

CAUSE of ACTION

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July 12, 2017

VIA FIRST-CLASS MAIL

The Honorable Donald J. Trump
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Re: **Federal Trade Commission Vacancies**

Dear President Trump:

While we have been encouraged by the many steps you have taken to reduce the regulatory burdens facing this country, we wish to bring to your attention an important opportunity to further enhance economic liberty and opportunity. Toward that end, we write to respectfully request that you move quickly to appoint one or more Commissioners to fill current vacancies at the Federal Trade Commission (“FTC” or “Commission”) to rein in the FTC’s pattern and practice of regulatory overreach, often consisting of abusive and unconstitutional FTC enforcement actions that concretely harm the economy and the rule of law.

Although the FTC’s Acting Chair, the Honorable Maureen K. Ohlhausen, has done a commendable job¹ of addressing the excesses and lawlessness that plagued the Commission under the helm of former Chairwoman Edith Ramirez,² the Acting Chair cannot fully right the ship unless and until you appoint one or more Commissioners who share her commitment to advancing economic liberty and believe that responsible businesses should have the freedom to succeed, unfettered by rogue regulators chasing chimerical harms.³

¹ For examples of the Acting Chair’s commitment to transparency, protecting economic liberty, and reducing unnecessary regulatory burdens and bureaucratic red tape, see Press Release, “FTC Announces First Economic Liberty Public Roundtable: Focus on License Portability and Job Mobility” (June 20, 2017), <https://www.ftc.gov/news-events/press-releases/2017/06/ftc-announces-first-economic-liberty-public-roundtable>; Press Release, “Process Reform Initiatives are Already Underway at the Federal Trade Commission: Acting Chairman Ohlhausen is Streamlining Agency Processes and Improving Transparency” (April 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade>.

² See, e.g., STAFF OF H. COMM. ON OVERSIGHT AND GOV’T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015), available at <https://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf>. See also Gus Horowitz, *Data Security and the FTC’s UnCommon Law*, 101 IOWA L. REV. 955 (2016).

³ See, e.g., *Daugherty et al. v. Sheer et al.*, No. 15-cv-2034, 2017 U.S. Dist. LEXIS 48943 (D.D.C. Mar. 31, 2017) (named defendant FTC Staff brought administrative prosecution as retaliation for target exercising First Amendment rights).

The Acting Chair's ability to promote competition and protect the free market and consumers from overregulation and overreach is hamstrung by the current gridlock on the Commission. Although Congress intended for the Commission to be an independent, bipartisan, five-member administrative body,⁴ there are currently only two Commissioners: the Acting Chair Ohlhausen, a Republican, and Commissioner Terrell McSweeney, a Democrat.⁵ Because a majority of Commissioners must vote to approve most Commission actions,⁶ and because only one of the two current Commissioners shares the Administration's commitment to cutting bureaucratic red tape to grow the economy, the Commission is hopelessly deadlocked on important policy issues affecting the entire private economy, such as the FTC's controversial efforts to regulate data security, technology, and privacy for all U.S. businesses citing its authority under Section 5 of the FTC Act to prohibit "unfair" or "deceptive" business practices.⁷

The Acting Chair's hands are also tied with regard to controversial "midnight" enforcement actions before your administration began, that were authorized by party-line 2-1 votes⁸ shortly before the departure of former Chairwoman Edith Ramirez,⁹ as well as a pending petition requesting that the Commission reconsider another improvident enforcement action.¹⁰ This is not only unfair to the responsible and innovative businesses wrongly targeted for political persecution by the FTC, but is also poor public policy.

For instance, as the Acting Chair explained in her dissent from one such "midnight" enforcement action:

[I]n the Commission's 2-1 decision to sue Qualcomm, I face an extraordinary situation: an enforcement action based on a flawed legal theory (including a standalone Section 5 count) that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere

⁴ See 15 U.S.C. § 41.

⁵ See Commissioners, FTC, <https://www.ftc.gov/about-ftc/commissioners>.

⁶ See 16 C.F.R. § 4.14(c).

⁷ See 15 U.S.C. §§ 45(a), (n).

⁸ See, e.g., FTC Press Release, "FTC Charges D-Link Put Consumers' Privacy at Risk Due to the Inadequate Security of Its Computer Routers and Cameras" (Jan. 5, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-d-link-put-consumers-privacy-risk-due-inadequate> (noting that 2-1 vote to authorize lawsuit, with Commissioner Ohlhausen voting no); Dissenting Statement of Commissioner Maureen K. Ohlhausen ("Qualcomm Dissent"), *In the Matter of Qualcomm, Inc.*, File No. 141-0199 (Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_mko_dissenting_statement_17-1-17a.pdf.

⁹ The former Chairwoman left the FTC on February 10, 2017. See Press Release, "FTC Chairwoman Edith Ramirez Announces Resignation" (Jan. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-chairwoman-edith-ramirez-announces-resignation>.

¹⁰ See Petition to Acting FTC Chair Maureen K. Ohlhausen et al., Withdraw Bogus Lawsuit Against Lamb & Stop Harassing Small Businesses & American Families, <https://www.change.org/p/withdraw-bogus-lawsuit-against-lamb-stop-harassing-small-businesses-american-families>.

issuance, will undermine U.S. intellectual property rights in Asia and worldwide.
These extreme circumstances compel me to voice my objections.¹¹

The Acting Chair's cogent analysis of the fatal flaws has been echoed and underscored in recent reporting by Daniel Newman appearing in the Huffington Post,¹² which leads us to question whether large private businesses have continued to leverage relationships with FTC Staff to use the FTC as their stalking horse for their own private gain which echoes FTC Staff's apparent collusion with a third party engaged in theft and extortion in connection with a controversial administrative prosecution of an innovative cancer-detection business.¹³

Last month, the Eleventh Circuit Panel in *LabMD* exposed the unfair and potentially illegal collusion between FTC and its partner in crime during Oral Argument:

THE COURT: Was there collusion between Tiversa and the government?
[FTC]: No.

THE COURT: Well, Counsel, let me put it this way. What – *the aroma that comes out of the investigation of this case is that Traversa (sic) was shaking down private industry with the help of the FTC, will go to the – with the threat of going to the FTC: “If you don’t cooperate we will go to the FTC.” It may well be how they got some of their clients. But that’s – that’s an aroma that – and with falsifications to the Commission. The administrative law judge just shredded Traversa’s (sic) presentation, just totally annihilated it.*

[FTC]: There’s no question that Tiversa engaged in serious, serious misconduct in connection with this –

THE COURT: *No, and got the Commission involved in their — in their shakedowns.*

[FTC]: I – I don’t – I don’t agree with that.

THE COURT: *Oh, Counsel. Come on.*

[FTC]: I don’t agree with that.

THE COURT: *Oh, you – I know, you can’t agree with it. But it should have become obvious after you – after the evidence collapsed and your — and complaint counsel couldn’t go any*

¹¹ Qualcomm Dissent, *supra* note 8, at 1.

¹² Daniel Newman, “Asleep at the Wheel: Lazy Journalism and the Apple vs Qualcomm Dispute,” Huffington Post (Jun. 26, 2017), at http://www.huffingtonpost.com/entry/asleep-at-the-wheel-lazy-journalism-and-the-apple_us_59513ab1e4b0f078efd9839d.

¹³ See *LabMD, Inc. v. FTC*, Oral Arg. Tr. at 24-28 (Case No. 16-16270) (11th Circuit) (June 21, 2017).

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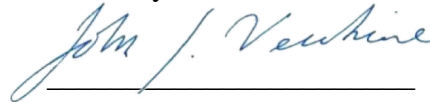
*further.*¹⁴

That is strong medicine indeed from the Judicial Branch regarding FTC's conduct in the *LabMD* case. And, within the Executive Branch, the Acting Chair should not be the lone (and thus powerless) voice of reason and sound economic policy on the Commission.

For these reasons, we respectfully ask that you expeditiously appoint one or more Commissioners to the FTC at your earliest convenience to assist the Acting Chair in furtherance of this Administration's efforts to reduce regulatory burdens and improve American's liberty to create.

Thank you very much for your time and attention to this matter.

Sincerely,



John J. Vecchione
President and CEO
Cause of Action Institute

cc:

Hon. Donald F. McGahn II, Office of the White House Legal Counsel
Hon. James Thune, Chairman, U.S. Senate Committee on Commerce, Science, & Transportation
Hon. Bill Nelson, Ranking Member, U.S. Senate Committee on Commerce, Science, & Transportation
Hon. Greg Walden, Chairman, U.S. House Energy & Commerce Committee
Hon. Joe Barton, Vice Chairman, U.S. House Energy & Commerce Committee
Hon. Frank Pallone, Ranking Member, U.S. House Energy & Commerce Committee
Hon. Maureen K. Ohlhausen, Acting FTC Chair
Hon. Terrell McSweeney, FTC Commissioner
Laura Berger, FTC Attorney
Kevin Moriarty, FTC Attorney
Shameka L. Walker, FTC Attorney

¹⁴ *Id.* at 25 ll. 10-24; 26 ll. 17-25; 27 ll. 1-6 (emphasis added).