



October 25, 2023

Via Electronic Submission

April J. Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

RE: Petition for rulemaking regarding disqualification of Commissioners (Docket No. R307004)

Dear Ms. Tabor:

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide these comments on the petition for rulemaking regarding the disqualification of Commissioners (Docket No. R307004).

SIIA is the principal trade association for the software and digital information industries. Our members include over 380 companies, reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, financial information, along with creators of software, as well as platforms used by millions all over the world. SIIA is dedicated to fostering a healthy environment for the creation, dissemination, and productive use of information.

The U.S. Chamber of Commerce recently petitioned the Federal Trade Commission (FTC) to initiate a rulemaking to establish a limited set of enhanced procedures for the disqualification of Commissioners in response to a request for recusal.¹ Without taking a position on the Chamber's specific proposal, we agree that greater procedural transparency, and a clearer standard for Commissioner recusals, would serve both the public and the institutional interests of the FTC.

The FTC is the only federal agency with both consumer protection and competition jurisdiction. As a result, it touches virtually every sector of the economy. In the area of consumer protection, the FTC has rulemaking authority, which means that it operates as a quasi-legislator; when it takes enforcement action, it often marries the roles of investigator, prosecutor, and judge. Because of its expansive reach, it is particularly important that all of the FTC's actions are not only factually and legally above-board, but also that they are perceived as such by the parties that come before it, as well as the public writ large.

There are currently two avenues for agency adjudicator recusal. In a limited set of circumstances, recusal is mandatory. Any federal government employee is prohibited from participating "personally and substantially" in a matter in which the employee, or anyone with whom the employee is closely associated, has a financial interest.² Beyond that, the rules on Commissioner disqualification are quite

¹ 88 FR 65865.

² 18 U.S.C. § 208.



opaque. In fact, the governing rule merely states that it applies to both adjudicatory and rulemaking proceedings, that any participant in such a proceeding may file a motion to disqualify a Commissioner, the steps that the Commissioner must take following receipt of the motion, and that the “motion shall be determined in accordance with legal standards applicable to the proceeding in which [it is] filed.”³ According to the Administrative Conference of the United States, the rule is a “discretionary recusal standard,” which means that it is left to the adjudicator’s own discretion whether to recuse.⁴

Because of the FTC’s unique role, fashioning clearer disqualification rules poses a challenge, but that does not make it any less important. Unlike federal court judges, for example, Commissioners are to some extent charged with implementing a policy agenda, which requires them to make certain value judgments.⁵ But at the same time, their actions cannot be seen as overtly partisan. And, like the federal judiciary, the FTC is ultimately dependent on the parties, and the public, to accept their decisions and abide by them.

Institutionally, it is therefore in the FTC’s own interest to promote public confidence in the integrity of its decision-making process.⁶ As mentioned, current rules mandate recusal where a Commissioner has a financial interest in the matter before them, but there are clearly other issues that also could raise legitimate questions about the impartiality of a Commissioner. For instance, whether strongly held, and publicly communicated, opinions on issues confronting the Commission should require recusal is a fact-specific question that rarely lends itself to easy answers. But precisely because of that it would behoove Commissioners to grapple with these types of issues publicly and on the record.

The FTC’s current rules on Commissioner disqualification are murky. This lack of transparency raises concerns for our members. At a minimum, therefore, the FTC should have recusal standards that offer some criteria to guide Commissioners and avoid conflicts of interest. As a result, we support revisions to the FTC’s rules of practice that would require Commissioners to seek written legal guidance of agency ethics officials and to disclose, in writing, the reasons for all recusal determinations. Revised rules should also specify instances where recusal would be required, such as financial interest, covered relationships, bias, and the appearance of bias.

SIIA appreciates your consideration of our views, and we would welcome the opportunity to answer any additional questions on this important matter.

Respectfully submitted,

Morten C. Skroejer
Senior Director, Technology Competition Policy

³ 16 C.F.R. § 4.17.

⁴ Louis J. Virelli, III, Administrative Conference of the United States, *Administrative Recusal Rules: A Taxonomy of Existing Recusal Standards for Agency Adjudicators* (May 14, 2020), at 11-12, 14.

⁵ 15 U.S.C. § 41. See also Louis J. Virelli III, Administrative Conference of the United States, *Recusal Rules for Administrative Adjudicators* (November 30, 2018), at 18.

⁶ *Id.* at 17.