PETITION FOR RULEMAKING

I. PETITION FOR RULEMAKING

NetChoice, Americans for Prosperity, Hispanic Leadership Fund, Innovation Economy Institute, Institute for Policy Innovation, James Madison Institute, National Taxpayers Union, R Street Institute, and Young Voices respectfully petitions the Federal Trade Commission ("FTC"), pursuant to the Administrative Procedure Act and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, to initiate rulemaking to revise the rule regarding disqualification of Commissioners (16 C.F.R. § 4.17) to establish procedures for disqualification of Commissioners in response to a request for recusal. Under the request, the current rule regarding disqualification of Commissioners would be amended to also apply to enforcement proceedings and include specific procedures on time to respond to petitions, review by the FTC Ethics Official and the Commissioners, and standards for determining recusal.

II. THE PETITIONER

The interests of the petitioners are impacted as, for example, NetChoice[1] is a national trade association of leading e-commerce and online businesses that share the goal of promoting convenience, choice, and commerce on the internet. NetChoice zealously defends American free enterprise and free expression from threats both foreign and domestic. At the same time, NetChoice believes that lack of clear rules for recusals for Federal Trade Commissioners undermine e-commerce and online businesses.

[1] NetChoice is a 501(C)(6) trade association based in Washington, D.C. As publicly disclosed on its website, NetChoice.org, NetChoice counts among its members nearly all of the leading tech businesses in the United States. 1401 K St NW, Suite 502 Washington DC 20005

III. INTRODUCTION

The provision of a neutral decisionmaker has long been one of the core requirements of a system of fair decision making. This requirement dates back to at least 1610, when the English Court of Common Pleas announced the principle that "no person can be a judge in his own cause."[2] This principle has likewise been embraced in the modern era. As Justice White, in his concurring opinion in *Arnett v. Kennedy*, observed, the Court's "decisions have stressed . . . that the right to an impartial decision-maker is required by due process."[3]

The concept of judicial recusal is, similarly, "as old as the law itself."[4] The Supreme Court has noted that recusal is derived from the maxim that "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment and, not improbably, corrupt his integrity."[5]

Recusal seeks two primary objectives. First, it seeks to "promote fairness to the parties by ensuring an impartial arbiter for their dispute."[6] This implicates due process principles and encourages parties to use arbiters and abide by their decisions. The second goal of recusal is to "create a broader appearance of judicial impartiality for society at large."[7] The importance of this goal cannot be understated: by creating an appearance of impartiality, recusal encourages public confidence in the judicial system. As noted in the Administrative Conference of the United States' (ACUS) recent survey of agency recusal rules, increased confidence in the judicial

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[2] *Bonham's Case*, 8 Co. 114a, 118a, 77 Eng. Rep. No. 646, 652 (1610).
[3] 416 U.S. 134, 197 (1974).
[4] Louis J. Virelli, *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators* at 11–12, Administrative Conference of the United States (May 14, 2020), https://www.acus.gov/sites/default/files/documents/Virelli%20ACUS%20Part%20II%20FINAL%20-%20June%2023%20%282nd%20release%2C%20cover%20sheet%29.pdf.
[5] *Gutierrez v. Lamagno*, 515 U.S. 417, 428 (1995) (quoting The Federalist No. 10 at 79 (James Madison)).
[6] *Id.*
[7] *Id.*

system "is critical to safeguarding the democratic legitimacy of our otherwise independent and politically unaccountable courts."[8]

This same principle applies to administrative recusal, which similarly works to bolster faith in government agencies and our democratic system. This is a clear priority of the current presidential administration: in his first State of the Union address, President Biden called on Congress to "prove democracy still works—that our government still works and we can deliver for our people."[9] The President's Ethics Pledge for all executive branch personnel, issued on his first day in office, echoes this theme by noting that it is "part of a broader ethics in government plan designed to restore and maintain public trust in government."

ACUS—the independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure—has written that "recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently."[10]

IV. THE CURRENT FTC RULE 16 C.F.R. § 4.17

The disqualification of FTC Commissioners is currently governed by 16 C.F.R. § 4.17, which by its terms applies to rulemaking and adjudicative matters. Under the rule, any participant to a proceeding may file a motion to disqualify a Commissioner. The petition is first addressed by the Commissioner in question and moves to the full Commission only if that Commissioner declines to recuse herself. In either event, the rule specifies that the motion is

[8] *Id.*
[9] Remarks by President Biden in Address to a Joint Session of Congress, U.S. Capitol, April 28, 2021, *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/.
[10] Recusal Rules for Administrative Adjudicators, https://www.acus.gov/recommendation/recusal-rules-administrative-adjudicators.

determined in accordance with the legal standards applicable to the overall proceeding. Section 4.17 was enacted in 1981 after courts overturned two of the FTC's decisions and a rulemaking over perceived bias by the Commissioners.

While undoubtedly a step in the right direction, the current recusal rule is significantly lacking. ACUS' survey of administrative agency recusal standards, published in May 2020, categorized § 4.17 as a "discretionary recusal standard." A "discretionary recusal standard" is one that makes recusal optional, leaving it wholly to the adjudicator's election. ACUS notes in its report that discretionary standards are unhelpful:

> "[T]hey serve only as a recognition of adjudicators' power, rather than a guiding principle that can protect litigants and promote public confidence. Although such purely discretionary standards obviously cannot displace constitutional, statutory, or other regulatory recusal standards, they offer little to no additional guidance for adjudicators as to when they should recuse, and in fact may prove confusing to adjudicators seeking to reconcile their obligations under discretionary regulatory standards and other recusal obligations."[11]

A purely discretionary standard, ACUS continues, could create the sense that recusal is *never* objectively necessary, moving recusal from a legal decision to a merely prudential one.[12] Most importantly, the report from ACUS warns that discretionary recusal standards "encourage public skepticism about the integrity of agency adjudicators because they appear to allow for seemingly arbitrary recusals."[13] This ultimately flies in the face of President Biden's emphasis on establishing and maintaining public faith in government.

[11] *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards*, *supra* n. 3, at 11 - 12.
[12] *Id.*
[13] *Id.*

V. THE CURRENT RULE IS DEFICIENT IN THREE AREAS

As it currently stands, § 4.17 is lacking in three critical ways: failure to include timing obligations, failure to include substantive standards, and failure to address a Commissioner's prosecutorial role.

A. Lack of timing obligations

First, the current rule does not require the Commissioner in question to respond to a petition seeking disqualification within any specific period of time—or indeed, require any type of response at all. This provides little insight to the petitioner seeking disqualification or the public at large. A completely opaque recusal process runs counter to the FTC's transparency aims, which have been touted as a top priority by Chair Khan and have enjoyed bipartisan support across the Commission.[14] Further, without any time period governing the Commissioner's review, the rule as currently written provides an opportunity for open-ended delay. A petitioner submitting a motion for recusal of a Commissioner is, under the current rule, sending a missive into the void and hoping for the best—or at the very least, a response.

B. Absence of consistent substantive standards

Second, the rule also fails to set out any guidelines for consideration of a motion to disqualify beyond a general instruction that it should be determined in accordance with the legal standards applicable to the overall proceeding in which such a motion is filed. The rule contains no discussion of what these standards may be, or requirement that Commissioners consider any

[14] *See* Chair Khan's opening remarks at the July 1, 2021 open meeting ("we intend to hold these types of open meetings on a regular basis . . . [they] allow the public to gain insight into the work and priorities of the agency"); *see also* Commissioner Christine Wilson's remarks at the July 1, 2021 open meeting, *available at* https://www.ftc.gov/system/files/documents/public_events/1591478/transcript_open_commission_meeting_7-1-21.pdf ("I support greater transparency in government decision making generally and in federal antitrust and consumer protection enforcement specifically") and the FTC's Draft Strategic Plan for Fiscal Years 2022 - 2026 at 5 (October 2021) *available at* https://www.regulations.gov/document/FTC-2021-0061-0001 (The FTC's "actions include . . . disseminating information about the Commission's activities to the public to foster understanding, accountability, and transparency").

specific factors or tailor their consideration to the circumstances at hand. As written, this skeletal reference to unspecified legal standards suggests that this is an open area where perhaps no standards have yet emerged or been widely adopted. This is incorrect. The legal standards governing recusal have been extensively developed in case law. These standards should be clearly spelled out and reflected in the FTC's rules.

ACUS' comprehensive research on recusal makes clear that increased transparency and direction in recusal proceedings benefits both the public and the agency itself. As part of its extensive survey of agency recusal requirements, ACUS concluded that "clear and easily discernible recusal standards, including procedural standards, would encourage an even more robust and thorough investigation of recusal issues."[15]

Detailed, specific regulations outlining recusal are more likely to be useful than the current rule, which contains a vague and general standard for review. ACUS considered the utility of recusal regulations supported by other, less formal sources and concluded that promulgating recusal standards in guidance documents, rather than rules, "sends a mixed message to the observing public."[16] While potentially valuable for communicating expectations to adjudicators and agency actors, to the public "they may suggest less of a commitment to recusal standards than regulations, and are often harder to find, and less likely to be understood, by interested third parties."[17]

Moreover, incorporating specific recusal standards into the existing rule is highly unlikely to cause any harm. At worst, the rare petitioner particularly well-versed in recusal standards governing various types of legal proceedings may find the incorporation of specific

[15] *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards*, *supra* n. 3, at 51.
[16] *Id.*
[17] *Id.*

standards redundant. But for the overwhelming remainder of the public, a specific, detailed standard of recusal would demonstrate that the FTC is committed to upholding the core principles of due process.

C. Inapplicability to prosecutorial functions

Third, the current recusal rule does not cover situations in which the Commissioner is acting as a prosecutor, whether in an administrative or federal court proceeding. This ignores the reality that prosecutorial functions and responsibilities are often inseparable from other roles and obligations. The American Bar Association's *Model Rules of Professional Conduct* note that a prosecutor "has the responsibility of a minister of justice and not simply that of an advocate," with "specific obligations to see that the defendant is accorded procedural justice."[18] Current Commissioner Christine Wilson has also noted this omission in the context of a recent refusal to permit the Commissioners to evaluate a recusal petition involving the FTC Chair's participation in a prosecutorial role.[19]

The blurring of prosecutorial and other roles is particularly relevant at the FTC, where the dual role Commissioners play in issuing complaints and deciding appeals from ALJ decisions means there is often little distinction between a Commissioner's role as a "prosecutor" and an "adjudicator" in adjudicative proceedings. In the recent *Axon Enterprises v. FTC* case—after the FTC issued a complaint seeking to unwind its acquisition of VieVu—Axon challenged the constitutionality of the FTC's structure, claiming it combines investigative, prosecutorial, adjudicative, and appellate functions.[20] Despite ruling against Axon's ability to bring a claim in

[18] Rule 3.8, Comment 1.
[19] *See* Dissenting Statement of Commissioner Christine S. Wilson, Facebook, Inc., Matter No. 1910413 (Aug. 19, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1594737/facebook_-_dissenting_statement_-_first_amended_complaint_-_final.pdf.
[20] Complaint for Declaratory and Injunctive Relief, *Axon Enterprise, Inc. v. FTC*, Case 2:20-cv-0014-DMF (D.Ariz. Jan. 3, 2020).

district court, the Ninth Circuit noted that the company "raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. Axon claims—and the FTC does not appear to dispute—that the FTC has not lost a single case in the past quarter-century." As a result, authorizing a Part III complaint often effectively becomes an adjudication on the merits.[21]

Due process requirements also apply to Commissioners' prosecutorial role in bringing complaints in federal court. All prosecutors are expected to exercise their discretion to bring cases in a "disinterested, non partisan fashion."[22] In *Marshall v. Jerrico*, the Supreme Court stated that the decision to prosecute is subject to due process standards:

> "Prosecutors are also public officials; they too must serve the public interest. Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."[23]

The Supreme Court has previously noted that due process is "not a technical conception with a fixed content unrelated to time, place, and circumstance."[24] Similarly, recusal rules seeking to protect due process must allow for consideration of the relevant time, place, and circumstances of each case. The Court has also previously opined that "matters of kinship, personal bias, state policy, [and] remoteness of interest" are matters for "legislative discretion,"

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[21] *See, e.g.*, Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43, 119 (1989–1990) ("No thoughtful observer is entirely comfortable with the FTC's (or other agencies') combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable.").
[22] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 683 at 4 (1996).
[23] 446 U.S. 238 (1980).
[24] *Mathews v. Eldridge*, 424 U.S. 319, 334 - 35 (1976).

indicating that Constitutional protections are intended to be the base on which specific procedures are built.[25]

By failing to provide for recusal in prosecutorial decisions, § 4.17 overlooks an important aspect of due process, where substantive responsibilities and issues are at stake. These serious deficiencies require the Commission to act promptly to amend its recusal rule. Federal agencies are obliged to comport their actions "to the standards required by the Constitution."[26] Indeed, a district court—considering a challenge to the adequacy of a federal agency's disqualification procedures—has stated that this obligation may in some instances require new rules: "If promulgating new regulations is the only manner in which the [agency] can properly conform its conduct, then the [agency] must do so."[27] Similarly, the D.C. Circuit has "encouraged agencies to adapt established internal procedures" to render "untainted decisions."[28]

VI. JUDICIAL PRECEDENT SUPPORTS ROBUST RECUSAL RULES

Courts have agreed that participation in a decision by an FTC Commissioner who may have already drawn factual and legal conclusions presents the potential for "appalling" due process violations. In *Texaco, Inc. v. FTC*, Texaco and the B.F. Goodrich Company sought the D.C. Circuit's review of an FTC order stemming from the Commission's investigation into a contract between the two companies. During the course of the proceedings, a new FTC Chair, Paul Rand Dixon, took office. Texaco filed a motion seeking to disqualify Chair Dixon on the basis of a speech Dixon had given before the National Congress of Petroleum Retailers while the case was pending. In his speech, Dixon had said that the the Commission was "well aware of the

[25] *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards*, *supra* n. 3, at 20; *Tunney v. State of Ohio*, 273 U.S. 510, 523 (1927).
[26] *Lowry v. Soc. Sec. Admin.*, 2000 WL 730412 at *14 (D. Or. 2000).
[27] *Id.*
[28] *Aera Energy LLC v. Salazar*, 642 F.3d 212, 223 (D.C. Cir. 2011).

practices" which "plague[d]" petroleum retailers, including "price fixing, price discrimination, and overriding commissions on TBA," and added that the audience "know[s] the companies—Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone."[29]

Although the FTC denied Texaco's motion and Dixon refused to withdraw from participation in the case, the D.C. Circuit sided with Texaco, finding that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act."[30] Citing its prior decision in *Amos Treat Co. v. Securities and Exchange Comm'n*, the court wrote that "an administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but *the very appearance of complete fairness.* Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process."[31] The court concluded that Dixon's participation in the hearing amounted to a denial of due process that invalidated the order under review.

The Sixth Circuit reached the same conclusion with respect to FTC Chair Dixon's involvement in *American Cyanamid v. FTC.*[32] In that case, the court examined the propriety of the Chair's refusal to recuse himself despite playing an "active role" in an antitrust investigation by a Senate subcommittee that involved many of the same facts, issues, and parties involved in the FTC proceeding (Chair Dixon had previously been counsel to the Senate subcommittee). The court was unconvinced by arguments that the proceedings differed because the Senate investigation was "legislative" and "investigative" in nature, and it instead advocated for a

[29] 336 F.2d 753 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965).
[30] *Id.*
[31] *Id.* (citing *Amos Treat Co. v. Securities and Exchange Comm'n*,306 F.2d 260, 267 (1962)) (emphasis added).
[32] 363 F.2d 757, 767 (6th Cir. 1996).

cautious approach: "It is fundamental that both unfairness and the appearance of unfairness should be avoided. *Wherever there may be reasonable suspicion of unfairness, it is best to disqualify*."[33] Later, the D.C. Circuit called the Chair's conduct in *American Cyanamid* an "appalling" due process violation.[34]

Beyond the obvious due process consequences, courts have also recognized that failures to recuse may result in Commissioners being "boxed in" by prior public statements and thus hampered in their ability to fully undertake their responsibilities. In *Cinderella Career & Finishing Schs., Inc. v. FTC*, the D.C. Circuit vacated an FTC order on the grounds that FTC Chairman Dixon had given a speech that appeared to prejudge the defendants' legal culpability. The court held that Commissioners may not "make speeches which give the appearance that the case has been prejudged," as doing so "may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record."[35]

VII. THE FTC'S ILL-DEFINED AND INCOMPLETE RECUSAL RULE IS INCONSISTENT WITH THOSE OF OTHER GOVERNMENT AGENCIES

In addition to the deficits evident on the face of the FTC's current recusal rule, § 4.17 is also inconsistent with other government agencies' practices, which provide more detailed recusal rules to the benefit of both the agency and the public.

Federal ethics rules require recusal of "any officer or employee of any agency" when necessary to "avoid an appearance of loss of impartiality in the performance of his official

[33] *Id* (emphasis added).
[34] *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970).
[35] *Cinderella*, 425 F.2d at 590.

duties."[36] As an initial matter, guidance from the Office of Government Ethics establishes a consistent standard for application across agencies and situations: "If the employee determines that a reasonable person would question the employee's impartiality, or if the agency determines that there is an appearance concern, then the employee should not participate in the matter."[37]

In addition to the judiciary, other federal agencies have adopted recusal rules that outline specific instances requiring recusal, provide an overarching standard for consideration of recusal requests, and require input from agency ethics officials. The fact that agencies across the federal government, in a diverse array of proceedings, currently employ more robust recusal rules shows that such procedures are workable in practice and benefit the agencies themselves and the constituencies that these institutions serve.

A. Recusal rules outlining broad grounds for recusal

Recusal rules are not limited to financial or personal relationships issues. For example, the judicial recusal rule requires recusal when a judge's "impartiality might reasonably be questioned," and specifies that a judge is required to disqualify herself if she has personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or has served in government employment and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.[38]

Recusal based on personal animus or specific views is consistent with practice at the Supreme Court. An illustrative case involves Justice Louis Brandeis, who, before his nomination,

[36] 5 C.F.R. § 2635.501(a).
[37] Office of Government Ethics, Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, https://www.oge.gov/web/oge.nsf/News+Releases/52E2FAA1B3F454D2852585BA005BEDC0/$FILE/99x8.pdf.
[38] 28 U.S.C. § 455(b).

wrote a series of essays criticizing trusts and the banking industry. In an essay titled *A Curse of Bigness*, for example, Brandeis wrote that size was not a crime but "may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put."[39] Once on the Court, Justice Brandeis recused himself from a number of monopolization cases, including *United States v. International Harvester* and 1920's *United States v. U.S. Steel*.[40]

Notably, previous FTC Commissioners have acknowledged that the broad judicial standard may be applicable to their work. In considering a petition for disqualification *In the Matter of Intel*, Commissioner J. Thomas Rosch, the subject of the petition, agreed with Intel that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary."[41] The remaining Commissioners agreed, and used the legal standard set forth above in considering the motion. The Commissioners also publicly issued a written response to Intel's petition that laid out their analysis and the reasoning behind their decision.

ACUS has likewise recommended that agency rules provide for the recusal of adjudicators in broad circumstances including not just improper financial or other personal interest in the decision, but also personal animus against a party or group to which that party belongs, or prejudgment of the adjudicative facts at issue in the proceeding.[42]

Other government agencies' recusal rules also include broad factors requiring recusal. The Department of Veterans' Affairs requires recusal of board members in hearings or appeals if the appeal involves a determination in which the member participated or had supervisory

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[39] Harper's Wkly., Jan. 10, 1914.
[40] Barak Orbach and Grace Campbell Rebling, The Antitrust Curse of Bigness, 85 Southern California L.R. 605, 625 (2012). Similarly, Justice Antonin Scalia recused himself in 2004's *Elk Grove Unified School District v. Newdow*, a First Amendment case challenging the inclusion of "under God" in the Pledge of Allegiance, after giving a public speech criticizing the Ninth Circuit's decision in the case.
[41] Opinion and Order of the Commission Denying Motion for Disqualification, *In the Matter of Intel Corporation*, FTC Docket No. 9341, https://www.ftc.gov/sites/default/files/documents/cases/100119intelstatement.pdf.
[42] Recusal Rules for Administrative Adjudicators, https://www.acus.gov/recommendation/recusal-rules-administrative-adjudicators.

responsibility in the agency of original jurisdiction prior to her appointment as a Member of the Board, or when there are other circumstances which might give the impression of bias either for or against the appellant.[43]

The Department of Health and Human Services requires recusal of a contract hearing officer and board member from cases "in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him."[44] The Department's rules for the Provider Reimbursement Review Board also allow for board member recusal "if there are reasons that might give the appearance of an inability to render a fair and impartial decision."[45]

B. Recusal rules requiring detailed response to recusal petitions

Other agencies' rules set out procedural requirements for recusals. For example, the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau requires recusal of administrators in any proceeding in which the administrator has engaged in investigation or prosecution. In these cases, the administrator must state her disqualification in writing and refer the record to the Under Secretary for appropriate action.[46] Similar obligations are in place at the Department of Housing and Urban Development, where if a hearing officer does not withdraw following a motion for disqualification, a written statement of his or her reasons must be incorporated in the record.[47] And at the Federal Communications Commission, the Commission's decision on disqualification petitions—as well as the initial petition, response, and any testimony or argument thereon—becomes part of the record of the underlying case.[48]

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[43] 38 C.F.R. § 20.107.
[44] 42 C.F.R. § 405.1817, 1847.
[45] Provider Reimbursement Review Board Rules (Aug. 29, 2018) (Rule 45), https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/Downloads/PRRB-Rules-August-29-2018.pdf.
[46] 27 C.F.R. § 71.116.
[47] 24 C.F.R. § 26.5.
[48] 47 C.F.R. § 1.245.

ACUS' survey of administrative recusal rules notes that while "established mechanisms for seeking and processing recusal decisions should promote public faith in the adjudication's integrity, the absence of any requirement that adjudicators explain and document their decisions can have the opposite effect."[49] A lack of written explanation "creates the impression that adjudicators are unwilling or unable to justify their decision," which ultimately undermines the public's trust in the agency.[50] Public explanation of recusal decisions, ACUS explains, results in increased transparency (again, a key priority of the current Chair) and "encourages adjudicators to be more thoughtful about their reasons for recusal." It also pushes adjudicators to develop norms and interpretive approaches that can help refine standards, ultimately sending a clearer message to the public as to how and when recusal will be used by the agency in the future.[51]

5 C.F.R. § 2635, which as discussed above sets out the standards for ethical conduct for employees of the executive branch, also supports the involvement of third parties, rather than leaving the decision solely in the hands of the official whose impartiality is at issue. The rule requires employees facing potential conflicts to inform the agency designee and receive authorization. It also allows for agency designees to choose to independently investigate a potential conflict, or to do so in response to a request from another source, including the employee's supervisor or someone responsible for the employee's assignment. Likewise, guidance from the Office of Government Ethics also requires employees to receive authorization from the relevant agency designee in certain circumstances.[52]

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[49] *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards*, *supra* n. 3, at 51.
[50] *Id.*
[51] *Id.* at 28.
[52] Office of Government Ethics, Memorandum dated April 26, 1999, from Stephen D. Potts, Director, to Designated Agency Ethics Officials Regarding Recusal Obligation and Screening Arrangements, https://www.oge.gov/web/oge.nsf/News+Releases/52E2FAA1B3F454D2852585BA005BEDC0/$FILE/99x8.pdf.

C. Case law requiring broad, fact-specific consideration of the circumstances

Additional guidance for considering recusal requests can be found in prior cases that support a broad, fact-specific approach to disqualification. For example, in *Stivers v. Pierce*, the Ninth Circuit considered whether a decisionmaker's indirect pecuniary interest or animus toward a party violates the neutral decisionmaker requirement.[53] The court concluded that the decision requires the use of a multifactor, fact-intensive test focusing on the degree of bias, circumstances, prior relationships, and conduct.[54]

Similarly, in *Liteky v. U.S.*, the Supreme Court found that although a decisionmaker can hold an unfavorable opinion of a party without being biased, it is problematic if the unfavorable opinion "results upon knowledge that the subject ought not to possess" or "is excessive in degree."[55] To justify disqualification on this basis, the Court wrote that the decisionmaker must "display a deep-seated favoritism or antagonism that would make fair judgment impossible." The Court then applied these principles to the facts of the case at hand, weighing rulings, decisions, and statements made by the judge subject to the recusal petition (even considering very minute, proceeding-specific details, such as the judge's failure to refer to the petitioner by his religious title).

VIII. PRIOR FTC RECUSALS SUGGEST THAT THESE TYPES OF BROAD OBLIGATIONS AND PROCEDURES ARE WORKABLE AND BENEFICIAL

A number of former FTC Commissioner recusals illustrate how more detailed substantive and procedural requirements could work in practice and would not be an impediment to the agency's objectives. In January 2017, President Trump's Ethics Pledge prohibited executive branch employees from participation "in any particular matter involving specific parties that is

[53] 71 F.3d 732 (9th Cir. 1995).
[54] *Id.*
[55] 510 U.S. 540 (1994).

directly and substantially related to [the executive branch employee's] former employer or former clients, including regulations and contracts." President Biden's Ethics Pledge contains this same prohibition.[56] Under the Trump pledge, prior FTC Chair Joseph Simons recused himself from participating in decisions related to the FTC's monopolization case against Qualcomm that was filed in federal court because he had previously advised the company on an (unsuccessful) unrelated acquisition.

Another former Chair's handling of a recusal request shows that consultation with the agency's ethics designee is beneficial and can be done in an expeditious manner. In 2007, Chair Deborah Platt Majoras addressed a petition for her recusal from the Google-DoubleClick investigation. In her statement—notably, issued two days after receipt of the petition—she explicitly referenced the procedures in 5 C.F.R. § 2635.501 and stated that she had consulted with the FTC's Ethics Official, who had determined that no conflict existed.[57] Further, although the parties in the Google-DoubleClick investigation only sought the recusal of Chair Majoras, Commissioner William Kovacic also issued a public statement addressing his wife's employment at a law firm involved in the matter. Commissioner Kovacic's response—again, published within two days of receipt of the petition—highlights the importance of issuing a written response to such requests: "even though the petition does not ask for my recusal, I want my position to be clear to avoid any future questions relating to this issue."[58]

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[56] https://www.federalregister.gov/documents/2017/02/03/2017-02450/ethics-commitments-by-executive-branch-appointees.

[57] Statement of Chairman Deborah Platt Majoras concerning Petition Seeking My Recusal from Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick Inc.) by Google, Inc. (Dec. 14, 2007), https://www.ftc.gov/news-events/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed.

[58] Statement of Commissioner William Kovacic concerning Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick Inc.) by Google, Inc. (Dec. 14, 2007), https://www.ftc.gov/news-events/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed.

By contrast Chair Khan recently failed to issue a written response to Facebook's recent petition seeking her recusal. The FTC press release did state that the Office of General Counsel "carefully reviewed" the company's petition—again underscoring that such consultations do not pose a significant burden. However, it appears that neither Chair Khan nor the FTC General Counsel consulted the other Commissioners about the recusal petition.[59]

Chair Majoras' recusal decision in Google-DoubleClick also illustrates that consultation with the other Commissioners in the first instance is possible and can be done in a timely manner. The remaining FTC Commissioners issued a concurring statement at the same time as Chair Majoras' response, noting that they had reviewed the petitions and both Chair Majoras and Commissioner Kovacic's responses, and agreed with the analyses outlined in those responses. The Commissioners' statement—which concluded that "it is evident that these Commissioners have at all times taken affirmative steps to conduct themselves in complete conformity with the ethical standards that apply to their positions"—though not required by FTC rule, was an excellent example of agency transparency that demonstrated that it can be done by the FTC Commissioners without compromising the FTC's effectiveness.

IX. PROPOSED AMENDMENTS TO 16 C.F.R. § 4.17

In light of the above, NetChoice, Americans for Prosperity, Hispanic Leadership Fund, Innovation Economy Institute, Institute for Policy Innovation, James Madison Institute, National

[59] Dissenting Statement of Commissioner Christine S. Wilson ("I write to make clear that no one should mistake my participation in today's vote to file an amended complaint for a vote, one way or the other, on the recusal petition that Facebook filed on July 14, 2021. In that submission, Facebook petitioned FTC Chair Lina Khan and the Commission to recuse Chair Khan from participating in any decisions concerning whether and how to continue the Commission's antitrust case against the company. If the Commission were to review Facebook's recusal petition, I would evaluate the petition carefully, applying the relevant law, including Constitutional due process considerations, to the applicable facts.") https://www.ftc.gov/system/files/documents/public_statements/1594737/facebook_-_dissenting_statement_-_first_amended_complaint_-_final.pdf

Taxpayers Union, R Street Institute, and Young Voices respectfully requests that the FTC's current recusal procedures as outlined in 16 C.F.R. § 4.17 be amended as follows:

First, the rule should apply to all motions seeking the disqualification of a Commissioner from any adjudicative, rulemaking, *or enforcement* proceeding. As outlined above, due process concerns also arise in connection with the prosecutorial role, whether in federal actions or administrative proceedings, which at the FTC are not siloed from other obligations and responsibilities. The recusal rule should reflect that reality.

Next, a motion for disqualification should be addressed in the first instance by the Commissioner whose disqualification is sought within 10 days of receipt of the motion. This provides both the moving party and the FTC with a predictable framework that ensures minimal disruption to an ongoing proceeding. As Chair Majoras' response in the Google-DoubleClick investigation shows, 10 days is ample time to consider a recusal request.

The Commissioner in question should also be required to furnish the FTC Ethics Official and other Commissioners with a copy of the motion and to consult with the Ethics Official regarding the motion. Consultation with agency ethics designees is a key component of other agencies' recusal rules and is supported by both the Office of Government Ethics and ACUS' recommendations for administrative agencies.

Next, the FTC Ethics Official must be required to issue a written determination that states the reasons the disqualification motion should or should not be granted. This is consistent with the FTC's stated goals of increased transparency and ensures that the Commissioner's consideration of the petition is informed by the FTC's ethics experts.

In the event that the Commissioner subject to the recusal petition declines to recuse herself from the proceedings, that Commissioner should issue a written statement outlining the

reasons for this decision and provide it to the other Commissioners. Following such a submission, the other Commissioners should determine the motion without the participation of the Commissioner in question and issue a determination within 10 days. The statement of the Commissioner subject to the recusal petition and of the Commissioners reviewing the initial decision should be provided to the petitioner. This is consistent with the current rule, but adds a specific time period for review to provide predictability for the parties and FTC staff involved in a proceeding and requires written statements, which will promote transparency and foster trust in the agency.

Finally, the FTC's recusal rule should outline the specific instances that require recusal. This would make the FTC's rule consistent with the practice of numerous agencies and ensure uniform treatment across recusal petitions. Without specific requirements, the FTC's recusal standard remains discretionary—which, as outlined by ACUS, encourages "public skepticism about the integrity of agency adjudicators."[60] Consistent with the judicial recusal requirements—which the FTC has acknowledged as applicable to its work and utilized in the past—recusal should be required if the Commissioner has personal bias or prejudice concerning a party, has personal knowledge of non-public evidentiary facts forming the basis of the proceeding from a prior employment capacity, or in a prior employment capacity participated as counsel, adviser, or material witness concerning the proceeding or, in a prior government employment capacity expressed an opinion concerning the merits of the particular case in controversy.

Below is the text of 16 C.F.R. § 4.17, with proposed amendments in red and underlined:

I. Applicability. This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative, rulemaking**, or enforcement** proceeding.

II. Procedures.

[60] *Supra* n. 27.

A. Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

B. Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

1. Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought **within 10 days of receipt of the motion. Such Commissioner shall promptly furnish the FTC Ethics Official with a copy of the motion and consult with the FTC Ethics Official regarding the motion. Such Commissioner shall also promptly furnish the Secretary of the Commission with a copy of the motion and the Secretary shall promptly circulate it to the other Commissioners.**

2. **The FTC Ethics Official shall issue a written determination that states the reasons the disqualification motion should or should not be granted. This written determination shall be promptly provided to all of the Commissioners.**

3. In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, **he or she will issue a written statement outlining the reasons for this decision and provide it to the other Commissioners. Following the provision of such a statement to the other Commissioners,** the Commission shall determine the motion without the participation of such Commissioner **within 10 days and provide a written statement of their reasons for the decision. The statement of the Commissioner subject to the recusal petition and of the Commissioners reviewing the initial decision shall be provided to the petitioner within 5 days of the decision of the Commissioners.**

III. Standards. Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed. **Recusal shall be required if the Commissioner has exhibited personal bias or prejudice concerning a party, has personal knowledge of non-public evidentiary facts forming the basis of the proceeding from a prior employment capacity, or in a prior employment capacity participated as counsel, advisor, or material witness concerning the proceeding or, in a prior government employment capacity expressed an opinion concerning the merits of the particular case in controversy.**