on which he voted violate the FTC Act's directive that "[n]o Commissioner shall engage in any other ... employment" while exercising the powers of office. 15 U.S.C. § 41.

Zombie voting also contradicts the basic institutional norms that apply equally to the Judiciary and the Commission. In *Yovino*, the Supreme Court found that counting the vote of a judge who died before other judges had voted improperly signals that any judge's vote is "inalterably fixed" when cast, whereas "it is generally understood that a judge may change his or her position up to the very moment when a decision is released." *Id.* at 708-09. That "general understanding" has long prevailed

at the Commission too. When revising its quorum rules in 2005, the Commission noted the importance of “enabl[ing] Commissioners who oppose an agency action to try to change the minds of their colleagues who are inclined to support it.”² The Commission’s current practice flouts that collegiality norm. Because ex-Commissioner Chopra can no longer change his votes, counting them in disputed matters holds the remaining Commissioners hostage to the “inalterably fixed” votes of a departed Commissioner with whom they can no longer reason or negotiate before any collective decision becomes final.

Finally, it is as unprecedented as it is unlawful for the Commission to count the vote of an ex-Commissioner to decide a contested FTC matter on which no majority had formed when he or she departed. An unidentified “FTC spokesperson” recently suggested otherwise to MLex, “point[ing] to two examples of past commissioners who had voted on decisions that were adopted after their departure.”³ But those two cases are completely inapposite. In neither case did the cited vote have any effect on the outcome because each was decided unanimously—indeed, in one of them, the departing Commissioner (properly) voted “not participating.”⁴ Here, in contrast, the whole point of counting ex-Commissioner Chopra’s votes is to break 2-2 ties in closely disputed matters that cannot lawfully be resolved until after Congress has confirmed Mr. Chopra’s replacement. Beyond that, as the MLex reporter observed, “neither of the[] cases” cited by the unnamed FTC spokesperson “involved a former commissioner’s vote being counted more than a month after they left the agency, as would be the case for Chopra.”⁵

² FTC, Final Rule, *Quorums*, 70 Fed. Reg. 53296, 53296 n.2 (2005).

³ Michael Acton, *FTC’s Use of Chopra “Zombie Votes” Is Bad Governance, Legality Is Unclear, Commissioner Phillips Says*, MLex (Nov. 10, 2021).

⁴ See Press Release, *Announced Actions for September 7, 2004* (Sept. 7, 2004), <https://www.ftc.gov/news-events/press-releases/2004/09/announced-actions-september-7-2004> (“The Commission vote to approve the respondents’ request to reopen and modify the order and to deny the elimination of the public comment period was 3-0-2, with Chairman Deborah Platt Majoras and Commissioner Pamela Jones Harbour not participating.”); Press Release, *FTC Action Leads to Shutdown of Texas-Based Debt Collector that Allegedly Used Deception, Insults, and False Threats Against Consumers* (Jan. 31, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/ftc-action-leads-shutdown-texas-based-debt-collector-allegedly> (“The Commission vote authorizing the staff to file the complaint was 4-0-1, with former Commissioner J. Thomas Rosch not participating.”).

⁵ Acton, *supra*.

This is not the first time that the Commission has engaged in troubling procedural irregularities under your leadership.⁶ It is unclear why the Commission would want to imperil its credibility still further on this losing gambit. Rather than count the zombie votes of a long-departed ex-Commissioner, it could simply defer action on the relevant matters until a fifth Commissioner has been confirmed. We encourage you to follow that more responsible and less litigation-baiting course. Rest assured, however, the Chamber will not hesitate to take legal action to defend businesses against unlawful actions taken by the Commission.

Sincerely,

A handwritten signature in black ink that reads "Daryl Joseffer". The signature is written in a cursive, flowing style.

Daryl Joseffer
Executive Vice President and Chief Counsel
U.S. Chamber Litigation Center

⁶ See, e.g., Dissenting Statement of Comm’rs Wilson and Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Cases at 2, 9 (Oct. 29, 2021) https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf; Editorial, *How to Block Mergers the Easy Way*, Wall St. J. (Sept. 15, 2021); Editorial, *Lina Khan’s Power Grab at the FTC*, Wall St. J. (July 5, 2021).