Smith, Michelle

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Sunday, June 27, 2021 12:48 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Sunday, June 27, 2021 - 00:48 Submitted by anonymous user: [redacted] Submitted values are:

First Name: John
Last Name: Borzilleri, MD
Affiliation: Self
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: Yes
Link to web video statement:
Submit written comment: I filed two qui tam whistleblower cases regarding the cause of US massive brand drug price inflation, driven by a price collusion payment scheme between pharmaceutical and PBM/health insurance companies which began with the Medicate Part D program. The extreme consolidation of the PBM/health insurance industry is a root cause of the ongoing scheme that is causing severe patient and taxpayer harm. The details of the scheme and all the legal documents can be found on a website I began last year - www.drugpricetruth.org. I would appreciate the opportunity to address the FTC regarding my investigation.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/2

[redacted]

From: Glenn Lammi <[redacted]>
Sent: Monday, June 28, 2021 1:18 PM
To: JulyPublicComments
Subject: comment on item on July 1 open meeting agenda
Attachments: WLF comment FTC July 1 meeting.pdf

Please find attached a Comment of the Washington Legal Foundation related to the July 1 open meeting.

Thank you.

Glenn G. Lammi
Executive Director | Vice President of Legal Studies
Washington Legal Foundation
[redacted]
Visit us online at WLF.org
Twitter: @WLF

Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, DC 20036

June 28, 2021

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on Possible Rescission of Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act

Dear Chair Khan:

Washington Legal Foundation (WLF) appreciates the opportunity to comment on an item set for discussion at the Commission's July 1 open meeting. We also applaud your general goal of bringing transparency to the Commission's work, and this open meeting is a positive step in that direction.

We must agree with Commissioner Noah J. Philips, however, who on June 25 stated via Twitter: "a mere week's notice on matters requiring serious deliberation . . . undermine[s] that very goal." Rescinding the 2015 policy statement on "unfair methods of competition" under Federal Trade Commission Act § 5 would represent a significant policy and enforcement shift for the Commission. For the public to participate meaningfully in any debate over the Statement's rescission, the Commission should provide at least 30 days, if not 60, of public comment.

The published meeting agenda infers that the Commission is considering rescinding the 2015 Statement because it is purportedly misaligned with "the requirements set out by Congress to condemn 'unfair methods of competition.'" We attach to this letter a 2014 WLF Working Paper by William Kolasky that probes the legislative intent behind Section 5. That analysis reveals a set of principles that Congress sought to advance by outlawing unfair methods of competition. Several of these principles are reflected in the 2015 Statement, including that § 5 enforcement should be guided by "the promotion of consumer welfare"; that enforcement should target "harm to competition or the competitive process"; and that the Commission should apply a framework "similar to the rule of reason" when evaluating acts or practices.

The principles that Mr. Kolasky identifies reflect that Congress meant to both guide and cabin the Commission's discretion under § 5. Rescission of the 2015 statement would greatly expand the Commission's discretion in a manner inconsistent with Congress's intent. We urge your office to take Mr. Kolasky's findings and conclusions into consideration before taking action on the 2015 Statement.

Respectfully,

Glenn G. Lammi

Glenn G. Lammi
Executive Director and Vice President of Legal Studies

Attachment: "Unfair Methods of Competition": The Legislative Intent Underlying Section 5 of the FTC Act

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Critical Legal Issues: WORKING PAPER SERIES

"UNFAIR METHODS OF COMPETITION": THE LEGISLATIVE INTENT UNDERLYING SECTION 5 OF THE FTC ACT

William Kolasky
Hughes Hubbard & Reed LLP

Foreword
A. Douglas Melamed
Stanford Law School

Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

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To receive information about previous WLF publications, contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, (202) 588-0302, glammi@wlf.org.

ABOUT THE AUTHOR

William Kolasky is a partner in the Washington, D.C. office of Hughes Hubbard & Reed LLP, and is a former Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice. While there, Mr. Kolasky was one of the architects of the International Competition Network, a network of over 100 competition authorities worldwide designed to promote great international cooperation and convergence among those authorities. He has also taught antitrust law for over ten years at the American University's Washington College of Law.

Mr. Kolasky regularly represents clients in antitrust litigation before courts all over the country. He also represents clients in criminal and civil investigations before both the Antitrust Division and the Federal Trade Commission. Mr. Kolasky has secured antitrust clearance from the two agencies for more than 100 mergers and acquisitions, and has coordinated merger reviews in multiple other jurisdictions around the world. In 2013, he received the Global Competition Review's Lifetime Achievement Award for his achievement in private practice, government service, and antitrust scholarship.

He was assisted in researching and writing this article by Katherine Steele, Tristan Bird, and Stephen Halpin, III, all of Hughes Hubbard & Reed LLP. Mr. Kolasky also thanks Marc McClure, whose book, *Earnest Endeavors: The Life and Public Work of George Rublee*, helped inspire this article and who provided valuable research assistance and comments on this article.

Comments are welcome as the author considers this a work in progress; please send them to kolasky@hugheshubbard.com.

FOREWORD

by
A. Douglas Melamed[1]
Herman Phleger Visiting Professor
Stanford Law School

Bill Kolasky has written an excellent, important, and carefully researched paper about the meaning of Section 5 of the Federal Trade Commission Act. To appreciate its importance, one needs to understand the context.

The Sherman Antitrust Act was enacted in 1890. It prohibits certain types of anticompetitive conduct. Twenty-four years later, in the aftermath of a Presidential election in which the three candidates' different views about antitrust enforcement figured prominently, Congress passed and President Wilson signed the Clayton Act, which prohibits anticompetitive mergers, and the Federal Trade Commission Act. Among other things, the FTC Act created a new agency, the Federal Trade Commission, and provided in Section 5 that "unfair methods of competition in and affecting interstate competition" are unlawful. Section 5 further authorized the new Commission to commence adjudicative proceedings against any person it has reason to believe has used or is using such methods of competition and to issue cease-and-desist orders with respect to such conduct.

In the 100 years since the passage of the FTC Act, the Federal Trade Commission has taken the position, largely without controversy, that it is authorized by Section 5 in effect to enforce the Sherman Act and the Clayton Act. The Commission and the Justice Department

[1] **A. Douglas Melamed** retired as Senior Vice President and General Counsel of Intel Corporation in June 2014 and will continue serving as Vice President and Senior Corporate Counselor at the company through January 26, 2015. He previously served as Acting Assistant Attorney General of the United States Department of Justice's Antitrust Division.

have thus acted largely in parallel. Both enforce the Sherman Act and the Clayton Act—the Commission in administrative proceedings and the Justice Department in federal court—and they have adopted and over the years refined a so-called "clearance" agreement to allocate enforcement matters between them.

Section 5 of the FTC Act uses language, "unfair methods of competition," that is different from the language of the Sherman Act and the Clayton Act. It is widely understood that Congress did not intend to confine the Commission's cease-and-desist authority to conduct that violated the Sherman Act or the Clayton Act, at least as those statutes were construed in 1914.

The Supreme Court stated that explicitly in *FTC v Sperry & Hutchison*, 405 U.S. 233 (1972). The case concerned a Commission order finding that Sperry & Hutchison had violated Section 5 in connection with its trading stamp business. According to the Court, the case raised the question whether Section 5 empowers the Commission to "proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws." The Court answered that question in the affirmative, largely on the basis of congressional committee reports stating that Congress had decided to leave it to the Commission to determine what practices are unfair because there were too many unfair practices for Congress to define them all and new ones would in any event be devised in the future. The Court's discussion turned out to be dicta, however, because the Court affirmed the lower court decision setting aside the Commission's finding of unlawful conduct.

Although dicta, the Court's discussion of Section 5 might have emboldened the Commission. Over the next several years, the Commission brought a number of cases that

applied Section 5 to conduct that did not violate the antitrust laws. None of them ended well for the Commission. In *Official Airline Guides v FTC*, 630 F.2d 920 (2d Cir. 1980), the court set aside a Commission order prohibiting a monopoly publisher of airline flight schedules from discriminating between certified air carriers and commuter airlines. The court explained that enforcing the order would "give the Commission too much power." In *Boise Cascade v FTC*, 637 F.2d 573 (9th Cir. 1980), the court refused to enforce a Commission order prohibiting noncollusive, parallel adoption by competitors of practices that the Commission believed diminished price competition. The court rejected the argument that it should defer to the Commission's expertise on the ground that that argument was "in tension with the acknowledged responsibility of the court to interpret Section 5," and it relied on what it called "well forged" antitrust case law to determine that Section 5 did not apply to the conduct at issue in the case. And in *E. I. Du Pont de Nemours v FTC*, 729 F2d 128 (2d Cir 1984), the court set aside another Commission order prohibiting certain practices that had been adopted without collusion by a number of competing firms and that the Commission found led to higher prices. The court said that, while the Commission is not confined to "the letter" of the antitrust laws and may proscribe "incipient violations" and conduct that is "close to a violation" or "contrary to the spirit" of the antitrust laws, it may not proscribe conduct simply because it has an adverse effect on competition.

That's where matters stood thirty years ago—a vague understanding that Section 5 encompasses something beyond the antitrust laws, not even the beginning of a workable definition of the bounds of Section 5, and a Commission that had repeatedly been slapped down when it tried to push Section 5 beyond the antitrust laws. Thereafter, except for a couple of uncontroversial consent decrees in cases involving invitations to enter into illegal

agreements, the Commission seemed content to confine its competition enforcement activities to enforcing the antitrust laws.

That changed with the *N-Data* case in 2008. The issue was whether the transferee of certain patents violated Section 5 by announcing an intention to license them on fair, reasonable, and non-discriminatory (FRAND) terms after the original patent holder had committed to a standard-setting organization that they would be licensed for a one-time fee of $1000. The Commission agreed that there was no antitrust violation because, even though the conduct meant higher prices for licensees, it did not exclude rival technologies or otherwise injure competition. Nevertheless, by a 3-2 vote, the Commission accepted a consent decree under Section 5. The majority acknowledged that case law permits the unfair competition prong of Section 5 to be applied only to conduct that injures competition and asserted that competition was injured in that case, but it did not explain how there could be injury to competition under Section 5 when there was no such injury under the antitrust laws.[2]

The *N-Data* case triggered an ongoing debate about Section 5. Proponents of a broad reading of Section 5 rely principally on the expansive language of the statute and argue that a broad reading is needed to proscribe anticompetitive conduct beyond the reach of the antitrust laws. Those who favor a narrow reading of Section 5 argue that, unless the vague term "unfair methods of competition" is understood to be cabined by the abundant judicial construction of the antitrust laws or some other authoritative legal source, the law will be unpredictable and thus more likely to harm than to promote competition; that the antitrust laws are sufficiently capacious to reach almost all anticompetitive conduct that

[2]The author represented N-Data in that matter.

warrants government enforcement; and that the FTC and the Justice Department ought to apply the same law regarding anticompetitive conduct. Present and former FTC Commissioners are on both sides of the debate.

The Commission held a workshop anticipating possible Guidelines about the meaning of Section 5, but the Commissioners were unable to reach agreement. A majority of the present Commissioners appear willing to apply Section 5 in some undefined way to conduct not prohibited by the antitrust laws, but the Commission has brought few cases since *N-Data* that attempt to do so. Notably, the debate has been almost entirely about how Section 5 ought to be construed as a policy matter. There is no consensus about that, and it appears that no one knows what Section 5 actually means.

Bill Kolasky's WLF WORKING PAPER shows a way, perhaps *the* way, out of this unsatisfying stand-off. Like most good insights after they have been articulated, the premise of the paper seems both simple and obvious: Instead of focusing on the second-order question whether Section 5 is broader than the antitrust laws, we should focus directly on the ultimate question of what Congress meant by "unfair methods of competition."

After a meticulous study of the legislative history of Section 5, Kolasky concludes that, in selecting the statutory language it did and adopting and rejecting various proposed changes thereto, Congress embraced important substantive principles that give meaning to Section 5 and can guide and cabin the discretion of the Commission and the judgment of the courts in applying Section 5. The most fundamental of these principles are that Section 5 gives the FTC authority to outlaw exclusionary practices, but not exploitative practices; that Section 5 is intended to protect competition, not individual competitors; and that Section 5 proscribes only practices that exclude equally efficient competitors.

Kolasky sets a high bar by drawing parallels at the beginning of his paper to Judge (then Professor) Bork's seminal work on the legislative history of the Sherman Act. Kolasky's WORKING PAPER is unlikely to be so influential, in part because its scope is narrower. Even so, it is a timely and thoughtful paper that brings a valuable new perspective to a question that has eluded satisfactory answer for decades.

ABSTRACT

In the debate over the scope of Section 5 of the Federal Trade Commission Act, the Section's legislative history has been largely neglected. Most commentators seem simply to assume that the Section's legislative history provides little guidance as to how the FTC should exercise its authority to prohibit as "unfair methods of competition" business practices. This same assumption has led the Supreme Court in at least one case to suggest in dicta that the Commission has broad authority to use Section 5 to prohibit practices that violate the "spirit," but not the letter, of the antitrust laws without explaining what that means.

Inspired by Robert Bork's seminal article, *Legislative Intent and the Policy of the Sherman Act,* this WORKING PAPER undertakes a closer examination of the legislative history of the Section 5. It shows that while Congress intended Section 5 to reach beyond the Sherman Act to enable the FTC to prohibit anticompetitive practices in their incipiency before they become full-blown Sherman Act violations, it intended that the Commission's authority to do so would be constrained by three critical governing principles. First, the Commission would have authority only to outlaw exclusionary, not exploitative, practices. Second, the Commission would have authority to prohibit only those practices that were likely to harm competition and hence consumer welfare, and not practices whose only effect was to harm less efficient competitors. Third, the Commission would be required to apply a rule of reason analysis, similar to that used under the Sherman Act, to declare unfair only those methods of competition "which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper." This paper's review of the legislative history shows, therefore, that Congress intended Section 5 to be a "consumer welfare prescription," just as Robert Bork found to be the case for the Sherman Act.

"UNFAIR METHODS OF COMPETITION": THE LEGISLATIVE INTENT UNDERLYING SECTION 5 OF THE FTC ACT

INTRODUCTION

Considering that the Federal Trade Commission (FTC) just celebrated its centennial, it is remarkable how much uncertainty remains as to the scope of its authority under Section 5 of the Federal Trade Commission Act to prohibit "unfair methods of competition."[1] This continuing uncertainty has led some to call for the Commission to issue a policy statement to define its authority with greater clarity.[2]

Surprisingly, the ongoing debate over the scope of the FTC's authority under Section 5 has taken place without much careful study of the legislative history of the statute itself. The commentators on both sides of the debate have largely ignored the Act's legislative history, assuming perhaps that it would provide little guidance.[3] If so, their assumption is

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[1] 15 U.S.C. § 45. As examples of the continuing debate over the scope of Section 5, *see, e.g.*, A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, GLOBAL COMPETITION POL'Y (Nov. 12, 2008), http://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=94926 (arguing for a narrow interpretation); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, The FTC's Section 5 Hearings: New Standards for Unilateral Conduct?, Remarks at the ABA 57th Antitrust Law Section Spring Meeting in Washington, D.C. (Mar. 25, 2009) (transcript available at www.ftc.gov) (urging a broad interpretation).

[2] *See, e.g.*, Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRON., at 7 (Nov. 27, 2013), www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf; William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930-33 (2010); James J. O'Connell, *Section 5, 1914, and the FTC at 100*, ANTITRUST (forthcoming Fall 2014).

[3] This is not to say that others have completely ignored Section 5's legislative history. There were, in fact, several earlier articles that reviewed it generally. *See, e.g.*, Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 229-38 (1980); Gilbert Holland Montague, "*Unfair Methods of Competition,*" 25 YALE L.J. 20, 2-6, 51-96 (1915). But none of these earlier discussions sought, as this article does, to fit that legislative history into the kind of consumer welfare framework Robert Bork did in studying the legislative history of the Sherman Act. *See infra* pp 2-3 and note 4.

mistaken. Just as Robert Bork found when he examined the legislative history of the Sherman Antitrust Act in his seminal article, *Legislative Intent and the Policy of the Sherman Act,*[4] the legislative history of Section 5 reveals it was intended to protect competition in order to promote consumer welfare, just as the Sherman Act was.

Over more than five months of debate on the floors of the House and Senate during the spring and summer of 1914, Section 5's proponents emphasized that their purpose in outlawing unfair methods of competition was to protect the public generally from the harms that flow from monopoly power, rather than to protect smaller competitors from larger, more efficient rivals. In response to objections that the term "unfair methods of competition" was too vague, they proposed a test for unfair competition similar to what Judge Richard Posner has urged be applied to single-firm conduct under Section 2 of the Sherman Act.[5] Like Judge Posner, they argued that a business practice should be found to be unfair only when it employs "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper," and should not be used to attack "a corporation which maintains its position solely through superior efficiency."[6]

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[4] *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). In his article, Professor Bork showed that Congress intended the courts to apply a consumer welfare standard in interpreting the Sherman Act. Under this standard, Bork argued that the courts were required "to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output" and that only the latter could violate the Act's broad prohibitions of "restraint of trade" and "monopolization." *Id.* at 9, 16. Just over a decade later, the Supreme Court, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), accepted Bork's reading of the legislative history, agreeing that the Sherman Act was a "consumer welfare prescription." That insight has helped shape antitrust policy ever since.

[5] *See* Richard A. Posner, ANTITRUST LAW 194-95 (2d ed. 2001) (arguing that a practice should not be found to violate the antitrust laws unless it "is likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor").

[6] *See* Memorandum from George Rublee for President Woodrow Wilson Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum) (on file with the Washington, D.C. office of Hughes Hubbard & Reed LLP). *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen.

To avoid confusion at the outset, it should be made clear that this WORKING PAPER uses the term "consumer welfare" in the same sense that Judge Bork did in his article on the legislative intent behind the Sherman Act. As Kenneth Heyer has explained in an article forthcoming in the *Journal of Law and Economics,* Bork treated "consumer welfare" as meaning "total welfare, which is . . . equivalent to consumer plus producer surplus and economic efficiency."[7]

As Judge Bork found in the case of the Sherman Act, the legislative history shows that the Congress that enacted Section 5 valued competition because of its contribution to overall social welfare, not because of its distributional effects in shifting surplus from producers to consumers. The proponents of Section 5 assured their colleagues that Section 5 would not give the FTC authority to condemn competition on the basis of a firm's greater efficiency as unfair, even if it resulted in driving other less efficient rivals from the market, leaving a single firm with a monopoly. Nowhere did they suggest that this outcome should be condemned because some of the resulting surplus might flow to producers, rather than consumers.

The legislative history also shows that Congress did not intend, by proscribing unfair methods of competition, to give the Commission authority to regulate a firm's efforts to exploit its power once it had obtained a monopoly, as the FTC mistakenly did in its 2008 action against *N-Data*.[8] Section 5 was intended to give the FTC only the power to regulate

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Henry Hollis), *reprinted in* THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 4141 (Earl W. Kintner ed., 1982).

[7]Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. (forthcoming 2014, issue no. 3) (manuscript at 2) (available at awards.concurrences.com/IMG/pdf/heyer_consumer_welfare.pdf). *See also* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 719 (2014).

[8]*See* Negotiated Data Solutions LLC, FTC Docket C-4234, 2008 FTC Lexis 119 (Complaint) (Sept. 22, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf.

exclusionary conduct that might otherwise result in a monopoly, not to regulate exploitative conduct once a firm had gained a monopoly. As Woodrow Wilson's key advisor on antitrust policy, Louis Brandeis, phrased it, the goal was "to regulate competition, instead of monopoly."[9]

With this introduction, the paper turns next to a brief overview of the legislative history of the Federal Trade Commission Act generally, and Section 5 in particular. It will then examine the legislative history in more detail, focusing in turn on each of the three principles governing Section 5 enforcement that emerge from that history:

- First, Section 5 gives the FTC authority only to outlaw exclusionary practices, not exploitative practices.
- Second, the purpose of Section 5 is to protect competition, not less efficient competitors.
- Third, a business practice may be found to be an unfair method of competition only when it employs "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[10]

The paper's final section will briefly review the case law interpreting Section 5. It will show that nothing in that case law should prevent the Commission and the courts from applying these three guiding principles in order to construe Section 5 in a manner consistent with its legislative purpose.

I. AN OVERVIEW OF THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT

By 1914, when Woodrow Wilson asked Congress to enact legislation to reform the antitrust laws as part of his New Freedom program, the idea of creating a new

[9] *See* Sidney M. Milkis, THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 204 (2009).

[10] *See* Rublee, *supra* note 6, at 3. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 4141.

administrative agency to assist in enforcing the antitrust laws had been under discussion for more than a decade. Theodore Roosevelt, despite his reputation as a trustbuster, never liked the Sherman Act. In his very first Message to Congress in December 1901, Roosevelt argued that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled."[11] Two years later, in 1903, at his urging, Congress established a Bureau of Commerce within its newly created Department of Commerce to collect information about the practices of large corporations. Roosevelt hoped that the Bureau of Commerce could use the information to persuade companies to comply with the antitrust laws and avoid government enforcement actions.[12]

Roosevelt continued to believe, however, that the federal government should have greater power to regulate the conduct of large companies. Thus, in his final Message to Congress in December 1907, Roosevelt urged Congress to amend the Sherman Act so as "to forbid only the kind of combination which does harm to the general public," and to give "a grant of supervisory power to the Government over these big concerns engaged in interstate business."[13] To accomplish this objective, Roosevelt asked Congress to enact a general federal incorporation law under which a new federal board or commission would determine whether the applicant for a federal charter stood in violation of the amended Sherman Act prior to granting a license, and would enforce compliance thereafter.

When a somewhat watered-down version of Roosevelt's proposal was introduced in

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[11]Theodore Roosevelt, First Annual Message to Congress (Dec. 3, 1901), http://teachingamericanhistory.org/library/document/first-annual-message-to-congress-2/.

[12]Martin J. Sklar, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS 184 (1989).

[13]Theodore Roosevelt, Seventh Annual Message to Congress (Dec. 3, 1907), http://teachingamericanhistory.org/library/document/state-of-the-union-address-part-i-12/.

Congress in March 1908, it met fierce opposition from those who feared it would give Roosevelt too much control over business generally.[14] Faced with an "avalanche of criticism,"[15] Roosevelt withdrew his support for the bill, which then quickly died in committee.

William Howard Taft succeeded Roosevelt as President in 1909 and immediately shifted direction. A former judge, Taft saw little value in trying to jawbone companies into complying with the law. He believed that it would be better to enforce the Sherman Act vigorously, leaving the courts to decide what was or was not unlawful.[16] Taft agreed with Roosevelt, however, that the Sherman Act should not prohibit all restraints of trade, but only those that unreasonably harmed competition. But to achieve that objective, rather than ask Congress to amend the Act, Taft appointed justices to the Supreme Court who shared his view of how it should be interpreted. By 1911, when the *Standard Oil* case reached the Court,[17] a majority of justices were Taft appointees. As a result, the Court ruled, over an angry dissent from Justice John Marshall Harlan, that the Act prohibited only unreasonable restraints, rather than all restraints as some earlier decisions had suggested.[18]

Despite being a victory for the government that resulted in dissolution of the country's most notorious trust, *Standard Oil* dismayed many progressives, who feared that

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[14]Sklar, *supra* note 12, at 244 (quoting *Amending the Anti-Trust Law*, N.Y. TIMES, Mar. 24, 1908, at 1, http://query.nytimes.com/mem/archive-free/pdf?res=F50611FA345E13738DDDA80A94DC405B838DF1D3) (objecting that the bill was "intended to enable President Roosevelt to accomplish by indirection what he very well knows he could not get by the express authorization of Congress, the power to regulate and control all corporation business of the country by a system of registration or license").

[15]*Id.* at 253.

[16]William Kolasky, *Theodore Roosevelt and William Howard Taft: Marching Toward Armageddon*, ANTITRUST 97, Spring 2011, at 97, 103.

[17]*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[18]*See, e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897) (holding that the statute's condemnation of '*every* contract . . . in restraint of trade' encompassed *all* contracts of that nature, not simply those invalid as unreasonable under the common law).

its "rule of reason" would give conservative judges too much latitude in deciding what constituted an unreasonable restraint of trade.[19] But it also worried the business community, which was concerned that the rule of reason would make it difficult to predict what practices would be found unlawful. These similar, but opposing concerns led to calls for legislative action from both sides. Five senators, described as "radical Democrats and Republican insurgents," introduced bills to overrule *Standard Oil* legislatively by proscribing all contracts, combinations, and conspiracies in restraint of trade.[20] A second group of three senators, led by Robert La Follette, introduced a bill that Louis Brandeis helped draft. They designed the bill to define more clearly what would constitute an unreasonable restraint of trade and to place the burden of showing that its conduct was reasonable on the defendant.[21] A third group, led by Senator Francis Newlands, Chairman of the Committee on Interstate Commerce, sought to revive the idea of an interstate trade commission to which corporations could submit their proposed "trade agreements" for approval or disapproval.[22]

With these competing legislative proposals on the table, the election of 1912 became a national referendum on how business conduct should be regulated, with each of the three candidates advocating very different approaches.[23] The incumbent President and Republican nominee, William Howard Taft, argued in favor of leaving the law unchanged and continuing to rely on judicial enforcement of the Sherman Act as interpreted by the Supreme Court in *Standard Oil*. The Progressive Party candidate, Theodore Roosevelt, renewed his

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[19] William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, ANTITRUST 82, Summer 2010, at 82.

[20] Winerman, *The Origins of the FTC*, *supra* note 3, at 13.

[21] Kolasky, *The Election of 1912*, *supra* note 19, at 85.

[22] SKLAR, *supra* note 12, at 290.

[23] *See generally* Kolasky, *The Election of 1912*, *supra* note 19.

calls for accepting that modern economic conditions required large corporations and for the creation of an interstate trade commission, with powers similar to those of the Interstate Commerce Commission, to regulate the conduct of these large companies. Finally, the Democratic Candidate, Woodrow Wilson, advised by Louis Brandeis, advocated a third approach. He argued that instead of accepting that monopolies were inevitable and trying to regulate them as Roosevelt proposed, the government should seek "to regulate competition" and thereby prevent monopolies from forming. Wilson, therefore, advocated legislation that would define more clearly those practices which tend to destroy competition and that would create an administrative "sunshine" commission to expose those practices and help prevent them.[24] With Taft and Roosevelt dividing the Republican vote, Wilson won the election decisively. Wilson took his victory as a mandate to pursue this third approach as part of his New Freedom legislative program.

After focusing in his first year on other parts of his New Freedom program, President Wilson, in his First Annual Address to Congress in December 1913, began his push for new legislation "to prevent private monopoly more effectually than it has yet been prevented."[25] One month later, in an address to a joint session of Congress, Wilson outlined a two-part program similar to the one he had advocated during his 1912 campaign.[26] First, he called for a "more explicit legislative definition of the policy and meaning of the existing antitrust law." Second, he proposed "an interstate trade commission" to provide "the advice, the definite

[24] *Id.* at 86.

[25] Woodrow Wilson, State of the Union Address (Dec. 2, 1913), *reprinted at* 51 CONG. REC. 75 (1913).

[26] Woodrow Wilson, Address Before a Joint Session of Congress on Additional Legislation for the Control of Trusts and Monopolies (Jan. 20, 1914), *reprinted at* 51 CONG. REC. 1962-64, 1978-79 (1914), and *reprinted in* Kintner, *supra* note 6, at 3746-49.

guidance and information which can be supplied by an administrative body."[27]

President Wilson, at the time he delivered this address, appeared to contemplate that his proposed "administrative body" would serve principally to gather information and provide advice, but would not have any enforcement authority, and that enforcement of the antitrust laws, as clarified by his proposed legislation, would continue to be left to the Justice Department and the federal courts. This conception of the new commission's authority was reflected in testimony Louis Brandeis gave on behalf of the Administration before the House Committee on Interstate Commerce in February.[28] It was also reflected in the Interstate Trade Commission bill that emerged from that Committee in April, which the Committee chairman, James Covington, introduced on the floor of the House on April 14, 1914.[29] Section 10 of that bill authorized the Commission to conduct investigations "relating to any alleged violation of the antitrust Acts" but only at the direction of the President, the Attorney General, or either house of Congress. That section further authorized the Commission only to "report the facts" relating to the alleged violation and to offer "recommendations for readjustment of business in order that the corporation investigated may thereafter maintain its organization, management, and conduct of business in accordance with law."[30] It gave the Commission no enforcement power.

Brandeis, after testifying before the House Commerce Committee in February, returned to his private practice in Boston, leaving one of his colleagues, George Rublee, to

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[27] *Id.*

[28] *See Bill to Create an Interstate Trade Commission: Hearing on H.R. 12120 Before the H. Comm. on Interstate and Foreign Commerce*, 63d Cong. 101 (1914) (statement of Louis Brandeis) ("The most important function which this commission can exercise is to prevent wrongs and not prepare for the prosecution of wrongs.").

[29] H.R. 15613, 63d Cong. § 10 (1914), *reprinted in* Kintner, *supra* note 6, at 3769.

[30] *Id.* at § 15, *reprinted in* Kintner, *supra* note 6, at 3773.

follow the progress of the trade commission bill, as well as its companion bill designed to define more clearly what conduct would violate the antitrust laws.[31] The chairman of the House Committee on the Judiciary, Representative Henry Clayton, introduced this companion bill on the floor of the House on the same day as the trade commission bill. By April, Rublee had become disenchanted with the idea of trying to define more precisely through legislation the conduct that would violate the antitrust laws. Rublee explained in a memorandum he prepared for President Wilson in June that he had become convinced it would be "impossible to frame a set of definitions which embrace all unfair practices" and would "fit business of every sort in every part of this country."[32] He concluded that the better approach would be to give the new trade commission broad authority "to prevent corporations from using unfair methods of competition in commerce," leaving it to the commission to determine what conduct met that test.[33]

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[31] *See* William Kolasky, *George Rublee and the Origins of the Federal Trade Commission*, ANTITRUST 106, Fall 2011, at 107; Thomas K. McCraw, PROPHETS OF REGULATION 122-23 (1984). Rublee's central rule in formulating Section 5 and in persuading President Wilson to propose it was acknowledged by Senator Newlands, the chairman of the Senate Committee on Commerce who introduced the Federal Trade Commission bill on the floor, during the debate on the bill. *See* 51 CONG. REC. 11,537 (1914) (Remarks of Sen. Francis Newlands) ("It is true . . . that a suggestion was made with reference to including unfair competition by Mr. Stevens of the House, Mr. Rublee, and Mr. Brandeis. That matter was presented to me, as it was to other members of the committee of both parties. . . . It was presented to the President, and that was his view, and the matter was presented to the committee later on and was accepted."), *reprinted in* Kintner, *supra* note 6, at 4077.

[32] Rublee, *supra* note 6, at 7.

[33] President Wilson was also advised by Joseph Davies, who was then the Commissioner of Corporations and later became the first chair of the FTC. Davies shared Rublee's and Brandeis's view that the new commission should regulate competition, not monopoly. Elizabeth Kimball MacLean, *Joseph E. Davies: The Wisconsin Idea and the Origins of the Federal Trade Commission*, 6 THE JOURNAL OF THE GILDED AGE AND PROGRESSIVE ERA 248, 270 (2007) ("'The whole purpose of [the FTC] legislation,' Davies reminded Newlands and other colleagues, was to 'destroy monopoly and to regulate competition.'"). Davies agreed with Rublee, but not Brandeis, that the commission should use its authority to protect consumers, not smaller competitors. *Id.* at 272 ("Davies favored the consumer—thus his opposition to price fixing, which suppressed competition that lowered prices for the consumer. Brandeis favored the small entrepreneur, whether he provided lower prices or not."). Like Rublee, Davies also "was convinced that the effort to define unfair practices through legislation was impractical. Given their 'infinite variety,' he knew it was 'impossible to specify all that [might] be regarded as 'unfair.'" *Id.* at 262.

Rublee took his idea to Congressman Raymond Stevens, a freshman Democrat he knew from New Hampshire and who sat on the House Commerce Committee. Stevens agreed to introduce a bill embodying Rublee's new conception of the commission and to seek to have it substituted in committee for the Covington bill. Stevens' bill renamed the proposed agency the "Federal Trade Commission," and added a new Section 5 to prohibit "unfair and oppressive competition" and give the commission power to issue orders restraining "unfair methods of competition."[34] The committee quickly rejected Stevens' substitute bill and reported out its original bill. Stevens then attempted to have his version substituted for the committee bill on the House floor, again without success.[35]

Having failed in the House, Rublee and Stevens decided to approach President Wilson personally, with the help of a mutual friend, Norman Hapgood, who was the editor of *Harper's Weekly* and a close friend of the President. With opposition to the Clayton bill growing, Wilson agreed in late May to meet with Rublee. Knowing that Wilson would likely not act without consulting Brandeis, Rublee asked Brandeis to join him for the meeting, along with Stevens and Senator Henry Hollis of New Hampshire.

After Rublee outlined his proposal to Wilson, Brandeis surprised Rublee by supporting his proposal, even though he had earlier opposed giving the commission any enforcement authority. Despite Brandeis' support, Wilson decided it was too late to so radically change the trade commission bill before it was voted on in the House. The president instead waited until the bill had passed the House on June 5 before calling Rublee and the others back to the White House to tell them that he intended to have Rublee's

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[34] H.R. 15660, 63d Cong. (1914).

[35] 51 CONG. REC. 9,059 (1914), *reprinted in* Kintner, *supra* note 6, at 3878-79.

provisions incorporated into a new bill in the Senate that would be introduced as a substitute for the House bill. At Wilson's direction, the chairman of the Senate Interstate Commerce Committee, Senator Francis Newlands, introduced this substitute bill on June 13.[36] The new bill was modeled closely after the bill Representative Stevens had introduced in the House. Like that bill, it changed the name of the new commission to the Federal Trade Commission, increased its membership from three to five, and added a new Section 5 to give it broad enforcement powers. Adopting Stevens' language, this new Section 5 provided that "unfair competition in commerce is hereby declared unlawful," and empowered the Commission "to prevent corporations from using unfair methods of competition in commerce."

Debate on the new bill began on the Senate floor on June 25 and continued for nearly six weeks until the bill passed by a vote of 53 to 16, with 27 senators abstaining, on August 5. Over this period, the bill was debated on the floor for 26 full days, with the vast majority of this time being spent on Section 5's grant of authority to the Commission to prohibit "unfair methods of competition." Senator Charles Thomas, a Democrat from Colorado, set the tone for this debate on the opening day by attacking the "indefiniteness" of the term "unfair competition," and declaring that Section 5 would give the FTC "the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition."[37] Senator James Reed, a Democrat from Missouri and perhaps the most persistent critic of Section 5, added that the bill would leave the FTC "without any guide of law . . . to determine what is fair and what is unfair," thereby unconstitutionally

[36] S. 4160, 63d Cong. (1914), *reprinted in* Kintner, *supra* note 6, at 3924.

[37] 51 CONG. REC. 11,103 (1914), *reprinted in* Kintner, *supra* note 6, at 3947.

delegating to the Commission the powers of Congress to legislate.[38]

After the first two weeks of this debate, George Rublee prepared a memorandum for President Wilson with "answer[s] to most, if not all, of the objections that have been raised to" Section 5.[39] This memorandum, which remains unpublished, provides valuable insight into the intentions of the original authors of Section 5. Stating that "[t]he object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods," the memorandum goes on to explain what Rublee understood the term "unfair methods of competition" to mean: "Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[40]

Rublee's statement of the purposes and meaning of Section 5 was later embraced by the proponents of the bill on the floor of both the Senate and House, who used his arguments—often verbatim—to rebut the concerns of Senator Reed and others that Section 5 was too vague to be enforceable.[41] As they expanded on these views over the course of

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[38] *Id.* at 11,114, *reprinted in* Kintner, *supra* note 6, at 3972.

[39] Letter from Franklin K. Lane, U.S. Sec'y of the Interior, to Woodrow Wilson, President of the United States, providing an introduction to and attaching George Rublee's Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission (July 10, 1914) (unpublished memorandum) (on file in the Washington, D.C. office of Hughes Hubbard & Reed LLP). For a more detailed account of Rublee's role in guiding administration senators in their defense of Section 5, *see* Kolasky, *The Election of 1912*, *supra* note 19.

[40] Rublee, *supra* note 6, at 3. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 1982 (repeating Rublee's formulation of the distinction between fair and unfair competition nearly verbatim).

[41] In a series of interviews conducted from December 1950 to February 1951, Rublee explained that he "was very busy during all this time furnishing ammunition by explaining to the Administration Senators what this meant, why it was a good thing, why it was constitutional, and all that. [He] actually wrote speeches that were delivered by senators." Reminiscences of George Rublee (series of interviews conducted from December 1950 to February 1951), at 116 (available at Columbia University's Rare Book & Manuscript Library in the Columbia Oral History Archives). Rublee sat in the visitors' gallery during the debates, distributing his notes and speeches to the senators, and slipping them arguments to rebut the other senators' views. *Id.* at 117

that debate, the proponents were able to overcome the initial skepticism, if not outright opposition, that greeted the bill when it was first introduced, resulting in the bill's ultimate passage in early September. Their arguments in support of the bill, therefore, provide the best evidence of the legislative intent behind Section 5.

II. THE PRINCIPLES CONGRESS INTENDED TO GOVERN THE COMMISSION'S ENFORCEMENT OF SECTION 5's PROHIBITION OF UNFAIR METHODS OF COMPETITION

The debates on the floor of both the Senate and House reveal three main principles that Congress intended would govern the FTC's exercise of its authority under Section 5 to prohibit unfair methods of competition. The first principle was that Section 5 would give the Commission authority only to regulate exclusionary practices that might lead to monopoly, not to regulate a firm's efforts to exploit its monopoly power once acquired. The second principle was that Section 5 would give the FTC authority only to prohibit those unfair methods of competition that threaten to harm competition itself and thereby expose consumers to the evils of monopoly, and the agency's authority could not be used to protect smaller, less efficient rivals. The third, which was a corollary of this second principle, was that the Commission could find that a business practice violated Section 5 only when it employed unfair "methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper," and that it could not be used

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("One speech I wrote, I had fifteen or twenty copies typewritten and distributed and I could see the distinctive covers which I had placed them in laying around on the tables."). Rublee was so visible during the debates that Senator Reed questioned his role: "I asked [the senator] if he did not know a man named Rublee, who has been weeks here in Washington and has haunted the galleries and antechambers of the senate. He has been very active in the advocacy of this bill, and I wanted to learn what the Senator knows about the activities of Mr. Rublee . . . and who, if anybody, is paying Mr. Rublee." 51 CONG. REC. 14,786-87 (1914), *reprinted in* Kintner, *supra* note 6, at 4702.

to attack "a corporation which maintains its position solely through superior efficiency."[42] Each of these three controlling principles will now be examined in turn.

A. Section 5 Gives the Commission Authority to Only Regulate Competition, Not Monopoly

The first major theme that emerges from the legislative history is that Section 5 was designed to put into law President Wilson's 1912 campaign pledge to regulate competition, not monopoly. Congress did not give the FTC the power to regulate a firm's use of monopoly power to extract monopoly rents from its customers, however unfair or oppressive a firm's conduct might be, but gave it the power to prevent firms from acquiring or maintaining monopoly power through exclusionary practices.

This limitation was a natural result of the debate during the election of 1912 as to how business should be regulated.[43] The Progressive Party, led by Theodore Roosevelt, saw some measure of monopoly power as inevitable in a modern industrial economy. The Progressives sought, therefore, to give the government the power to regulate the exercise of that monopoly power which, in their view, could not be prevented. The Democratic Party, led by Woodrow Wilson and Louis Brandeis, argued to the contrary that large firms were not necessarily more efficient than small ones and that most monopolies were likely the result of exclusionary conduct. The Democrats urged, therefore, that the government should strive to prevent monopolies from forming by seeking to regulate competition, rather than try to regulate monopolies once they had formed, as Roosevelt urged.

The reports of the House and Senate Committees on Interstate Commerce that

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[42] Rublee, *supra* note 6, at 4-5. *See also* 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Henry Hollis), *reprinted in* Kintner, *supra* note 6, at 1982.

[43] *See generally* Kolasky, *The Election of 1912*, *supra* note 19.

accompanied the bills to create a new trade commission took great pains to make clear that these bills embodied the Democratic Party's view and not that of the Progressive Party. Thus, the House report begins by stating that the purpose of its bill was "the preservation of proper competitive conditions in our great interstate commerce," and that there was "no place in the bill" for "the establishment of a commission having powers of regulation or control of prices."[44] The Senate report was even more explicit:

> Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable . . . , but recognize that a commission is a necessary adjunct to the preservation of competition. . . . The commission which is proposed by your committee in the bill is founded upon the latter purpose and idea.[45]

Notwithstanding these clear statements of legislative purpose by both committees, several senators and representatives sought further assurances during the floor debates that the new commission would not have the power to regulate the conduct of firms with monopoly power, expressing a fear that such authority could dull efforts to prevent monopolies from forming in the first place. The first senator to raise the issue was Senator William Borah, an outspoken populist from Idaho who had spent much of his political career crusading for stronger antitrust enforcement.[46] As soon as Senator Newlands introduced the Senate substitute with its new Section 5, Senator Borah rose to state:

> What I fear is that this bill can serve no other purpose than to dull the edge of our activities and our desire to destroy monopoly. We know that within the last few years there has been a distinct and aggressive movement in this country to legalize monopoly . . . . The people are told that they will be made safe and even happy . . .

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[44] H.R. REP. NO. 63-533, pt. 1, at 2 (1914), *reprinted in* Kintner, *supra* note 6, at 3757.

[45] S. REP. NO. 63-597, at 10 (1914), *reprinted in* Kintner, *supra* note 6, at 3907.

[46] *See* Thurman Arnold, THE FOLKLORE OF CAPITALISM 217 (1937) ("Men like Senator Borah founded political careers on the continuance of such crusades, which were entirely futile but enormously picturesque.").

> by means of a commission or bureau appointed and sitting at Washington, whose functions it shall be to regulate these monopolies. It is argued that combinations with monopolistic powers . . . are inevitable, necessary, and that all they need is a little regulation.[47]

Two of the bill's principal proponents, Senator Newlands, the Chairman of the Commerce Committee who introduced the bill in the Senate, and Senator Hollis, who had helped persuade President Wilson to add Section 5, responded that Senator Borah's concerns were unwarranted. They assured the Senate that the commission would have no power to regulate a firm's exercise of its monopoly power.

Senator Hollis, responding to Senator Borah's concerns, referred back to the fact that "[o]ne of the great issues in the last presidential campaign was whether the solution of the trust problem was to be found in the regulation of monopoly or in the regulation of competition."[48] He reminded Borah that the Democratic Party in that election had "declared itself for the abolition of monopoly and the regulation of competition," rather than accepting monopolies as inevitable and attempting to regulate them as the Progressive Party had urged. At a later point in the debate when Senator Borah, still not persuaded, raised this point again, Senator Hollis suggested he read all three of the pending antitrust bills the Administration was proposing, saying that if he did so, he would "find that there is not one line or syllable in any one of them that countenances monopoly in any way" and that they were all "intended not to regulate monopoly, but to . . . prohibit those practices which will lead to and encourage it."[49]

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[47] 51 CONG. REC. 11,233 (1914), *reprinted in* Kintner, *supra* note 6, at 4009–10. *See also id.* (Remarks of Sen. Borah) ("While I know it is not the purpose of the authors of the bill—I know the very opposite to be the object and purpose of the authors of the bill—a time is coming when this will be used as a buffer against prosecutions under the Sherman Act."), *reprinted in* Kintner, *supra* note 6, at 4009.

[48] *Id.* at 12,146, *reprinted in* Kintner, *supra* note 6, at 4142.

[49] *Id.* at 12,732, *reprinted in* Kintner, *supra* note 6, at 4236.

Senator Newlands, both at the time and again later in the debate, likewise drew a sharp distinction between the type of commission the Progressive Party had proposed and that which his bill would create:

> The commission which they [the Progressive Party] wanted was a commission which would recognize consolidation, which would recognize monopoly, but would regulate it even to the extent of regulating its prices.
> . . . .
> Now, this kind of a commission is an entirely different commission. This commission is not to recognize consolidation, but to destroy it. It is not to recognize monopoly, but to destroy it. . . . Instead of regulating monopoly we are regulating unfair competition. . . . [This commission] is so organized as . . . [to] impair and destroy monopoly in the future in the embryo . . . .[50]

Senator Albert Cummins, a Republican from Iowa and the ranking minority member of the Commerce Committee, endorsed these descriptions of the limitations on the FTC's authority under Section 5. Saying that he "was astonished to hear it said that this bill was intended or would have the effect of regulating monopoly instead of maintaining and preserving competition,"[51] Cummins told the Senate:

> I do not believe there is a single provision in any of the bills intended to encourage or protect monopoly, or that can by any possibility encourage or protect monopoly. The bill that we have before us is not a regulation of monopoly in any of its parts. It is not intended to permit monopoly to exist and then prescribe the terms or conditions upon which it may operate or do business. It is intended to destroy the monopolies that are now with us and to prevent the establishment of other monopolies.[52]

Again referring back to the 1912 election, Senator Cummins assured the Senate that, while the Progressive Party "did propose to regulate monopoly," he, as a member of the committee reporting out the bill, was "unalterably opposed to any such proposition," and did not "want a commission imposed upon the industry of this country which recognizes a

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[50] *Id.* at 12,867*, reprinted in* Kintner*, supra* note 6, at 4342–43.

[51] *Id.* at 12,919*, reprinted in* Kintner*, supra* note 6, at 4373.

[52] *Id.* at 12,733*, reprinted in* Kintner*, supra* note 6, at 4237-38.

monopoly and attempts to check its ravages in that way."[53]

When the Senate's substitute bill returned to the floor of the House after passing the Senate, Representative James Covington, who had introduced the original House bill, likewise assured his colleagues that the addition of Section 5 would not give the commission the power to regulate the pricing or output decisions of large firms:

> The acceptance of section 5 of the present bill, conferring upon the Federal trade commission the power to deal with unfair methods of competition, in no wise [sic] interferes with the declaration made by me respecting the way in which the powers of the commission ought to be circumscribed. There is not now found within the extent of the well-defined doctrine of the substantive law recognized by the courts as "unfair methods of competition" any attempt to make terms with monopoly or . . . to regulate production or enforce by orders the maintenance of fixed prices.[54]

These excerpts from the Act's legislative history illustrate how far from the legislative purpose of Section 5 the FTC strayed when, in 2008, it authorized a complaint against Negotiated Data Solutions LLC ("N-Data") for allegedly violating Section 5 by engaging in unfair methods of competition in its enforcement of its patents against makers of equipment employing Ethernet, a widely used computer networking standard.[55] In its complaint, the Commission alleged that N-Data had violated Section 5 by reneging on a commitment its predecessor company had made to an Ethernet standing-setting organization by demanding higher royalties for its patents than it had committed to charge at the time they were incorporated into the industry standard. Two commissioners dissented from the Commission's action, with one of them writing that "[t]his case departs materially from the prior line [of FTC standard-setting 'hold-up' challenges], in that there is no allegation that [N-

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[53] *Id.* at 4238.

[54] *Id.* at 14,927*, reprinted in* Kintner*, supra* note 6, at 4721.

[55] *See Negotiated Data Solutions LLC*, FTC Docket C-4234, 2008 FTC Lexis 119 (Complaint) (Sept. 22, 2008), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf.

Data] engaged in improper or exclusionary conduct to induce" the Ethernet standard-setting organization to include its technology, which would have required proof that its predecessor intended to renege on its commitment at the time it made it.[56]

The three commissioners voting to authorize the complaint did not disagree. Instead, they argued that a complaint was justified because N-Data, by reneging on its predecessor's commitment, had "engaged in conduct that was both oppressive and coercive when it engaged in efforts to exploit licensees that were locked into a technology by the adoption of a standard,"[57] and that "consumers would be forced to pay higher prices" because of its conduct.[58] This rationale for the Commission's action shows that however "contrary to good morals" N-Data's conduct may have been, it was not conduct designed to exclude any rival from the market—because there were none—but was simply an effort to more fully exploit a monopoly its predecessor had acquired lawfully. Just as Theodore Roosevelt might have wished, the Commission was therefore seeking to regulate the pricing behavior of a lawful monopolist, not to protect competition. But that was a power the proponents of Section 5 had repeatedly assured their Senate and House colleagues the Federal Trade Commission would not have.

B. Section 5 Protects Competition, Not Competitors

The second governing principle that emerges from the legislative history is that by giving the FTC authority in Section 5 to prohibit unfair methods of competition, Congress

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[56] *See id.* (Dissenting Statement of Chairman Majoras), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122majoras.pdf.

[57] *See id.* (Statement of the Commission), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122statement.pdf.

[58] *See* Press Release, Fed. Trade Comm'n, FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S. (Jan. 23, 2008) (transcript available at http://www.ftc.gov/news-events/press-releases/2008/01/ftc-challenges-patent-holders-refusal-meet-commitment-license).

sought to protect the public interest in competition, not to protect weaker competitors for their own sake. Section 5, therefore, like the Sherman Act, can be fairly described as a "consumer welfare prescription."[59]

When Senator Newlands introduced the Senate substitute for the House bill on the floor, some senators raised serious concerns as to its new Section 5 declaring "unfair competition" unlawful and giving the new commission authority to prohibit "unfair methods of competition." Led again by Senator Borah, a number of senators objected that the bill would leave the FTC free "to determine whether or not that competition was fair or unfair," without any legal standard to guide judicial review of whether it had acted beyond its authority.[60] The new section would, Senator Reed declared, "confer upon five men a power more arbitrary than that possessed by any king or potentate on earth."[61]

Senator Borah and others also saw a potential conflict between the policy of the Sherman Act and that of the new bill. As Borah explained,

> The Sherman law bids the business of the country to compete. It was built upon the theory that competition is the life of trade. It punishes those who unnecessarily restrain trade or destroy competition. . . . We have given business to understand that we were not concerned with the severity of competition, but only with its preservation, however strong.[62]

He then contrasted this policy in favor of free and open competition with that of a law that would regulate that competition:

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[59] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

[60] 51 CONG. REC. 11,232 (1914) (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 4007.

[61] *Id.* at 11,113, *reprinted in* Kintner, *supra* note 6, at 3969.

[62] *Id.* at 11,186, *reprinted in* Kintner, *supra* note 6, at 3989. *See also id.* at 12,208 (Remarks of Sen. McCumber) ("There are two vices in section 5, vices that must not only seriously affect the producer and seller of commodities but more disastrously affect the consumer. First, this section destroys the main purpose of the antitrust law. Second, it destroys the incentive for any new and untried project by surrounding the individual and hemming him in between two conflicting laws—one law that enforces full competition and another that ... punishes him if his competition is too ardent or too strong."), *reprinted in* Kintner, *supra* note 6, at 4151.

> [W]hile the Sherman antitrust law bids the business world to compete . . . we announce another rule here in another law, saying that while we recognize competition as necessary we insist that it shall not be unfair competition. We propose to have competition, but to regulate competition which means to oversee the whole business world and ultimately and logically to tolerate monopoly.[63]

To illustrate his point, Senator Borah cited the then-recent *International Harvester* case,[64] where defendants had argued that the alleged restraints of trade had been "made for the purpose of getting rid of ruthless, unfair, overreaching competition."[65] He maintained that, while the defendants may have viewed the competition as unfair, it had proven to be "of unquestionable benefit" to the farmers who paid the lower price, and who suffered "when the severe competition ended [and] the price was ultimately raised."[66]

Several days later, to further illustrate his concern, Senator Borah cited a letter he had received "from a gentleman who is in favor of a trade commission which should have power to fix prices."[67] Using the letter as a foil, he continued:

> That undoubtedly would be a satisfactory proposition to the small competitor if his business was in a failing condition; but how about the consumers throughout the country? Would the commission say that that was unfair competition—that because a large business could afford . . . to sell at the lower price it was unfair for them . . . simply because smaller concerns could not afford to sell for that price?[68]

A number of other senators expressed similar concerns over the course of the ensuing

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[63] *Id.* at 11,186, *reprinted in* Kintner, *supra* note 6, at 3989.

[64] *See State ex rel. Major v. International Harvester Co. of America*, 237 Mo. 369, 141 S.W. 672 (1911), *aff'd*, 234 U.S. 199 (1914).

[65] 51 CONG. REC. 11,187 (1914), *reprinted in* Kintner, *supra* note 6, at 3992.

[66] *Id.* at 11,232, *reprinted in* Kintner, *supra* note 6, at 4007.

[67] *Id.* at 11,601, *reprinted in* Kintner, *supra* note 6, at 4100.

[68] *Id.*

debate.[69]

In response to these concerns, the proponents of Section 5 emphasized throughout the debate that it would give the new commission power to prohibit a practice as an "unfair method of competition" only if it was likely to cause harm to the public at large, not just to a competitor. Thus, Senator Cummins, who was the first to address Senator Borah's concerns, assured the Senate that Section 5 was concerned "not merely with unfairness to the rival or competitor," but instead that "the unfairness must be tinctured with unfairness to the public."[70] Expanding on this point, he explained:

> We are not simply trying to protect one man against another; we are trying to protect the people of the United States, and, of course there must be in the imposture or in the vicious practice or method something that has a tendency to affect the people of the country or be injurious to their welfare.[71]

Senator Cummins assured Senator Borah that Section 5 would not condemn aggressive price competition just because it discomfited a rival. "No sane, sensible man," he argued, "ever suggested that mere underselling constitutes unfair competition."[72] Instead, Section 5

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[69] *See, e.g.*, *id.* at 12,218 (Remarks of Sen. McCumber) ("He may take means that I consider unfair . . . , and he may drive down the price of the commodity that we are both selling, . . . and suppose he has not destroyed me entirely but has merely injured me[,] . . . but [that] I am still continuing in business. Can he be indicted for unfair practices so long as I am keeping alive and keeping up a competition, when the result of that competition is for the benefit of the purchasing public which buys our commodities? . . . If that is the case, then I think we are stifling competition, and in the end are doing a great injury to the country."), *reprinted in* Kintner, *supra* note 6, at 4172; *id.* at 12,221 (Remarks of Sen. Frank Brandegee) ("[R]epresentatives of both the large and small coal operators . . . were complaining of [ ] cutthroat competition. . . . They said that . . . if they were allowed to have a trade commission which would have authority to set the seal of approval of this government upon an agreement that those otherwise competing coal miners and coal companies might make with each other to stop this wasteful competition, to fix the price of coal higher, it would result in a great economic operation of their coal properties."), *reprinted in* Kintner, *supra* note 6, at 4178.

[70] *Id.* at 11,105, *reprinted in* Kintner, *supra* note 6, at 3952. *See also id.* at 13,304 (Remarks of Sen. McCumber) ("[T]here are a great many practices which might be declared to be unfair as between two competitors, the result of which is beneficial to the public, and it only ceases to be beneficial to the public when the effect of the competition is such that it destroys one of the competitors and thereby creates a monopoly."), *reprinted in* Kintner, *supra* note 6, at 4655.

[71] *Id*. at 11,105, *reprinted in* Kintner, *supra* note 6, at 3952

[72] *Id.* at 12,815, *reprinted in* Kintner, *supra* note 6, at 4315.

would reach only those "practices indulged in for the purpose of driving anybody out of business or destroying his trade,"[73] and that were "inconsistent with or repugnant to the continuance of competition as a force in the business life of the country."[74]

Senator Hollis, another proponent of the bill who had helped persuade President Wilson to add Section 5, agreed. In successfully resisting an amendment designed to define what constituted an unfair method of competition, he argued that the amendment would have meant that, "[i]f you undertook to undersell him honestly or to give better service, you would come under the prohibition of the amendment."[75]

Other supporters of the bill likewise assured the Senate that Section 5 would not interfere with price competition that resulted in lower prices to consumers, but only those unfair methods of competition that were likely to lead ultimately to consumers paying higher prices. Senator Newlands, for example, said that he assumed that the commission would act only when it felt that "the matter is of sufficient importance, both between the parties and with reference to the public interest, to call the parties before them and hav[e] a hearing."[76] Senator Henry Lippitt of Rhode Island likewise emphasized that, "when you come to the question of what is 'unfair competition,' such unfair competition must involve an element of unfairness to the public."[77] For competition to be unfair, he continued, it must be "because in some way it will ultimately result in higher prices to [the public], but if

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[73] *Id.* at 13,046, *reprinted in* Kintner, *supra* note 6, at 4464.

[74] *Id.* at 13,051, *reprinted in* Kintner, *supra* note 6, at 4475.

[75] *Id.* at 13,313, *reprinted in* Kintner, *supra* note 6, at 4669. Several other senators echoed these views. *See, e.g.*, *id.* at 13,101 (Remarks of Sen. Porter McCumber) ("I further agree that the definition ought to be such as will exclude all the ordinary efforts of competition except those which are directed to the destruction of competition in some way and at some particular point."), *reprinted in* Kintner, *supra* note 6, at 4510.

[76] *Id.* at 11,109, *reprinted in* Kintner, *supra* note 6, at 3960.

[77] *Id.* at 11,081, *reprinted in* Kintner, *supra* note 6, at 3952.

the competition results in lower prices to the public, it is fair to them."[78]

Other senators continued to be concerned, however, that this public interest requirement did not appear in the language of the statute itself. Senator George Sutherland, a Republican from Utah and later Supreme Court Justice, said that while he found comfort in Senator Cummins' remarks, he still would not be able to support the bill when it came to a vote in the Senate because he did not read its language as imposing such a requirement:

> The Senator from Iowa [Cummins] who, I may say, of those who have stood sponsors for this legislation is, in my judgment, the only one who has measurably put coherence into what I regard as a hopelessly incoherent proposition, says [that unfair competition] "is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor, and of introducing monopoly. . . . The unfairness must be tinctured with unfairness to the public, not merely with unfairness to the rival or competitor. . . ." That is a coherent statement, although I do not believe it to be a precise limitation of what unfair competition will include.[79]

To satisfy those who shared Senator Sutherland's concerns, when the Senate bill reached conference, the committee added an express public interest requirement to Section 5. Their amendment read as follows:

> Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, *and it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public,* it shall issue . . . a complaint stating its charges in that respect . . . .[80]

Representative Covington, who had chaired the conference committee, explained when he introduced the conference substitute in the House that the purpose of this amendment was to ensure that Section 5 would give the FTC authority to prohibit only those

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[78] *Id.* at 11,106, *reprinted in* Kintner, *supra* note 6, at 3953.

[79] *Id.* at 12,981, *reprinted in* Kintner, *supra* note 6, at 4415. *See also id.* at 11,081 (Remarks of Sen. McCumber) ("I confess I cannot agree with the Senator from Iowa [Mr. Cummins] that the term here used would be applicable only to those cases in which the public itself might be interested."), *reprinted in* Kintner, *supra* note 6, at 3959.

[80] H.R. REP. NO. 63-1142, at 3 (1914), *reprinted in* Kintner, *supra* note 6, at 4682 (emphasis added). Senator Cummins, it should be noted, was a member of the conference committee.

unfair methods of competition that were "detrimental to the public" and had the "potential for restraint of trade or monopoly."[81] He continued:

> As the bill passed the Senate there was not, however, any limitation in section 5, relating to unfair competition, directing the trade commission to deal with cases only where a public interest is involved, so the conferees agreed to insert a provision that the commission shall act—"if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public." That prevents the commission from becoming a clearing house to settle the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts.[82]

Another member of the conference committee, Representative Frederick Stevens of Minnesota, offered further insight into the committee's reasoning. It was, he said, "a recognized fact that there may be many controversies between competitors over the unfairness or fairness of methods of competition with which the public can have no concerns."[83] "In such cases," Representative Stevens argued, "competitors properly ought to be left to their ordinary legal remedies through the courts." If, on the other hand, "the general purpose and the result of it will be to the detriment of the public by eliminating competition which in the public interest ought to exist . . . , then it is fraud against the public and ought to be repressed."[84]

Several of the senators who had expressed concerns about the vagueness of the term "unfair methods of competition" had insisted for this reason that its enforcement by the new commission should be subject to strict judicial review.[85] In order to secure its

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[81] 51 CONG. REC. 14,931 (1914), *reprinted in* Kintner, *supra* note 6, at 4732

[82] *Id.* at 14,930, *reprinted in* Kintner, *supra* note 6, at 4729.

[83] *Id.*

[84] *Id.* at 14,937, *reprinted in* Kintner, *supra* note 6, at 4744.

[85] *See, e.g.*, *id.* at 12,874 (Remarks of Sen. Atlee Pomerene) ("If we cannot define [unfair competition], I want the courts to define it. I do not want it to be left to the single judgment of the commission itself."), *reprinted in* Kintner, *supra* note 6, at 4355; *id.* at 14,793 (Remarks of Sen. Reed) ("In closing, I may say that the

passage, the conference committee therefore also amended Section 5 to give any party against whom the Commission issued a cease-and-desist order a right to seek judicial review of that order by one of the circuit courts of appeal.[86] This amendment enabled the Supreme Court, in the first FTC case to come before it, *FTC v. Gratz*, to hold that, "[i]t is for the courts, not the commission, ultimately to determine as a matter of law what [the words 'unfair method of competition'] include."[87]

With these changes to its language, the Federal Trade Commission Act passed both the House and Senate by overwhelming margins.[88] As its legislative history shows, clarification that Section 5's purpose was to protect competition, not competitors—and thereby promote consumer welfare—was critical to the Act's passage. Like the Sherman Act, Section 5 is, therefore, "a consumer welfare prescription."[89]

C. The Enforcement of Section 5 Requires a Rule-of-Reason Analysis in which the Ultimate Question Is Whether a Practice May Exclude Equally Efficient Competitors

A requirement that the public interest in competition must be harmed still left open the question of how the new commission was to determine whether an allegedly unfair method of competition met that test. Congress devoted much of the remainder of the debate to this issue. Three main points emerged from this discussion. The first was that whether a method of competition was fair or unfair should depend on whether it was likely

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conference report improves the Senate bill. The court review is more carefully safeguarded."), *reprinted in* Kintner, *supra* note 6, at 4715.

[86] *See* H.R. REP. NO. 63-1142, at 4 (1914), *reprinted in* Kintner, *supra* note 6, at 4683.

[87] 253 U.S. 421, 427 (1920).

[88] The Act passed the Senate by a vote of 43 to 5. 51 CONG. REC. 14,802 (1914), *reprinted in* Kintner, *supra* note 6, at 4716. The Act passed the House by voice vote without the yeas and nays being taken. *Id.* at 14,943, *reprinted in* Kintner, *supra* note 6, at 4756.

[89] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

to exclude equally efficient competitors. The second point was that the new commission and the courts would need to rely on a rule of reason similar to that which the courts used to enforce the Sherman Act in determining whether a method of competition was fair or unfair in the circumstances of each particular case. The third point was that Section 5 would allow the FTC to prohibit incipient practices that might ultimately lead to a loss of competition before they had matured into a full-blown Sherman Act violation, but not to prohibit practices that did not have that potential. These three points will now be examined in detail.

1. The ultimate test of whether a practice is a fair or unfair method of competition is whether it is likely to exclude equally efficient competitors from the market

Many of those who have examined the legislative history of Section 5 have come away with the impression that it provides little guidance as to how the Federal Trade Commission should apply its authority to prohibit unfair methods of competition.[90] It may be true that the debate on the floor of the Senate was often confused, with different senators at different points in the debate offering what seemed to be conflicting understandings of what the term meant. A close reading of the legislative history reveals, however, that by the end of the debate there was general agreement that the new commission was not intended to be a general arbiter of business morals, but that its focus should instead be on whether a practice was likely to harm competition by excluding equally efficient competitors, thereby allowing the respondent to then raise prices to the detriment of consumers.

A major source of the confusion over the scope of the FTC's authority stems from the comments of the bill's chief sponsor in the Senate, Senator Francis Newlands. When he first

[90] *See supra* p. 1 and note 3.

introduced the Senate substitute for the House bill, Senator Newlands—who had played no role in its drafting—described Section 5 in a way that made it sound as if the new commission's job would be to police business morals. "[I]t would be utterly impossible," he announced, "for Congress to define the numerous practices which constitute unfair competition and which are against good morals in trade and that tend to give competitors unfair advantage and dishonest advantage."[91] Newlands continued to make similar statements throughout much of the ensuing debate.[92]

Senator Newlands' suggestion that Section 5 would outlaw business practices that were "against good morals" triggered a wave of protests from others in the Senate, sometimes bordering on ridicule. Senator Porter McCumber of North Dakota, for example, asked Newlands "whether [he] contemplate[d] that the Government of the United States is to go into the business of controlling the commercial morals of every individual in the country . . . ."[93]

The other proponents of Section 5 quickly distanced themselves from Senator Newlands' remarks. On the floor of the Senate, they sought to assure their fellow senators that policing business morals was not the purpose of Section 5 through statements like this one from Senator Cummins:

> One Senator has gone so far as to say that the words "unfair competition" would leave a court at liberty to denounce any conduct which, in the opinion of the court,

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[91] 51 CONG. REC. 11,084 (1914), *reprinted in* Kintner, *supra* note 6, at 3936.

[92] *See, e.g.*, *id.* at 11,112 (Remarks of Sen. Newlands) ("[T]he question is what unfair competition covers. It covers every practice and method between competitors upon the part of one against the other that is against public morals . . . or is an offense for which a remedy lies either at law or in equity."), *reprinted in* Kintner, *supra* note 6, at 3968; *id.* at 12,980 (Remarks of Sen. Newlands) ("The Senator objects to the term 'public morals' or 'good morals' as a test. I think it is a very good test. I think there are certain practices that shock the universal conscience of mankind, and the general judgment upon the facts themselves would be that such practices are unfair."), *reprinted in* Kintner, *supra* note 6, at 4414.

[93] *Id.* at 11,108, *reprinted in* Kintner, *supra* note 6, at 3959.

> was unethical or un-Christian or unneighbor like. I feel sure that a review of the matters I have already brought to the attention of the Senate will disabuse the mind of any candid person of that view.[94]

In private they were even more derogatory. Louis Brandeis, for one, described Newlands as "the despair of mankind," attributing "his shortcomings to senility."[95] The other proponents argued that the fairness of a business practice should be understood instead in economic terms and that determining whether it was fair or unfair would require an examination of both its purposes and its likely effects on competition. Thus, Senator Hollis explained that, "[t]he regulation of competition means the prevention of competition that destroys competition for the purpose of creating a monopoly, and so is harmful to the public—the prevention, in short, of unfair competition."[96] Senator Cummins agreed, arguing that the term referred to "those methods which have not for their object the profit of the person who practices them so much as the destruction of the competitor against whom the methods are used."[97]

In order to counter concerns stimulated by Senator Newlands' opening remarks that the language of Section 5 was too vague and would give the new commission virtually unbridled authority over business conduct, the bill's other proponents also argued that the

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[94] *Id.* at 12,913, *reprinted in* Kintner, *supra* note 6, at 4360.

[95] Winerman, *The Origins of the FTC*, *supra* note 3, at 78 n.473 (internal quotation marks and citation omitted).

[96] 51 CONG. REC. 12,146 (1914) (Remarks of Sen. Hollis), *reprinted in* Kintner, *supra* note 6, at 4142. Several other proponents of Section 5 echoed Senator Hollis' view that to be viewed as unfair a practice must have as its objective the destruction of competition. *See, e.g.*, *id.* at. 11,104 (Remarks of Sen. Cummins) ("Unfair competition is the pursuit of that practice which destroys competition and establishes monopoly."), *reprinted in* Kintner, *supra* note 6, at 3950; *id.* at 12,150 (Remarks of Sen. McCumber) ("No competition should be covered by this bill except that competition which is intended in the end to create a monopoly and destroy competition."), *reprinted in* Kintner, *supra* note 6, at 4152; *id.* at 12,213 (Remarks of Sen. Newlands) ("I will ask the Senator, if one of these corporations was cutting the price with a view to destroying its competitor, and with a view to afterwards raising the price to a high monopolistic price, whether he would not regard that a method that should be condemned by law?"), *reprinted in* Kintner, *supra* note 6, at 4161.

[97] *Id.* at 11,389, *reprinted in* Kintner, *supra* note 6, at 4041.

term "unfair methods of competition" had a well-understood meaning in the business community.[98] To support this argument, they pointed to cases in both the federal and state courts in which the term had been used to describe conduct that violated the federal or state antitrust laws, often quoting at length from those decisions.[99] Several also pointed to an article by Professor William S. Stevens of Columbia University, in which he had identified eleven types of business practices that the courts had characterized as unfair methods of competition.[100] The practices he listed included various forms of predatory pricing, such as local price cutting, "fighting ships," and "fighting brands." They also included various forms of exclusionary conduct, such as tying, exclusive dealing, boycotts, rebates, and preferential contracts.

From these eleven practices, Professor Stevens had distilled a definition of fair competition, which several proponents quoted approvingly during the debates:

> Fair competition in an economic sense signifies a competition of economic or productive efficiency. On economic grounds an organization is entitled to remain in business so long and only so long as its production and selling costs enable it to hold its own in a free and open market. As the production and selling efficiency of competitors increase, marginal concerns which are unable to keep pace will gradually lose their market and ultimately discontinue business. But in such an

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[98] *See, e.g.*, *id.* at 11,189 (Remarks of Sen. Lewis) ("[T]he expression 'unfair competition,' as now incorporated in the bill, is not a new phrase. It is not untried, and in the processes of business is not an experimental phraseology, but is a mere adaptation of expressions from the decisions of the courts which have come down to us as expressive of certain conduct."), *reprinted in* Kintner, *supra* note 6, at 3996; *id.* at 11,228 (Remarks of Sen. Robinson) ("Not only has the term 'unfair competition' a meaning fairly well-fixed in law and in economics, but it is also easily understood by the average business man."), *reprinted in* Kintner, *supra* note 6, at 4003.

[99] *See, e.g.*, *id*. at 11,107 (Remarks of Sen. Robinson) ("The words 'unfair competition' have received definition by the courts in quite a number of cases."), reprinted in Kintner, *supra* note 6, at 3956; *id.* at 11,107 (Sen. Robinson quoting *T.B. Dunn Co. v. Trix Manufacturing*) ("The term 'unfair competition in trade' includes the simulation by defendant of the packages of plaintiff, … The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition, when 'the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer…"), reprinted in Kintner, *supra* note 6, at 3957.

[100] *See, e.g.*, *id.* at 11,230 (Remarks of Sen. Joe T. Robinson), *reprinted in* Kintner, *supra* note 6, at 4003 (quoting William S. Stevens, UNFAIR COMPETITION–A STUDY OF CERTAIN PRACTICES (1914).

> elimination there is nothing not economically fair to all concerned. If all have an equal chance to survive, it is economically proper that those failing through lack of efficiency should be destroyed. The community is entitled to the most efficient service that can be given. Inefficient organizations constitute a burden to the community and no justification can be found for their continued existence.[101]

Based on Professor Stevens' article, these proponents of Section 5 argued that efficiency should be the touchstone of fair versus unfair competition. Senator Hollis, for example, argued that efficiency should be the principal criterion for distinguishing fair from unfair competition:

> Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor. The mere size of a corporation which maintains its position through superior efficiency is ordinarily no menace to the public interest. The object of Section 5 is to prevent the creation or continuance of monopoly through unfair methods.[102]

Senator John Sharp Williams, a Democrat from Mississippi who also supported the bill, agreed:

> [I]f any monopoly could grow up without a legal privilege merely by fair competition and by producing as good an article as someone else, or a cheaper article and a better one, it would have a God-given right to a monopoly. If I could go out to-morrow and raise cotton cheaper than any man in the South . . . I would have conferred a benefit upon mankind; in other words, it is not the size of the business that hurts; it is the nature of the business that hurts. . . . If I can exceed you in cheapness and quality of production or you can exceed me, that is

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[101] *See, e.g.*, *id.* at 11,300 (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 4021 (quoting STEVENS, *supra* note 100).

[102] *Id.* at 12,146, *reprinted in* Kintner, *supra* note 6, at 4141. The chair of the House Commerce Committee, James Covington, who had been the sponsor of the commission bill in the House and was later chair of the conference committee that reported it out, cited Senator Hollis' speech with approval when he introduced the conference substitute of the floor of the House. *See id.* at 14,929 (Remarks of Rep. Covington) ("Upon this subject, I want to call the attention of the House to the statement of Senator Hollis, of New Hampshire, in his very able speech elucidating the subject of unfair competition, in the Senate on July 15 last"), *reprinted in* Kintner, *supra* note 6, at 4726.

your right, and no man has any right to do away with it . . . .[103]

Even Senator Newlands ultimately agreed that an efficiency-based test would provide an effective criterion for separating fair from unfair competition. Speaking shortly after Senator Williams delivered his remarks, Senator Newlands agreed that the purpose of Section 5 was "to prevent the stifling of competition by unfair methods" and that the new commission should look to "authorities, both in economics and in the decisions of courts and the decrees of courts," in determining what constitutes an unfair method of competition.[104] He then pointed to Senator Hollis' earlier remarks, which had emphasized the central role of efficiencies in distinguishing between fair and unfair competition, as providing a sound framework for doing so:

> I will not weary the Senate by reading these decisions or decrees. They will be found in the remarks I made in presenting this bill [and] in the very able address of the Senator from New Hampshire [Senator Hollis] yesterday, in which he met fully and completely every criticism that has been made upon this phrase, and I beg Senators who did not have the pleasure of hearing that speech to read it, for it is a strong, close, legal argument upon this single proposition.[105]

Many of the senators who initially had been most skeptical of Section 5 also came ultimately to accept the notion of using efficiency as a measuring rod for unfair competition. Even Senator Borah, who had been concerned that the bill would be used to protect small, inefficient competitors for their own sake, seemed to endorse this standard when he stated: "Mr. President, the Senator says that if a combination

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[103] *Id.* at 12,211, *reprinted in* Kintner, *supra* note 6, at 4156. *See also id.* at 11,231 (Remarks of Sen. Joe T. Robinson) ("Not only has the term 'unfair competition' a meaning fairly well fixed in law and in economics, but it is also easily understood by the average business man. Nearly all normal business men can distinguish between 'fair competition' and 'unfair competition.' Efficiency is generally regarded as the fundamental principle of the former—efficiency in producing and in selling, while oppression or advantage obtained by deception or some questionable means is the distinguishing characteristic of 'unfair competition.'"), *reprinted in* Kintner, *supra* note 6, at 4003.

[104] *Id.* at 12,211, *reprinted in* Kintner, *supra* note 6, at 4157.

[105] *Id.* at 12,212, *reprinted in* Kintner, *supra* note 6, at 4157–58.

or an individual can produce an article cheaper than anybody else and thereby get control of a market and in a sense create a monopoly, that would be a blessing to mankind. I agree with that proposition . . . ."[106] Senator Reed, another of the bill's most persistent skeptics, agreed: "What are we trying to do?" he asked. "We are not trying to write a code of business morals. . . . We are trying to keep the doors of competition open in this land. . . ."[107] Citing the *Standard Oil* case, Senator Reed drew a distinction between conduct designed only to destroy a rival and conduct that benefitted the purchaser of the larger firm's products:

> Another practice calculated not to benefit the purchaser, but to destroy competition, is well illustrated in certain practices attributed to the Standard Oil Co. . . . It was merely a method used to destroy competition; not an attempt to sell goods, but to destroy a rival. That would be within the terms of my amendment, because it is an act done for the purpose of restraining trade. It is not the lessening of the trade of one man which results from simple competition. The object and purpose is to destroy the trade rival. That can be reached under this definition.[108]

As this examination of the debates on the Senate floor shows, despite initial confusion over the purposes of Section 5, there ultimately emerged a consensus among its supporters, and even among those who in the end reluctantly voted in favor of it, that the ultimate test of whether a practice was an unfair method of competition was whether it might exclude equally efficient competitors from the market.[109] Again, this is plainly a consumer welfare prescription, similar to the

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[106] *Id.* at 12,211, *reprinted in* Kintner, *supra* note 6, at 4157.

[107] *Id.* at 13,231, *reprinted in* Kintner, *supra* note 6, at 4635.

[108] *Id.* at 4635–36.

[109] The emphasis on efficiency as the determinant of fair versus unfair competition on the floor of the Senate was consistent with the views Representative Ray Stevens of New Hampshire had expressed in his minority views to the House report in which he had urged the addition of Section 5 to the House bill. *See* H.R. REP. NO. 63-533, pt. 2, at 2 (1914) ("[T]he chief means these combinations have used to acquire a monopoly or partial control of the business field has been by unfair methods of competition. They have been able to drive

standard Robert Bork argued a half century later should be used in enforcing Section 2 of the Sherman Act.[110]

2. Congress intended the Commission to apply a rule of reason in enforcing Section 5

Having argued that the main criterion of whether a practice should be prohibited should depend on whether it was likely to exclude equally efficient competitors if allowed to continue, the proponents of Section 5 were next asked how the new commission would be expected to apply this test in practice.[111] Their response, delivered first by Senator Cummins, was that the new commission should do so "[b]y applying the rule of reason."[112] Referring back to the Supreme Court's decision in the *Standard Oil* case,[113] Senator Cummins argued, "If the rule of reason—and I am not quarreling with the rule of reason, because it must prevail everywhere—if the rule of reason is used to interpret the phrase 'restraint of trade,' likewise will the rule of reason be used to interpret the phrase 'unfair competition.'"[114]

Other supporters of Section 5 agreed. Senator Hollis was perhaps the most explicit, agreeing that the commission should "apply the rule of reason, which every judge has in his

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their competitors out of business not by superior efficiency in the manufacturing of their product but by securing special advantages and contracts in the buying of their raw materials and in the distribution and selling of their products. Any advantage large corporations have over small corporations or individuals through lower costs or production they are entitled to, but they should be prevented from an unfair use of the power that comes from their size alone."), *reprinted in* Kintner, *supra* note 6, at 3763-64.

[110]Bork, *supra* note 4, at 7 ("Congress intended the courts to implement . . . only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.").

[111]*See, e.g.*, 51 CONG. REC. 12,917 (1914) (Remarks of Sen. LeBaron B. Colt) ("I should like to ask the Senator how the court would determine what was fair and what was unfair in trade practices?"), *reprinted in* Kintner, *supra* note 6, at 4369-70.

[112]*Id.* (Remarks of Sen. Cummins), *reprinted in* Kintner, *supra* note 6, at 4370.

[113]*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

[114]51 CONG. REC. 12,910 (1914), *reprinted in* Kintner, *supra* note 6, at 4366.

head, . . . precisely as our courts have under the Sherman antitrust act."[115] Another supporter, Senator James Hamilton Lewis of Illinois, added that "if 'unfair competition' shall be so construed and applied by those to whom its construction is committed within the light of the reason of business affairs, then such does no wrong."[116]

By suggesting that the new commission should apply a rule of reason in enforcing Section 5, these senators were endorsing a test that the Supreme Court had held requires an examination of both the purposes and likely effects of an alleged restraint or other anticompetitive conduct. In its opinion in *Standard Oil*, the Court instructed the lower courts, in applying the rule of reason, to examine whether the alleged restraint had "been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade," or had, instead, "been entered into or done with the intent to do wrong to the general public" and thereby "bring about the evils, such as enhancement of prices, which were considered to be against public policy."[117] This is the same test the courts apply today in evaluating allegedly anticompetitive conduct under both Sections 1 and 2 of the Sherman Act.[118]

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[115] *Id.* at 13,000, *reprinted in* Kintner, *supra* note 6, at 4447.

[116] *Id.* at 12,931, *reprinted in* Kintner, *supra* note 6, at 4392-93.

[117] *Standard Oil Co.*, 221 U.S. at 58.

[118] *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 ("[O]ur inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . , or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'") (citations omitted); *United States v. Microsoft Corp.*, 253 F.3d 34, 45-48 (D.C. Cir. 2001) (holding that under Section 2, a court must first examine whether the plaintiff can show that alleged exclusionary conduct had the "requisite anticompetitive effect" and, if it did, whether the defendant can show "a procompetitive justification" for its conduct—that is, "that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal," in which case the burden then "shifts back to the plaintiff to rebut that claim").

While not mentioning the rule of reason expressly, several others, some of whom had initially questioned Section 5 but ultimately voted in favor of it, suggested essentially the same test. Thus, Representative Frederick Stevens of Minnesota told the House that if an act or practice was "merely for an ordinary business purpose, it is as innocent as any other act."[119] By contrast, as Senator Reed of Missouri noted, if it "was merely a method used to destroy a competitor, not an attempt to sell goods," then it should be unlawful.[120] Another Senator, John Sharp Williams of Mississippi, described an unfair method of competition as a "profitless stifling of competition," rather than an honest effort to sell one's goods by undercutting the price of a rival.[121] Another, Senator Porter McCumber, provided an example of how he thought the rule of reason should be applied in practice:

> The mere fact that a manufacturer or merchant may sell his product at a particular point at a loss would not constitute an offense against the term 'unfair competition' as defined by the amendment which I propose. For the purpose of disposing of a surplus or getting rid of an accumulation at the end of a season, the sale of such product at a loss is not only proper and just but often necessary but if that sale is made not for these purposes, but from all of the evidence it should appear that it is persisted in for the main purpose of getting rid of a competitor, it ought to be stopped, and it ought to be stopped not because it is competition, but because in the end it is destructive of competition.[122]

Senator McCumber's example illustrates a key point made throughout the debates in both the House and Senate. The proponents of Section 5 did not intend for it to be used to interfere with competition on the merits, but only to reach what the Supreme Court has

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[119] 51 CONG. REC. 12,910 (1914), *reprinted in* Kintner, *supra* note 6, at 4743.

[120] *Id.* at 13,231, *reprinted in* Kintner, *supra* note 6, at 4636.

[121] *Id.* at 12,210, *reprinted in* Kintner, *supra* note 6, at 4154 (Senator Williams offered two examples of what he viewed as a "profitless stifling of competition. The first was "selling goods within a restricted area or for a restricted time at less than the cost of production, in order to drive out of trade a restricted competitor;" the second, "buying the raw material at a price so high that the restricted competitor cannot afford to pay for it, and thus drive him out.").

[122] *Id.* at 12,208, *reprinted in* Kintner, *supra* note 6, at 4152.

called "unnecessarily restrictive" conduct.[123] By this, both the proponents of Section 5 and the Supreme Court meant an act or practice that could potentially exclude a rival from the market that served no other legitimate business purpose in terms of promoting the sale of the firm's own goods or services. The senators who in the end supported Section 5 believed that "competition, however severe or unfair, would finally work out for the public good," even if it was painful for smaller, less efficient competitors.[124] They, therefore, did not intend Section 5 to be used to condemn bigness itself, so long as it "resulted from normal and regular growth, from giving increased quality of goods," or from other forms of competition on the merits.[125] Instead, they expected it to be used only to condemn those practices designed to "place[] the individual at such a disadvantage that he cannot obtain . . . equal opportunities for trade and sale . . . ."[126]

3. Section 5 gives the Commission power to prohibit unfair methods of competition in their incipiency before they mature into full-blown Sherman Act violations

While Congress intended the FTC to apply a rule of reason in enforcing Section 5, this does not mean that it viewed that section as outlawing only those practices that would violate the Sherman Act. The legislative history makes it clear that in order to protect competition, Congress intended that Section 5 would give the new commission authority to prohibit unfair methods of competition in their incipiency before they matured into full-

[123] *See Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585, 604 (1985) ("If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory.").

[124] *See* 51 CONG. REC. 11,187 (1914) (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 3991. *See also id.* at 12,212 (Remarks of Sen. Thomas Sterling) (noting that "[in] the intensity of competition . . . , perfectly independent concerns will . . . be induced to cut prices to the general public," and that this may cause smaller "competitors with fewer facilities or . . . a higher wage . . . [to] be forced out of business," but should not, for that reason alone, "come under the ban of the law"), *reprinted in* Kintner, *supra* note 6, at 4160.

[125] *Id.* at 11,187 (Remarks of Sen. Borah), *reprinted in* Kintner, *supra* note 6, at 3990-91.

[126] *Id.* at 12,933 (Remarks of Sen. Lewis), *reprinted in* Kintner, *supra* note 6, at 4396-97.

blown Sherman Act violations—as one senator put it, to "nip those practices in the bud."[127] The debates on the floor of both the House and Senate made it equally clear, however, that Congress did not intend to give the Commission free rein to go after practices that did not have that potential.

Thus, when Representative Covington, the original sponsor of the legislation and the chair of the conference committee, brought the bill to the floor of the House for a final vote, he received applause when he stated that the purpose of Section 5 was to prohibit only those anticompetitive practices that might otherwise culminate in a restraint of trade or monopoly that would violate the Sherman Act:

> We are seeking here not to enter into any unknown or speculative realm of the law but to deal, as we ought to deal, with those practices of unfair trade in their incipient stages which if left untrammeled and uncontrolled become the acts which constitute in their culmination restraint of trade and monopoly and the groundwork of the trusts which have menaced us industrially. [Applause.][128]

On the floor of the Senate, the bill's proponents likewise emphasized that the purpose of Section 5 was to give the commission authority to prohibit unfair methods of competition that threatened the same type of harm to the public interest in competition as

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[127] *Id.* at 12,146 (Remarks of Sen. Hollis), *reprinted in* Kintner, *supra* note 6, at 4142. *See also, e.g.*, *id.* at 11,529 (Remarks of Sen. Cummins) ("We propose to make it unlawful for any corporation, or any person, indeed, to practice unfair competition, and wherever the practice of unfair competition has not reached a point that constitutes a violation of the antitrust law . . . ."), *reprinted in* Kintner, *supra* note 6, at 4066; *id.* at 12,146 (Remarks of Sen. Hollis) ("The Sherman Act does not become effective until a monopoly is fully grown . . . ; but if the proposed trade commission has its attention called to some unfair method of competition, it can immediately investigate, and if it decided that it is unfair competition and may lead to monopoly or restraint of trade, it may prohibit it."), *reprinted in* Kintner, *supra* note 6, at 4141.

[128] *Id.* at 14,929*, reprinted in* Kintner, *supra* note 6, at 4725. *See also id.* at 13,156 (Remarks of Sen. Kenyon) ("That, it seems to me, is the difference between the Sherman Act and the present act. This can take hold of matters that are not in themselves sufficient to amount to a monopoly or to amount to restraint of trade."), *reprinted in* Kintner, *supra* note 6, at 4576; *id.* at 12,217 (Remarks of Sen. Newlands) ("I should say, with reference to stifling competition, that all you would have to prove would be an unfair method whose tendency was to stifle competition. I do not think you would have to wait until the destruction was complete in order to entitle you to make the complaint."), *reprinted in* Kintner, *supra* note 6, at 4170; *id.* at 13,160 (Remarks of Sen. Kenyon) ("If this act shall do even a little to help in stopping monopoly in this country by getting at unfair practices before they have fully ripened and blossomed, then it will do good and it will justify the long time that has been taken in its discussion."), *reprinted in* Kintner, *supra* note 6, at 4582.

did violations of the Sherman Act, but to do so before that harm had "fully ripened and blossomed."[129] As Senator Cummins explained,

> Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the antitrust law. . . . The purpose of this bill in this section . . . is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.[130]

The bill's proponents envisioned that, by stepping in to prohibit conduct before it violated the Sherman Act, the FTC would play an important role in supplementing the Department of Justice's enforcement of antitrust laws. Congress intended for the Commission to conduct quick investigations of potentially anticompetitive practices that the Department of Justice had neither the authority nor the resources to challenge. During the debates, Senator Hollis explained:

> [T]he Department of Justice with its manifold other activities, has not in the past brought suit under the Sherman Act, and probably will not do so, except in cases of great magnitude involving what appear to be very clear violations of the act.
> . . . .
> The commission, by reason of its knowledge of business affairs and . . . its facilities for investigation, its rapid, summary procedure, will be able to protect business against unfair competition in [a] much more effective and timely fashion than the Department of Justice can do.[131]

The quoted portion also appears verbatim in the memorandum Rublee prepared for President Wilson, which suggests that Rublee prepared this speech for Senator Hollis.[132]

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[129] *Id.* at 13,160, *reprinted in* Kintner, *supra* note 6, at 4584.

[130] *Id.* at 11,455, *reprinted in* Kintner, *supra* note 6, at 4060.

[131] *Id.* at 12,146, *reprinted in* Kintner, *supra* note 6, at 4141-42. *See also id.* at 11,236 (Remarks of Sen. Borah) ("[T]he execution of the Sherman law has not thus far aided the man in the street; but that is because we stopped short of our duty; it was not the court's fault. I agree the way we have been proceeding the burden has been too great for the court; but we can relieve the situation by appropriate administrative measures.), *reprinted in* Kintner, *supra* note 6, at 4015; *id.* (Remarks of Sen. Cummins) ("The Attorney General of the United States. . . is a man who must take into account tens of thousands of other things than the enforcement of the antitrust law. It is utterly impossible, as I look at it, to expect that the Attorney General will follow these decrees into their full and complete execution."), *reprinted in* Kintner, *supra* note 6, at 4016.

[132] Rublee, *supra* note 6, at 4-5.

These excerpts from the legislative history show that Congress did not intend, as some have seemed to suggest,[133] to wholly untether Section 5 from the principles governing the application of the other antitrust laws. Like Section 5, the Clayton Act was designed to make unlawful the practices at which it was aimed—tying, exclusive dealing, price discrimination, and mergers—in their incipiency when they were likely "substantially to lessen competition," even if they would not yet have violated the Sherman Act as then interpreted.[134] As the next section discusses, it is a mistake, therefore, to suggest, as the Supreme Court did in *FTC v. Brown Shoe*,[135] that Section 5 could be used to prohibit a practice that is expressly addressed in the Clayton Act, but that would not violate that Act under its own incipiency standard.

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This review of its legislative history shows that its sponsors drafted Section 5 with a clear purpose—to protect competition in order to promote consumer welfare. It also shows that the section's proponents articulated a viable set of governing principles to guide the FTC's exercise of its enforcement power. First, Section 5 can only be used to prohibit exclusionary, not exploitative, practices. Second, Section 5 can only be used to protect competition, not weaker competitors. Third, Section 5 can be used to prohibit only those

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[133] *See, e.g.*, Rosch, *supra* note 1, at 1 (Stating that the first "unassailable proposition[] about Section 5 . . . is that its reach is not confined to conduct reached by the Sherman and Clayton Acts. Otherwise, Congress would just have provided that the Commission could enforce these statutes. It did not do so. Instead it provided that the Commission could challenge, inter alia, any 'unfair method of competition.' That is why the Supreme Court held in the *Sperry & Hutchinson* case that Section 5 was not simply coextensive with these other antitrust statutes.").

[134] *See, e.g.*, S. REP. NO. 63-698, at 1 (1914) ("The purpose is only to supplement [the Sherman Antitrust Act] and the other antitrust acts . . . and make unlawful certain trade practices . . . in their incipiency and before consummation."); S. REP. NO. 81-1775, at 6 (1950) (Referring to the Clayton Act as a "statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.").

[135] 384 U.S. 316 (1966).

unfair methods of competition that threaten to "shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper."[136] All three governing principles require the Commission to apply a rule of reason in order to determine whether a particular act or practice represents fair competition designed to promote the sale of the firm's own goods or services or unfair competition designed to stifle competition by denying rivals an equal opportunity to compete.

III. THE COURTS' CHANGING INTERPRETATIONS OF SECTION 5

In its early cases interpreting Section 5, the Supreme Court interpreted the provision in a manner consistent with its legislative purpose as outlined in this WORKING PAPER, using what was essentially a rule-of-reason analysis to determine whether allegedly anticompetitive practices violated Section 5. Several of the justices who decided these early cases had been involved in the formulation of Section 5, so they understood its legislative purpose and the limits imposed on the FTC's authority. In the 1960s and early 1970s, however, when the Warren Court was generally interpreting the antitrust laws very expansively, it deviated from these earlier decisions, appearing to read Section 5 broadly to condemn practices that violated "the spirit of the antitrust laws" even if they could not be found to have harmed competition.[137] In the early 1980s, both the Commission and the lower courts appear to have returned to a narrower construction of Section 5 that is more consistent both with the section's legislative history and with the Supreme Court's earlier decisions. The Supreme Court has not had occasion to discuss the scope of Section 5 in any detail since these more recent lower court decisions, but when it finally has an opportunity

[136] Rublee, *supra* note 6, at 3.

[137] *FTC v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244 (1972).

to do so, it will hopefully follow the lead of the lower courts in applying Section 5 in a manner more consistent with its original purpose.

A. Early Supreme Court Cases Adhered to the Governing Principles Outlined in Section 5's Legislative History

In *Gratz*[138]—the first Section 5 case to reach it—the Court affirmed a decision by the U.S. Court of Appeals for the Second Circuit overturning an FTC order condemning an alleged tying arrangement. In analyzing the alleged tie, the Court interpreted Section 5 in a manner consistent with the governing principles outlined in the above review of its legislative history. The Court held that the words

> unfair methods of competition . . . are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, *or as against public policy because of their dangerous tendency to unduly hinder competition or create monopoly*. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.[139]

The Court emphasized the importance of analyzing an allegedly unfair method of competition thoroughly in order not to inhibit healthy competition. Applying what was essentially a rule-of-reason test, the Court held that the allegations in the FTC complaint were "wholly insufficient" to charge the respondent with practicing an unfair method of competition because it did not allege any "deception, misrepresentation, or oppression," did not allege what share of the market was affected by respondent's behavior, and did not allege that respondent "held a monopoly of either [the tying or tied products] or had ability, purpose, or intent to acquire one."[140] The Court also pointed to the absence of any allegation that respondent had sold to customers at unfair prices or injured the public in any

[138] *FTC v. Gratz*, 253 U.S. 421 (1920).

[139] *Id.* at 427-28 (emphasis added).

[140] *Id.* at 428.

other way.[141]

Throughout the opinion, the Court reiterated the importance of not interfering with free competition. After detailing the inadequacy of the FTC's findings and emphasizing the absence of consumer harm, the Court concluded,

> [a]ll question of monopoly or combination being out of the way, a private merchant, acting with entire good faith, may properly refuse to sell, except in conjunction, such closely associated articles as ties and bagging. If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.[142]

Gratz made it clear that the FTC has no authority to condemn a tie in the absence of persuasive evidence that competition would be unduly hindered.

Justice Brandeis dissented in *Gratz*, arguing in favor of a broader interpretation of the FTC's authority under Section 5, but one that was still consistent with the governing principles outlined above. Brandeis agreed with the majority that the FTC must engage in a rule-of-reason analysis in order to distinguish between "honorable rivalry" and conduct that "may result in grave injustice and public injury, if done by a great corporation in a particular field of business which it is able to dominate."[143] Brandeis disagreed with the majority as to the outcome of the case only because he saw the facts of the case differently. He saw the respondent as dominating the market for the tying product with a 45 percent share, as a result of which he believed consumers would often be unable to purchase that product from anyone other than respondent, thereby forcing them to buy the tied product from it as well.

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[141] *Id.*

[142] *Id.* at 428-29.

[143] *Id.* at 438 (Brandeis J., dissenting).

FTC v. Sinclair Refining Co.,[144] decided three years later in 1923, was similarly consistent with the governing principles outlined above. The FTC alleged that refiners and wholesalers of gasoline "leas[ed] underground tanks with pumps to retail dealers at nominal prices and upon condition that the equipment should be used only with gasoline supplied by the lessor."[145] The Supreme Court affirmed the Third Circuit's decision to set aside the FTC's order requiring the refiners and wholesalers to cease this conduct. In concluding that the FTC had not met its burden of proving that this practice was an unfair method of competition, the Court emphasized the procompetitive benefits of the practice. It found that many refiners and wholesalers had adopted this practice because they "regard[ed] it as the best practical method of preserving the integrity of their brands," and as "promot[ing] the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads."[146] The Court also found that the practice did not foreclose the market to competitors, because retailers could purchase competing pumps inexpensively and then use any distributor's gasoline in those pumps. After thoroughly analyzing the restraint's impact on the retail market for gasoline, the Court described the agency's limited authority under Section 5:

> The powers of the commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. . . . And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.[147]

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[144] 261 U.S. 463 (1923).

[145] *Id.* at 464-65.

[146] *Id.* at 475.

[147] *Id.* at 475-76.

Sinclair, like *Gratz* and the other early Supreme Court cases interpreting Section 5, therefore adhered to the original legislative purpose behind Section 5 and to the governing principles outlined in its legislative history.

B. Supreme Court Cases in the 1960s and 1970s Departed from the Limiting Principles Outlined in the Legislative History

In the 1960s, during a period in which the Supreme Court has been criticized by one current justice for adopting "antitrust theories so abbreviated as to prevent proper analysis" under which the "Government always wins,"[148] the Court appeared to take that same approach with respect to Section 5 in three cases, *Atlantic Refining Co. v. FTC*,[149] *FTC v. Brown Shoe Co.*,[150] and *FTC v. Sperry & Hutchinson Co.*.[151] These three decisions marked a substantial departure both from the Court's earlier decisions and from the limits Congress intended would govern the FTC's exercise of its authority under Section 5.

In *Atlantic Refining*, the Court upheld an FTC order finding that Atlantic had violated Section 5 by using a sales commission plan to induce its dealers to sell Goodyear tires, batteries, and accessories. Conceding that this arrangement could not be found to be an illegal tying arrangement under either the Sherman or Clayton Acts, the Court nevertheless upheld the FTC order, holding that "all that is necessary in § 5 proceedings to find a violation is to discover conduct that 'runs counter to the public policy declared in the' Act."[152] In so holding, the Court blessed the FTC's "refus[al] to consider evidence of economic justification

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[148] *California Dental Ass'n v. FTC*, 526 U.S. 656, 794 (1999) (Breyer, J., dissenting).

[149] 381 U.S. 357 (1965).

[150] 384 U.S. 316 (1966).

[151] 405 U.S. 233 (1972).

[152] 381 U.S. at 369.

for the program."[153] It was enough, the Court held, that the case involved "'a classic example of the use of economic power in one market . . . to destroy competition in another market.'"[154] The Court failed to explain how Atlantic's actions could have destroyed competition in the market for automotive tires, batteries, and accessories when Atlantic's share of the national market for gasoline was only 2.5 percent.[155] In both respects, the Court's opinion failed to recognize that the legislative purpose of Section 5 was to prohibit only those unfair methods of competition that threatened harm to the public at large, not just competing manufacturers.[156]

Similarly, in *Brown Shoe*, the Court upheld an FTC order finding that Brown Shoe had violated Section 5 by structuring its franchise program to give special benefits to retailers that sold Brown Shoes exclusively. The Court accepted the FTC's finding that "the franchise program effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers"[157] without analyzing what share of the market was foreclosed, without finding any consumer harm, and without considering procompetitive justifications. At the time, Brown Shoe had a share of less than ten percent of the total U.S. market for shoes and its program included fewer than 700 retail stores—only about one percent of the country's 70,000 retail shoe outlets.[158] The Court neither considered the procompetitive justifications

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[153] *Id.* at 371.

[154] *Id.* at 361.

[155] *Id.* at 364.

[156] As Justice Goldberg pointed out in dissent, many small dealers liked Atlantic's sales commission plan, arguing in an *amicus* brief that they needed sales commission plans to compete effectively with larger dealers. *See id.* at 385 (Goldberg, J., dissenting).

[157] *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

[158] *See Brown Shoe Co. v. FTC*, 339 F.2d 45, 47-48 (8th Cir. 1964) (program affected 682 stores; Brown Shoes had shoe sales of $111 million of the $1.8 billion in sales by the top 70 shoe manufacturers); *Brown Shoe Co. v. United States*, 370 U.S. at 300 (finding 70,000 retail shoe outlets in U.S.).

for the practice, which the lower court had found was designed to provide stores participating in the program services to make them more competitive with other retailers, nor the fact that several of Brown Shoe's competitors had similar programs. Again, the Court deviated from the legislative purpose of Section 5, which was not to interfere with practices a firm adopted in order to compete more effectively, but only to prohibit practices that were likely to destroy competition through methods that served no legitimate purposes but threatened to exclude competitors from the market.[159]

In support of its decision, the Supreme Court criticized the Eighth Circuit's reliance on *Gratz* in overturning the FTC order. Writing for the Court, Justice Black declared that "[l]ater cases of this court . . . have rejected the *Gratz* view and it is now recognized in line with the dissent of Justice Brandeis in *Gratz* that the Commission has broad powers to declare trade practices unfair."[160] This characterization of Justice Brandeis' dissent overlooks how Brandeis himself analyzed the alleged restraint in that case. It also mischaracterizes the two cases Justice Black cited as having overruled *Gratz—FTC v. R. F. Keppel*[161] and *FTC v. Cement Inst.*[162]

Keppel condemned the Respondent's sale of candy packages known as "break and take." There were three variations of the candy packages and consumers did not know which variation they would receive upon purchase. The packages had differing values, so there was an element of gambling involved in the purchase of the candy. The FTC considered this practice "dishonest" because "break and take" packages were enticing to

[159] The only plausible theory of anticompetitive harm in *Atlantic Refining* and *Brown Shoe* would have been an exclusionary theory, but the facts of neither case supported such a theory.

[160] *FTC v. Brown Shoe*, 384 U.S. at 320-21.

[161] 291 U.S. 304 (1934).

[162] 333 U.S. 683 (1948).

children and might induce them to buy Keppel's candy, even if it was inferior to other candies.[163] The Court concluded that "[a] method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion" not to engage in was an unfair method of competition.[164] There is nothing about this ruling that can be read to overrule *Gratz* either explicitly or implicitly. In it, the Court merely held that a practice that gave one competitor an unfair competitive advantage over its rivals based not on the merits of its product, but through a dishonest practice could be found to violate Section 5. That is entirely consistent with the legislative history, which made it clear that other dishonest practices, such as passing off one's goods as those of a competitor, could be found to be an unfair method of competition if they harmed the public at large, not just another competitor.[165]

In *Cement Institute,* the Court upheld an FTC order finding that an agreement among cement producers to employ a multiple basing point pricing system violated Section 5 because it facilitated more uniform pricing. Again, there is nothing in that ruling that could be read to overrule *Gratz.* The portion of the Court's opinion Justice Black cites as overruling *Gratz* actually cuts the other way; in it, the Court rejects the argument of the Respondents that "the term 'unfair methods of competition' should not be construed as embracing any conduct within the ambit of the Sherman Act."[166] The Court's holding in *Cement Institute*—

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[163]*Keppel*, 291 U.S. at 313.

[164]*Id.*

[165]*See, e.g.*, 51 CONG. REC. at 11,107 (1914) (Sen. Robinson quoting *T.B. Dunn Co. v. Trix Manufacturing*) ("The term 'unfair competition in trade' includes the simulation by defendant of the packages of plaintiff, … The court will only interfere to protect the plaintiff and the public, and for the suppression of unfair and dishonest competition, when 'the resemblance is such that it is calculated to deceive, and does in fact deceive, the ordinary buyer . . . ."), reprinted in Kintner, *supra* note 6, at 3957

[166]*Cement Inst.*, 333 U.S. at 692.

that Section 5 prohibits anticompetitive practices that would also violate the Sherman Act—does not support Justice Black's claim that the Court's decision in that case somehow overruled *Gratz.*

In *Sperry & Hutchinson*, the Court affirmed a Fifth Circuit decision overturning an FTC order. The order required the country's largest trading stamp company to cease and desist from attempting to suppress the operation of trading stamp exchanges. The FTC had failed to challenge the lower court's holding that Sperry & Hutchinson's conduct violated neither the letter nor the spirit of the antitrust laws. In his opinion for the Court, Justice White nevertheless cited Justice Black's opinion in *Brown Shoe* as having held that "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior."[167]

Justice White's dictum offers a more expansive reading of the scope of the FTC's Section 5 authority than that of any other justice in any Supreme Court opinion, "appear[ing] to contemplate almost no principled limitations on the Commission's power."[168] It is also the most at odds with the section's legislative history and purpose. As we have seen, while Congress intended Section 5's prohibition of unfair methods of competition to reach conduct that would not necessarily be unlawful under the antitrust laws, it did so only to the extent necessary to "nip those practices in the bud" before they matured into full-blown Sherman Act violations.[169] The legislative history reflects nothing, other than Senator Newlands'

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[167] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

[168] Karin A. DeMasi and Jonathan J. Clarke, *Section 5 of the FTC Act and the End of Antitrust Modesty*, BLOOMBERG LAW REPORTS, at 3 (June 25, 2010), http://www.cravath.com/files/Uploads/Documents/Publications/3233999_1.pdf.

[169] *See* discussion *supra* pp. 38-41, part II.C.3.

vague references to morality, to suggest that Congress intended Section 5 to reach anything other than "competitive behavior." Nor is there anything in the legislative history to suggest that Section 5 was intended to empower the FTC to prohibit "competitive behavior" that was not likely, if continued, to cause substantial harm to competition and thereby deprive consumers of the benefits of that competition.

In support of his broad reading of Section 5, Justice White claims that Congress' passage of the Wheeler-Lea Act of 1938 reflects that the legislature intended "unfair methods of competition" would reach beyond practices that harm competition. But, if anything, the passage of that Act reflects just the opposite. Congress passed the Wheeler-Lea Act in large part because the Supreme Court had earlier held, in *FTC v. Raladam Co.*,[170] that the Commission had no power under Section 5 to condemn misleading advertising as an unfair method of competition unless it "substantially injured, or tended thus to injure, the business of any competitor or competitors generally."[171] Congress responded in the Wheeler-Lea Act by amending Section 5 to broaden the FTC's authority beyond unfair methods of competition to "unfair or deceptive acts or practices in or affecting commerce," thereby giving the Commission an express consumer protection mission in addition to its mission to protect competition.[172] The passage of those amendments cannot be read to have somehow broadened the FTC's *existing* authority over unfair methods of competition to reach conduct that does not injure competition.

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[170] 283 U.S. 643 (1931).

[171] *Id.* at 652-53.

[172] *See* H.R. REP. NO. 75-1613, at 1 (1937) (stating that the Wheeler Lea Act's purpose was " to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce.").

C. The FTC and Lower Courts Have Returned to a Narrower Interpretation of Section 5 More Consistent with Its Legislative Purpose, but the Supreme Court Has Not Yet Spoken

As the Supreme Court began in the mid-1970s to acknowledge that many formerly suspect restraints may have procompetitive benefits,[173] the FTC and lower courts returned to an interpretation of Section 5 more consistent with its legislative history. In 1982, in *Beltone Electronics Corp.*,[174] the Commission analyzed the state of the law on exclusive dealing arrangements. The FTC reviewed Supreme Court cases dealing with exclusive dealing arrangements under Section 5, including *Brown Shoe*, and concluded that, although market foreclosure had frequently been the determinative factor in courts' analyses,

> today it would remain only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints, *under both Section 3 of the Clayton Act and Section 5 of the FTC Act*. More specifically, a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.[175]

Beltone can be fairly read as repudiating *Brown Shoe*, because the Court's brief opinion in *Brown Shoe* concluded that market foreclosure occurred without defining the relevant market, analyzing the degree of foreclosure, or examining the legitimate business reasons for exclusive dealing arrangements, all of which would be required under the rule-of-reason test adopted by the Commission in *Beltone*.

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[173] *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (Overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and holding that non-price vertical restraints could serve procompetitive purposes and therefore must be evaluated using the rule of reason.)

[174] 100 F.T.C. 68, 92 (1982).

[175] *Id.* at 92 (emphasis added).

Subsequent lower court cases echoed *Beltone*'s rule-of-reason approach to Section 5. For example, in *Boise Cascade Co. v. FTC*,[176] a case involving a basing-point pricing system in the freight industry similar to the system at issue in *Cement Institute*, the Ninth Circuit stated, "[W]e decline to follow the Commission's suggestion that industry-wide adoption of an artificial method of price-quoting should be deemed a per se violation of section 5."[177] To do so, the court wrote,

> would be to assume what must be proven, namely, that the use of West Coast freight by southern plywood producers is not a natural competitive response to buyer preference for traditional forms of price quotation, but rather is a deliberate restraint on competition. . . . [T]he weight of the case law, as well as the practices and statements of the Commission, establish the rule that the Commission must find either collusion or actual effect on competition to make out a section 5 violation for use of delivered pricing.[178]

The court noted that consumers prefer this type of pricing scheme and that consumers and an industry expert believed that the scheme had no impact on prices. *Boise Cascade* and *Beltone* both reaffirmed the need for a rule-of-reason approach to Section 5. The authors of the leading treatise on antitrust law, Areeda and Hovenkamp, endorse the approach taken to applying Section 5 in these cases and agree that it requires a rule-of-reason analysis of the allegedly anticompetitive practices:

> Federal Trade Commission Act § 5 does not simply speak of that which may be "unfair" in any vagrant sense. It concerns "unfair methods of competition." This would seem to require the Commission—at least when operating within the antitrust laws as distinct from, say, prohibiting practices that deceive consumers—to confront the same issues of competitive policy that must be analyzed in applying the Sherman Act and the Clayton Act.[179]

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[176]637 F.2d 573 (9th Cir. 1980).

[177]*Id.* at 581.

[178]*Id.* at 581-82.

[179]Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 230 (3d ed. 2009).

The Second Circuit likewise articulated what is fundamentally a rule-of-reason test for applying Section 5 in *E.I. Du Pont De Nemours & Co. v. FTC*.[180] In that case, all four leading manufacturers of a compound added to gasoline to prevent "knocking" had "independently and unilaterally" adopted certain business practices that allegedly facilitated coordinated pricing.[181] The court held,

> In our view, before business conduct in an oligopolistic industry may be labeled "unfair" within the meaning of § 5 a minimum standard demands that, absent tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.[182]

The court emphasized the limits of the FTC's authority under Section 5, stating that "Congress did not . . . authorize[] the Commission under § 5 to bar any business practice found to have an adverse effect on competition. Instead, the Commission could proscribe only 'unfair' practices or methods of competition."[183]

Whether the Supreme Court will follow these decisions remains unclear. None of its decisions in Section 5 cases decided since *Du Pont* turned on whether the scope of Section 5 was broader than that of the Sherman Act.[184] Nevertheless, in one case, *FTC v. Indiana Federation of Dentists*,[185] the Court cited its earlier decision in *Sperry & Hutchinson* for the proposition that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust

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[180]729 F.2d 128 (2d Cir. 1984).

[181]*Id.* at 130.

[182]*Id.* at 139.

[183]*Id.* at 136.

[184]*See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2014); *FTC v. Phoebe Putney Health Sys, Inc*., 133 S. Ct. 1003 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[185]476 U.S. at 454.

laws, . . . but also practices that the Commission determines are against public policy for other reasons."[186] This statement has led one law professor, Robert Lande, to argue:

> There is no doubt that when Congress enacted Section 5 of the FTC Act, it intended the law to be more aggressive than the Sherman and Clayton Acts. The legislative history and Supreme Court decisions demonstrate that Section 5 was intended to cover incipient violations of the other antitrust laws, conduct violating the spirit of the other antitrust laws, conduct violating recognized standards of business behavior, and conduct violating competition policy as framed by the Commission. Even though reasonable people may differ as to whether the FTC Act should be more expansive than the other antitrust laws, congressional intent concerning this point is clear.[187]

As we have seen, Professor Lande is only half right. The legislative history does show that Congress intended Section 5 to reach anticompetitive practices that might otherwise not violate either the Sherman or Clayton Acts, in order to "nip those practices in the bud."[188] But in this regard, Section 5 is no different from the Clayton Act, which Congress also intended to prohibit practices whose effect "may be substantially to lessen competition" in their incipiency before maturing into full-blown Sherman Act violations.[189] The only difference between the Clayton Act and Section 5, in that sense, is that the Clayton Act was limited to a handful of defined anticompetitive practices, whereas Section 5 was aimed at anticompetitive practices outside those defined areas that could likewise "substantially lessen competition."

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[186] *Id.*

[187] Robert H. Lande, Statement at the Federal Trade Commission's Workshop on Section 5 of the FTC Act as a Competition Statute, at 1 (Oct. 17, 2008) (cited in its revised and expanded written version, available at www.antitrustsource.com).

[188] *See* discussion *supra* pp. 38-41, part II.C.3.

[189] *See, e.g.*, *United States v. Von's Grocery Co.*, 384 U.S. 270, 284 (1966) (citing S. REP. NO. 63-698, at 1 (1914) ("Broadly stated, the bill, in its treatment of unlawful restraints and monopolies seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act), or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."); S. REP. NO. 81-1775, at 4-5 (1950) ("The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding.")).

What Professor Lande overlooks is that the legislative history makes it equally clear that Congress did not intend Section 5 to prohibit methods of competition that were what we would today call competition on the merits—competition based on a firm's greater efficiency or on its ability to offer new and better products or services than its competitors. Congress intended, instead, only to give the FTC authority under Section 5 to prohibit *unfair* methods of competition, by which it meant exclusionary practices that had the potential to exclude equally efficient competitors from the market and that did not serve any legitimate business purpose.

D. Efforts by the FTC to Extend Section 5 beyond Exclusionary Conduct to Police Tacit Collusion

Another area in which the FTC has arguably applied Section 5 in a manner that goes beyond what its proponents viewed as its original purpose relates to the Commission's use of the provision to prohibit practices that it views as facilitating tacit coordination among a group of competitors or as invitations to collude. As our discussion of its legislative history shows, both the committee reports and the floor debates on Section 5 focused almost exclusively on the FTC's ability to prohibit exclusionary conduct that otherwise could not be reached under the Sherman Act before it had matured into a full-blown Sherman Act violation. To the extent there was any discussion of collusion, it was directed to the concern of Senator Borah and others that the commission might misuse Section 5's prohibition of unfair methods of competition as a vehicle for sanctioning price-fixing and other collusive conduct among smaller producers who viewed the prices charged by larger, more efficient producers as unfair.[190] As we have seen, the proponents argued strenuously that Section 5

[190] *See supra* pp. 21-26.

would give the Commission no such power and the conference committee ultimately added an express public interest requirement designed to assure it was not misused in that manner.

Despite those assurances and the addition of an express public interest requirement, Senator Borah's concerns were borne out in the 1920s when the FTC began to approve industry codes developed through so-called "Trade Conferences" that included provisions designed to limit price competition and restrict output, and that would otherwise have been *per se* unlawful under Section 1 of the Sherman Act.[191] These industry codes grew out of the associationist movement that began just a few years before the FTC was created and then flowered during World War I, when Woodrow Wilson created a War Industries Board, headed by New York financier Bernard Baruch. This board required every major industry to cooperate with it to develop policies to redirect their production to needed war material while imposing price controls to protect the public from price gouging.

Having grown accustomed to working together in this manner, many industries formed trade associations after the war to develop codes of conduct and to exchange pricing and other information.[192] While the Justice Department brought several actions challenging these trade association practices under the Sherman Act,[193] the FTC actively promoted them, sponsoring Trade Practice Conferences to assist industries in developing these industry codes and then approving the rules that emerged.[194] As one commentator has observed,

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[191] *See generally* Robert T. Joseph, *John Lord O'Brian, Hoover's Antitrust Chief, Gives the FTC an Antitrust Lesson*, ANTITRUST 88, Fall 2010.

[192] *Id.* at 89.

[193] *See, e.g.*, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

[194] Joseph, *supra* note 191, at 89-90.

some of the rules approved by the FTC between 1927 and 1930 were

> startling—even shocking—when read today from the perspective of current antitrust doctrine. . . . [M]any of the provisions treated as "unfair methods of competition" pricing or marketing activity that we would view today as competition on the merits. These included secret discounts, selling surplus stock at reduced prices, failing to adhere to fixed bids, competition on elements other than price, and other competitive tactics that aggressive competitors could use to win business, but that would be disruptive of "stable" market conditions.[195]

By condoning these practices under Section 5, the FTC was plainly operating in a manner inconsistent with the section's legislative purpose. In 1929, the then-head of the Antitrust Division, John Lord O'Brian, began to urge the FTC to re-examine the industry codes it had approved and to excise from them any anticompetitive provisions. In response, the Commission ultimately revised its rules in at least fifty industries, deleting some of their most objectionable features and rephrasing others.[196]

After World War II, beginning with its action against the *Cement Institute,*[197] the FTC changed course and began using Section 5 to attack trade association practices that it found were likely to facilitate coordinated pricing. As discussed above, in *Cement Institute,* the Supreme Court affirmed a Commission order finding that an agreement among cement producers to employ a multiple basing point price system that the Commission found was calculated to produce more uniform pricing was an unfair method of competition that violated Section 5. Thirty-five years later, in the *DuPont* case, the Commission sought to extend this precedent to the parallel adoption by competitors in a highly concentrated industry of several allegedly facilitating practices, including a multiple basing point price

[195] *Id.* at 90.

[196] *Id.* at 92.

[197] *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

system similar to the one in *Cement Institute.*[198] As discussed earlier, the Second Circuit in this case agreed with the Commission that practices that facilitated coordinated pricing could violate Section 5, without the need to find an agreement, but only if it could be shown that they harmed consumers by raising prices and that there was no legitimate procompetitive explanation for the industry's parallel adoption of those practices.

Relying on this authority, the Commission has since used Section 5 to prohibit collusive practices, such as facilitating practices and invitations to collude, that it believes were likely to limit competition and thereby harm consumers even if they did not violate the Sherman or Clayton Acts. Some of these actions have involved "exchanges of competitively sensitive information" that the Commission alleged would "increase the likelihood of tacit collusion."[199] Others have involved what the Commission alleged were private, "naked solicitation[s] regarding price," [200] that did not result in an agreement. All of these cases were resolved through consent orders so they did not produce a reasoned Commission decision, much less any judicial review of the FTC's use of Section 5 to attack these allegedly anticompetitive practices. As a result, there is only a limited public record on which to evaluate whether the Commission's actions in these cases—in some of which the Commission itself conceded no actual agreement was reached—were warranted.[201]

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[198] *Id.* at 696-700.

[199] Susan D. DeSanti & Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 94 (1994-95). The authors state that "courts have found a variety of facilitating practices to be unlawful under particular circumstances." *Id.* at 95-96 (citing, as examples, *FTC v. Cement Inst.*, 333 U.S. 683 (1948); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965)).

[200] DeSanti, *supra* note 199, at 109 (citing *Quality Trailer Prods. Corp.*, 115 F.T.C. 944 (1992); *A.E. Clevite Inc.*, 116 F.T.C. 389 (1993); *YKK (U.S.A.)*, 116 F.T.C. 628 (1993)). *See also Valassis Commc'ns Inc.*, 141 F.T.C. 247 (2006); *U-Haul Int'l, Inc.* 150 F.T.C. 1 (2010).

[201] DeSanti, *supra* note 199, at 107.

Despite the lack of a full public record in these cases, even those who have objected to the Commission's other efforts to apply Section 5 to conduct that would not violate the Sherman Act seem to agree that the FTC's application of Section 5 to prohibit invitations to collude, information exchanges that could facilitate coordinated pricing, and other facilitating practices is, in theory at least, a proper use of its authority under that section.[202] When these practices are, in fact, likely to result in higher prices and thereby harm consumers, and fail to serve any legitimate pro-competitive business purpose, the legislative history would appear to support the Commission's use of its authority to prohibit them. Even though the section's proponents focused principally on exclusion, rather than collusion, there is nothing in the legislative history to suggest that the FTC could not use its authority under Section 5 to attack practices that facilitate collusion in a way that would be likely to harm consumers.

CONCLUSION

When it enacted Section 5, Congress expected that the meaning of its prohibition on "unfair methods of competition" would be developed through a common law process as the Commission and courts enforced that prohibition over time, just as the meaning of "restraint of trade" and "monopolization" had been developed over time by the courts in deciding cases brought under the Sherman Act.[203] The proponents of Section 5 would almost

[202] *See, e.g.*, A. Douglas Melamed, *The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5*, *supra* n. 1, at 3*;* Statement of Comm'r Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013) (available at www.ftc.gov) ("An invitation to collude satisfies the harm to competition element of an unfair method of competition—whether or not it ultimately results in increased prices, reduced output, or other harm to competition—because it creates a substantial risk of competitive harm.").

[203] *See, e.g.*, 51 CONG. REC. 13,234 (1914) (Remarks of Sen. James Clarke) ("Those of us who think the phrase 'unfair competition' is adequate understand that it will be for the commission, subject to review by the courts, to fill in, under the rule of reason, such things as they may find to be unfair competition."), *reprinted in* Kintner, *supra* note 6, at 4642; *id.* at 11,179 (Remarks of Sen. Hollis) ("The very first case that went from this

certainly be disappointed that the meaning of Section 5 has not been developed nearly as fully through Commission and court decisions as they expected.

Having the Commission issue a policy statement explaining what it thinks the term "unfair methods of competition" means might be helpful, but would not be sufficient, by itself, to fill this gap. While such a policy statement might clarify how the FTC intends to use its authority under Section 5, it would suffer from the problem the framers of Section 5 saw in any effort to define more clearly in the statute itself what constitutes unfair competition. Instead, the best means to give content to the words "unfair methods of competition" would be to follow the common law approach that Congress intended. This path would require the FTC to explain more fully the reasoning behind each of its enforcement decisions and would require it to spend less time investigating and more time litigating, as Congress expected,[204] so that a fuller body of well-reasoned precedents could be developed as to what this otherwise inherently vague term means.[205]

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commission to the court would give a precedent; and there would probably be in a few years a body of advancing, progressing decisions on this question that would be a continually growing and improving guide of conduct, just like the decisions of every court in the county on the question of negligence in tort cases."), *reprinted in* Kintner, *supra* note 6, at 3980.

[204] *Id.* at 12,146 (Remarks of Sen. Hollis) (referring to the Commission's expected "facilities for investigation" and "rapid, summary procedure"), *reprinted in* Kintner, *supra* note 6, at 4141-42.

[205] For a contrary view on the efficacy of the case method, *see* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 GEO MASON L. REV. 1287 (2014). The authors argue that the common law approach has failed to define the contours of the FTC's "unfair methods of competition" authority, and that the Commission should instead issue a formal policy statement explaining the purpose and limits of its authority. *Id.* at 1292 ("[T]he Commission's case-by-case approach to Section 5 enforcement has little to do with the common law process and cannot be expected to result in the same development of substantive competition doctrine or possess any of its other virtues.").

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 8:29 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 20:28 Submitted by anonymous user [redacted] Submitted values are:

First Name: Zhi
Last Name: Liu
Affiliation: N/A
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
As the husband of a wife in MLM, I want to thank you for revising the business opportunity rule. I want to share with you the impact of MLM(one kind of business opportunity) in our relationship and family life. The MLM company my wife joined is called Market America (MA), she recruits other people and sells dietary supplements.

1. Time.

My wife devotes herself to the "business opportunity" and paid to join every training her upline recommends, most of the trainings are in weekend or in weekday evenings, the training time is from 6 hours to 8 hours. In addition, my wife has to spend time talking to her customers, training her downlines, creating blogs marketing the products and delivering products for her customer living in China. Considering that my wife has a fulltime job, there is little time left for our family. Usually when I want to chat with my wife, her room's door is often closed, I can hear her sound of doing her MA business, I simply can't talk to her, in the weekends or evenings when she works her MA business.

2. Money.

As my wife works very hard, you might think she could make a good amount of money. The reality is the contrary. From 2020 Q3 I insisted that she must count the money and time spent in her "Market America business" and I'm glad that she did it. From her notes, in 2020 Q3, she spent $3449 for self and family use, and her sales commission was $213. In 2020 Q4, she spent
$3380 for family use, and sales commission was $286. In 2021 Q1, spending was $2084, sales commission was $61. In total, during the past 3 quarters her expense is $8913, her revenue is $566, her net loss is $8347. All her self-expense is used on trainings and dietary supplements from Market America including vitamins, minerals, fish oil, protein powder, coffee, tea, collagen. While my wife loses money, her upline takes a commission from her expense. Now my wife starts to have her own recruits, and is dreaming of making money from her team.

3. Lost trust in medical professional and medicine.

My wife is healthy, her annual health exam doesn't show any issues except only once she was found deficient in iron. It was during that time she was approached by someone selling Market America supplement and became a "Market America" UFO (the Market America name for reps that recruit others).

Now she doesn't go to the doctor when she has some health issues, instead, she becomes addicted to the supplements, believes that doctors are not trained in nutrition and doctors have no idea about preventive medicine. Now she thinks that supplements are necessary in her life: every morning and night, she drinks one big cup (12 oz.) of "Isotonix" supplements. Every day, she takes Market America's protein powder, collagen, vitamin gums.
When she feels tired or sleepy, she drinks MA products like Turn up, MochaTonix coffee, etc. When she cooks, she puts the fish oils from MA in our salad. All of these products have no evidence other than some anecdotes to show that they are effective in improving health, there is no evidence to show that MA products are better than those dietary supplements from Costco, Trader Joe's or any super market, but the price is significantly higher than most non-MLM products.

My wife is the only one in our extended family who doesn't want to take covid vaccine because she thinks that she has "strengthened" her immunity via the Market America solution!

Not only she becomes the doctor for herself, she also becomes the doctor for our family. Every time I have some ailments, or not feeling well, she proposes some combination of MA dietary supplements. They are not effective for me at all, and I just have to stop sharing any of my pain with my wife and check with my doctors secretly to save some expense for our household.

Conclusion

When my wife joined IMA in 2016, she was attracted by the potential of financial freedom. She didn't realize her financial situation until I insisted that she record her gains and losses. Even after she sees the number, her upline can still hold her in the network marketing business, she believes that with more investment, she'll one day make a profit from IMA.
As her husband, I see how she gets more and more isolated by family, how her time in our family becomes less, how she was spending tens of thousands of dollars that probably won't come back. How she lost her trust in medicine and doctors. Now she even wants to quit her job and become a full time IMA UFO.

From IMA's earner disclosure https://market-america.info/mais , I don't understand how my wife could ever think a business where only the top 1% make an income more than $46730 could give her financial freedom. I feel sad for her and our family every day.

I want that the tragedy of my wife and family to be avoided in the future. I hope that the FTC could reform the business opportunity rule. Below are my two cents:
Any business opportunity should advertise the typical earning potential honestly (average, 90 percentiles, 99 percentiles), and give recruits time to think about it.
Upline shouldn't make any profit from their team member's sales. They are all independent contractors, they are equal to each other, why upline can profit from downline's work? Isn't a one-time referral bonus enough?
The MLM company should be responsible of what their reps are saying. Even though IMA's official website doesn't mention their supplements could cure any disease, my wife's upline and their network talks about it and they are not recording it and report it to the FTC.

Thanks

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/174

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Monday, June 28, 2021 3:48 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Monday, June 28, 2021 - 15:47 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Conor
Last Name: Healy
Affiliation: IPVM
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: Yes
Link to web video statement:
Submit written comment:
As a watchdog and consumer publication for the surveillance industry, we are pleased to see the FTC consider a stronger stance on false Made in the USA claims. IPVM regularly sees sellers profit from lies about the true origins of their products, and believes our industry serves as a demonstrative example for how such behavior causes real harm to honest American businesses.
In the surveillance space, this even comes at a cost to US national security, and results in Federal agencies unwittingly purchasing hardware that originates from sanctioned companies complicit in genocide.

Although disagreement remains as to the importance of origin for consumer preferences at-large, government purchasing regulations create a clear preference products that are Made in the USA. Since Federal, State, and Local agencies make up a large proportion of demand for surveillance products, the impact of these rules is that businesses in our industry selling American gear have a profitable advantage. Those who are willing to lie, masking cheaper foreign-made products as Made in the USA, stand to make even more profit. And this creates an economic disadvantage for thousands of honest American small businesses that would otherwise receive these government contracts.

This is far from being a hypothetical. An investigation by IPVM that will be published next week shows that certain sellers in our industry are so brazen in their fraud as to list secretly-relabelled products for sale on the Federal procurement marketplace, GSA Advantage. To give just one example, 14 listings of products by Lorex were found on the site, and public records show they went on to be sold to Federal agencies like the US Air Force. All these products are falsely described as being Made in the USA. Those familiar with surveillance businesses will know that Lorex is a wholly-owned subsidiary of Dahua; their products are cosmetically altered versions of Dahua models, which are made in China. Federal purchasing of Dahua products was banned for national security reasons under the 2019 NDAA because they pose well-evidenced cybersecurity risks. Dahua is also sanctioned for its complicity in genocide, as a key supplier and designer of police surveillance systems used to track Uyghurs in Xinjiang.

Frauds like these do not occur because sellers desire to undermine US national security. Rather, the impetus for these frauds is to profit from false claims regarding product origin. They occur because unscrupulous government contractors seek to profit from the advantage of selling products that are "Made in the USA", at the expense of others and with untold side-effects. In other words, the risks to American networks are the side-effect rather the disease.

In that sense, the responsibility falls squarely on the FTC's shoulders to take action. We support the proposal today as a necessary expansion of FTC's ability to impose consequences on violating behavior. Right now, bad actors have little incentive to care about the dubious origins of their products. We believe clear risks of real FTC enforcement can change that.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/50

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 11:18 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 11:17 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Aaron
Last Name: Greenspan
Affiliation: PlainSite
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
Submit written comment:
The FTC is in a unique position to enforce laws that have a direct impact on income inequality by reining in the flagrantly unlawful practices of billionaires.

Specifically, Elon Musk, who was recently the richest man in the world, has been violating the FTC Act for years through his company, Tesla, Inc. The FTC is well aware of many of these violations, having been referred a consumer protection matter by NHTSA as early as October 17, 2018. Yet while Germany and even China have taken action to protect their consumers from Tesla's false claims (regarding Autopilot and vehicle safety, specifically), the FTC has done precisely nothing. Meanwhile, the list of false claims by Elon Musk is so extensive that there is an entire web site dedicated to his lies, presently on-line at https://elonmusk.today.

Similarly, the FTC should be taking action with regard to fake accounts on Facebook (referred to internally as "SUMA" for Single User Multiple Accounts)—a matter of which Mark Zuckerberg has personal knowledge. His lieutenant, Ami Vora, is on record in already-disclosed October 26, 2017 e-mail to top executives openly worrying that "I think there is a real chance this is a very bad moment for us — 'Facebook lies about its user #s to get record profits.' The combo of long-term eroded trust + congressional testimony + suma + earnings means the target on our back just gets bigger."
That's because Facebook actually does lie about its user numbers to achieve record profits, has lied for years, and since Wall Street analysts are paid to look the other way, it falls to regulatory bodies such as the FTC and SEC to take action. That has not happened and the results have been catastrophic for democracy.

I believe Facebook and Tesla represent the two largest corporate frauds in history, with their combined market capitalization at various points approaching two trillion dollars. I have written detailed reports on both companies, accessible at https://www.plainsite.org from the home page. I also testified before the UK Parliament's DCMS sub-committee regarding the Facebook fake account issue. See https://www.parliamentlive.tv/Event/Index/d434d37f-c020-44b4-bda8-11bbad29ac58.
I sincerely hope the FTC re-examines its enforcement approach to these companies (and others, such as Airbnb, Herbalife and Credit Acceptance Corporation) and deposes every current and former top executive, most especially including Mark Zuckerberg and Elon Musk.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/130

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 4:07 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 16:06 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Alden
Last Name: Abbott
Affiliation: Mercatus Center at George Mason University Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement: VA
Submit written comment:
The FTC's announcement that it may consider rescinding its 2015 "unfair methods of competition" policy statement ("Statement") is most concerning. The Statement elegantly enunciated Commission policy in challenging "unfair methods of competition" which are barred by Section 5 of the FTC Act.

Along with Republican Commissioner Josh Wright, three Democrats – Chairwoman Ramirez and Commissioners Brill and McSweeny – backed the Statement.

The Statement has two important limiting principles.

FIRST, this bipartisan Statement aligns FTC competition enforcement with the overarching goal of U.S. antitrust enforcement, which is the promotion of consumer welfare – a goal explicitly endorsed by the US Supreme Court. In Reiter v. Sonotone (1979), the Court stated plainly that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"

SECOND, along with consumer welfare, the Statement also stresses that the FTC will evaluate a practice under a framework similar to the antitrust rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications.

These principles mean that FTC competition enforcement will focus on practices that undermine consumer welfare by harming competition. By considering efficiencies and business justifications, the FTC will take care to avoid the error of mistakenly challenging efficient business practices that would actually benefit consumers.

Regrettably, abandonment of the Statement would create great confusion and uncertainty for the private sector as to the FTC's enforcement intentions.
It would mean that even if businesses compete on the merits and advance consumer welfare – that is, benefit the general public – they may be subject to FTC investigations and lawsuits.

This uncertainty will deter aggressive competition on the merits that spurs innovations and brings forth new and better products and processes that benefit consumers, and the economy as a whole. (Think of all the benefits created by the internet economy that are the fruit of innovative business actions.) It will also impose unwarranted investigation and litigation-resulted costs on businesses, hampering their ability to serve their customers effectively.

Finally, since existing U.S. case law recognizes the consumer welfare standard, new FTC suits that ignore consumer welfare and competition on the merits would likely fail, leading to a waste of public and private resources.

In short, abandonment of the section 5 statement could spur FTC actions that would be bad for consumers, bad for innovation, and bad for the American economy. Before acting,, the FTC should think again and once again endorse, not rescind, the bipartisan Statement.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/158

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Monday, June 28, 2021 7:45 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Monday, June 28, 2021 - 19:45 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Robert
Last Name: Fischer
Affiliation: Consumer
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
The Telecommunications Act of 1996 required Local Exchange Carriers (LECs) to offer number portability. So let's think examine that: the idea was that if a consumer changed service providers, her existing contacts would be able to reach her using the same number.
Contrast that with Apple's iMessage and FaceTime. When a consumer signs up, her phone number is used (I would posit stolen by Apple) such that all other iOS members can initiate FaceTime calls and iMessage actions to the consumer.
What is a FaceTime video call but an enhanced phone call from yesteryear?
What is an iMessage but an enhanced text message from yesteryear?
But if the consumer buys an Android phone...there is no portability. Existing contacts' FaceTime calls ring, unanswered. iMessages may be sent to her Macbook but never appear on her phone. To remember this requires PROACTIVE actions by the consumer to ''reclaim'' her phone number from Apple's ecosystem.

Apple makes a mockery of existing laws and regulations by duplicating the services provided by LECs - at greater scale - and refusing to provide consumer protections the incumbents must provide.
It is an unfair system, and one that takes away consumer benefits previously won. We *solved* the problem of number portability... in 1996. Apple has recreated it for profit, for lock-in, and to support supracompetitive pricing.

Thanks to Disney's MoviesAnywhere.com, any movie I buy has its rights instantly synced between the Tech Giants' ecosystems. That does not exist for music, books, newspapers, or videogames, despite IP holder's enjoying a legal monopoly. That also demonstrates how powerful these ecosystems are - only Disney could stand up to them.

The answer is simple: market capitalization tests force breakups. Companies that achieve $1 trillion in market cap have figured out how to avoid competition. Break them up.

Thank you.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/58

Smith, Michelle

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 7:31 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 19:31 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: John W
Last Name: Budgick II
Affiliation: Disenfranchised by Amazon
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: Yes
Link to web video statement:
Submit written comment:
Amazon destroyed my life.

Had excellent credit score, decades of not a single missed payment on my report, and have spent the past 15 years (well, all up to July 12th, 2020) being obsessively private. As a result, I was offered on the spot financing ... Significant on the spot financing. Citi Flex Pay. On Amazon. Cue what can only be described as resolution hell. Attorneys trying to frame me, manufactured narratives and counternarratives aimed at discrediting me, insolvency, billking of 3rd party sellers, gag orders, promises & lies & misdirection and a concerted attempt to use the atypical chain of misdoings on their part as aberrations on mine.

Thank you for this opportunistic pulpit and apologies for any breach in decorum. Having said that - here's a short intro.

Is it not weird for Amazon to contract out Davis Wright Tremaine attorneys to try to intimidate me when they have their own counsel? And weirder still that no Amazonian will even admit said firm was contracted by Amazon? Look beyond the superficial shell of the narrative furnished by Amazon. Examine the data holistically. Everything auth'd. Multiple guarantees of shipment & process fulfillment from numerous Amazonians are published right here on my profile.
Timestamped.

So what happened? Was it some kind of licensed algorithm by Amazon to Citi for use in the amazon marketplace? Is that what happened? Was the software/code making up that algorithm kept so under cover of "proprietary information and processes" that the guarantee Amazon attached to it while licensing it to Citi had to be taken on blind faith by Citi? Has this all been Amazon trying to dig itself out of a grave of its own making since July 12th - hoping to have me take its place?

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/170

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 3:11 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 15:10 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Jon
Last Name: Morgan
Affiliation: Democrat
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
On or just prior to June 1, my account on Facebook was intruded upon by an individual who then altered the images for the header of a business page that I maintain. This resulted in the immediate disabling of my FB account, and issue that I've been trying to reverse since then. As soon as I realized that the page had been altered without my permission, I attempted to log into my account, and that is when I discovered that my account had been disabled.
Facebook prompted me to verify my ID, but when I did I was taken to a page which stated that my account had been disabled for violating their community standards, and that my account would not be reviewed. Additional attempts to appeal have been met with the same message. I have also tried to reach Facebook via a number of support email addresses I found, and filed a complaint with the BBB. Mostly, I would like to speak with someone at Facebook and try to get this straightened out. Other than the incident with the intrusion, I have almost always followed their community standards. There are a number of groups and pages that I was administering that I need to have access to. Furthermore, there are a number of photos on Facebook of my son who passed away in April from brain cancer, and I really would like to be able to have access to them again.

As I've researched possible solutions to my issue, I have discovered that this is even more wide spread than I could have imagined. Every day, there are new reports from people whose accounts were restricted or disabled with barely an explanation from Facebook. And, it is nearly impossible to reach Facebook's support team. The most successful stories are from those who reached out to support for Facebook's hardware, such as their Oculus product, with the hope that the support there would assist them with re-activating their account.

Aside from wanting my account to be re-enabled, I just think that something more needs to be done. Facebook needs to improve the ways that it communicates with its users as well as its system for moderation.

More of my story can be found here: http://www.gazerbeam.com.

Thank you,

Jon Morgan

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/22

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Sunday, June 27, 2021 2:30 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Sunday, June 27, 2021 - 14:30 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Matthew
Last Name: Krupczak
Affiliation: Krupczak Org
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement: https://www.youtube.com/watch?v=AlpIrdaQmHU
Submit written comment:
Hello,

I am a young professional and student of computer science currently building a career in Technology.

I fear I have been directly harmed in my prospects for employment and interstate commerce by well-doccumented anti-competitive employee non-poaching agreements, predatory pricing against and acquisition of technology startups, and prohibitive digital app marketplace policies by several large technology firms.

My question for the FTC is: what standard of proof must the commission meet for determining if this activity violates section 1, and section 2, of the Sherman anti-trust act?

Thank you.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/6

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 9:16 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 09:16 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Lillian
Last Name: Salerno
Affiliation: Entrepreneur/former public servant Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: Yes
Link to web video statement:
Submit written comment: I am a founder of RTI a syringe innovator and manufacturer of the worlds first retractable low dead space syringe. RTI has struggled to gain US market share because of the monopolistic practices of the dominant manufacturer. The results of the monopolistic practices was highlighted during the pandemic wherein the Dominant supplier was unable to meet the syringe demand needed required for the COViD-19 vaccination campaign. Fortunately RTI was present and stepped up to meet the challenge.
The monopolistic practices of dominant suppliers in the healthcare supply not only costs the USG billions of dollars in inflated healthcare costs but also costs American lives. The pandemic showed how few essential healthcare suppliers/manufacturers have survived. The FTC has an opportunity to help navigate a path forward.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/74

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 2:29 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 14:29 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Zahida
Last Name: Ullah
Affiliation: Citizen with dual nationality Full Email Address: [redacted] Confirm Email Address: Z[redacted]
Telephone: [redacted]
FTC-Related Topic:
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement: TX
Submit written comment:
How does the FTC monitor privacy policy set up in by countries and/or institutions outside of the US? Do expatriates especially British have an established system, with consent, when they move? What about the people that move from State to state, how are they monitored under the different jurisdiction for each State?

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/14

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 9:30 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 09:29 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Deborah
Last Name: Bowers
Affiliation: Yorkville Pharmacy
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: No
Link to web video statement:
Submit written comment: CVS CAREMARK vertical integration takes away competition which in turn makes a monopoly and drives up prices. You don't have to take my word for it google and you will find multiple articles that prove they are overcharging and scamming the system. They take away patient choice which in turn makes for worse patient experiences.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/82

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 1:57 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 13:56 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Linda
Last Name: Knauss
Affiliation: N/A
Full Email Address: [redacted] Confirm Email Address [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: Please take a good hard look at what mail order pharmacies r doing. They r forcing us to use them because of the price. Smaller pharmacies r being forced to closed down. Then there's a major issue about temperature control & timely delivery.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/10

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 6:21 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 18:20 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Kenneth
Last Name: Evans
Affiliation: Consumer
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement: MA
Submit written comment: Safety, one small word with a big meaning. I am a diabetic, type 1. When I first needed to acquire syringes, from my insurance covered program, for my insulin it took three tries for Express Scripts to get it right. If I had not started well in advance this could have been a serious problem. Being able to go to a local pharmacy makes it so much easier, quicker and safer. I never had a problem getting the correct syringes or other products from my local pharmacy. I understand the cost benefit analysis logic for the insurance company but, safety.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/30

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 10:36 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 10:36 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Hemant "Henry"
Last Name: Patel
Affiliation: AAHOA
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: Yes
Link to web video statement:
Submit written comment: I was the board member and. Chairman of largest hotel owners association . Majority of our hotels are franchised properties and there are lots of challenges to the Franchisees due to unfair business practices . This way the franchisors have literally taken lots of profit away from Franchisees and also lots of trading could be looked as unethical or illegal as lots of this Franchisor owned brands are publicly traded companies . Congress in past have tried to bring fairness by introducing Fair Franchise bipartisan bills . FTC can be game changer..

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/106

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 9:08 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 21:08 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Nada
Last Name: Terstenyak
Affiliation: Consumer
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Please , please ,please remember us patients, I feel secure , confident and trusting in dealing with my pharmacist face to face about anything and everything related to my medications .This is very ,very important to us knowing that I can depend on my local pharmacy and have PERSONAL trustworthy relationship. Thank you for reading my comments , taking it into consideration the most important the relationship of TRUSTr LOCAL pharmacy !

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/34

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 9:06 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 09:05 Submitted by anonymous user: [redacted] Submitted values are:

First Name: RICH
Last Name: GANDHI
Affiliation: Reform Lodging
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: Yes
Link to web video statement: NJ
Submit written comment: Would like to discuss unfair and deceptive business practices in regards to franchisor and franchisees. Franchisors are openly stealing from franchisees without any regard for their well being.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/58

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 8:56 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 08:56 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Todd
Last Name: Achilles
Affiliation: CEO, Evoca TV
Full Email Address: t[redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: Yes
Link to web video statement:
Submit written comment:
Dual content suppliers—horizontally integrated media networks that supply both broadcast channels and non-broadcast content—are engaged in tying and refusals to deal. Both of these anticompetitive activities harm consumers. The dual content suppliers are pursuing these anticompetitive actions to protect a revenue stream to which they have recently become accustomed.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/26

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 8:43 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 08:42 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Matthew
Last Name: Lower
Affiliation: Employee bound by non-compete Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Thank you for reviewing this topic.

Non-compete agreements are fundamentally at odds with at-will employment.
They introduce an obvious power imbalance between employer and employees.
They are not enforced consistently, and states like California have seen incredible success in ignoring them. Please strike down non compete clauses and let the highest-bidding employers employ who they want, when they want.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/2

Smith, Michelle

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 10:23 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 10:22 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Donna
Last Name: Schexnaydre
Affiliation: Independent
Full Email Address: [redacted]
Confirm Email Address: [redacted]m
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
Submit written comment: I support breaking up CVS. Consumers are losing out on life-saving medications that have to be purchased at CVS due to the monopoly which has been created. Do your job for the American people. We deserve truth and honesty. We don't want big pharma controlling our lives.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/98

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 8:59 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 08:59 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Jeff
Last Name: Chester
Affiliation: Center for Digital Democracy Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: Yes
Link to web video statement: www.democraicmedia.org Submit written comment: I will prepare a comment that discusses past problems at commission and challenges ahead, as well as make specific recommendations.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/34

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Monday, June 28, 2021 3:07 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Monday, June 28, 2021 - 15:06 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Peter
Last Name: Tregillus
Affiliation: None, retired citizen
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement: CO
Submit written comment: Breakup the eyeglass and frame companies or work with the EU to get it done. Eyeglasses are heavily branded and made in China.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/42

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]
Sent: Tuesday, June 29, 2021 9:52 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Tuesday, June 29, 2021 - 09:51 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Linda
Last Name: Holliday
Affiliation: None
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Regarding Facebook, don't overlook--The paying customers of Facebook are advertisers.
And they would be close to unanimous in saying that they have no choice but to use Facebook. Ask them. This was never true of any advertising vehicle.
One could argue TV was mandatory for certain products, but no single network.
That should be the primary basis for defining monopoly.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/10

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 9:15 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 09:15 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Patricio
Last Name: Silva
Affiliation: Independent
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: Yes
Link to web video statement:
Submit written comment: I would like to address the nationwide issue behind the Live Event Ticking Industry. The US Committee on Energy and Commerce has already discussed that issue on the House floor but no solutions have been put in place yet.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/70

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 10:03 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 22:02 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Loretta
Last Name: Boesing
Affiliation: Unite For Safe Medications
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement: https://youtu.be/Ad2sjuayfj0 Submit written comment:

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/178

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Saturday, June 26, 2021 5:28 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Saturday, June 26, 2021 - 17:28 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Emily
Last Name: Hellmann
Affiliation: None
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: Non-competes further the power imbalance between employees and employers, and make it harder for employees to negotiate better pay and benefits. People should have the freedom to change where they work and continue working in an industry that fits their skill set - non-competes inhibit this freedom.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/26

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Monday, June 28, 2021 1:23 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Monday, June 28, 2021 - 13:22 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Austin
Last Name: Phillips
Affiliation: NA
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: I am requesting an independent audit of the financial information and income sources of Lina Khan dating the last 15 years.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/34

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Friday, June 25, 2021 9:42 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Friday, June 25, 2021 - 09:41 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Elijah
Last Name: Turner
Affiliation: Law student
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: Tuning in to see my professor in her new role as Chair of the FTC

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/86

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:49 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:48 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Carl
Last Name: Szabo
Affiliation: NetChoice
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- FTC Operations

Register to speak during meeting: No
Link to web video statement: https://youtu.be/GE7WExzfMeQ Submit written comment:
We worry that several of the changes being considered would undermine trust and credibility in the Commission, expose it to politically motivated actions, and move the FTC away from focusing on protecting consumers and at the same time remove consumer input.

We ask the Commissioners to:
1. Vote AGAINST "streamlining" Section 18 rulemaking procedures as the proposal undermines the Magnuson-Moss Act and Congress's intent in passing it, and it greatly curtails public input in FTC rulemaking;

2. Vote AGAINST rescinding or amending the adopted principles regarding "unfair methods of competition" under Section 5 of the FTC Act as the 2015 Policy Statement provides affected parties and the public with notice of what conduct is permissible, supports the rule of law, and appropriately confines the FTC's discretion; and

3. Vote AGAINST changes to enforcement investigations as Congress intentionally structured the FTC to be a multi-member, consensus-driven organization, and the proposed "streamlined" subpoena process would violate that structure .

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/46

[redacted]

From: Crenshaw, Jordan <[redacted]>
Sent: Tuesday, June 29, 2021 2:16 PM
To: JulyPublicComments
Cc: Heather, Sean; Quaadman, Tom
Subject: U.S. Chamber Comments for July 1 Open Meeting
Attachments: US Chamber_Comments_Open Meeting_FTC (final).pdf

To Whom It May Concern:

Please find attached comments from the U.S. Chamber of Commerce regarding the July 1 Open Meeting.

Thank you!

Best,

Jordan Crenshaw
Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce
[redacted]

www.americaninnovators.com

U.S. CHAMBER OF COMMERCE

1615 H Street, NW
Washington, DC 20062-2000
www.uschamber.com

June 29, 2021

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

Re: July 1, 2021 FTC Open Commission Meeting

Dear Chair Khan:

The U.S. Chamber of Commerce writes to express our concerns with the Open Meeting scheduled for July 1, 2021 that was noticed on June 24, 2021.[1] Although the Federal Trade Commission ("FTC" or "Commission") has expressed its intention to "open the work of the Commission" to the public, the FTC has failed to provide meaningful notice or adequate opportunity to comment on the pending items to be voted upon on July 1.

In the Notice, the Commission provides vague and brief summaries of significant FTC rulemakings, process, and policy changes that fail to provide the public with adequate notice of the proposals. For example, regarding Section 18 rulemaking procedures, the Notice merely states "The Commission will vote on whether to streamline the procedures for section 18 rules prohibiting unfair or deceptive trade practices. Section 18 rules allow the Commission to seek redress for defrauded consumers and penalties against firms that cheat."[2]

The descriptions of the proposal fail to describe the scope or subject matter of potential rules as well as the proposed streamlined Section 18 rules themselves. A Section 18 streamlining could impact a wide range of conduct. In light of the recent 9 to 0 decision by the Supreme Court that held the Commission has already exceeded its statutory authority in consumer redress cases[3], it would benefit the Commission to seek meaningful public input and establish a robust record that achieves the best and legally durable public policy result.

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[1] Federal Trade Commission Announces Agenda for July 1 Open Commission Meeting (June 24, 2021) *available at* https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting. ("Notice")
[2] *Id.*
[3] *AMG Capital Management, LLC v. Fed. Trade Comm'n*, No. 19-508 (Apr. 22, 2021).

The Chamber recommends that if the Commission seeks to conduct open meetings to vote upon policy or significant process changes, it should follow the bipartisan example of the Federal Communications Commission ("FCC") which notices meetings months in advance.[4] The FCC, beginning with former Chair Ajit Pai in 2017 and continued by Acting Chair Jessica Rosenworcel, publishes the full proposed text of orders and proposed rules to be voted upon three weeks in advance of open meetings. This approach follows the spirit of the Administrative Procedure Act and adequately notifies the public about what the agency intends to consider, therefore enabling meaningful public comment.

We urge the Commission to show good faith and transparency by providing the public with the text of its proposals. The Commission should give the public at least three weeks, as opposed to the *one week* provided by the FTC for the current meeting, before its Open Meeting to comment.

Based upon the limited notice provided by the Commission, the Chamber offers the following substantive concerns about the proposed topics at the Open Meeting:

Section 18 Rulemaking Procedures:

The Supreme Court made it clear that the Commission had been misusing its 13b authority for years whenever it attempted to seek monetary relief under 13b. Congress has already outlined a path for the FTC to seek monetary relief for cases that arise from fraudulent and dishonest conduct in Section 19. Section 18 should not be used to circumvent the Supreme Court ruling, nor should the Commission get out ahead of the pending Congressional debate over when such remedies would be appropriate.

While it is unclear from the posted agenda for the open meeting what is envisioned by the use of the word "streamlining," it is clear is that the FTC should, for now, use Section 19 to prosecute such cases and not consider writing rules that do an end-run around the Congressional process.

"Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015):

The statement of principles was developed on a bipartisan basis that served as a path forward for the agency to bring viable Section 5 Unfair Methods of Competition cases that may not be entirely consistent with the antitrust laws. The statement remains sound because it tethers enforcement both to harm to the consumer and to the rule of reason standard.

The Notice for the open meeting fails to put forward any objective rational for removing the guidance. Nor does the Notice suggest that the Commission plans to replace such guidance

[4] *See* Open Commission Meetings, Federal Trade Commission *available at* https://www.fcc.gov/news-events/events/open-commission-meetings.

with updated guidance. It seems premature to make any decision around the guidance without a more fulsome debate, including FTC workshops with stakeholders. In the end, any removal of existing guidance should only be done when updated guidance is ready for consideration. Finally, without bipartisan support, guidance will fail to stand the test of time and lead to lengthy court challenges brought on by partisan impulses.

Enforcement Investigations:

The Federal Trade Commission's notification of its plans to consider "a series of resolutions" is vague and does not provide any specificity as to what is truly under consideration. Such an approach is counter to the goal of transparency and the purpose of open meetings. As a result, it is difficult for the Chamber to comment.

However, the Notice signals the intent to use omnibus resolutions to empower the staff to launch investigations without seeking a vote from commissioners. The Chamber strongly opposes any such attempt to delegate Commission votes to initiate competition investigations to a staff level decision. Omnibus resolutions lead to "fishing expedition" that circumvents the oversight that comes from the Commission having to approve staff proposed investigations.

Further, the notion that a single commissioner can turn a staff-initiated investigation into a compulsory exercise holds the potential for a gross abuse of power. Yet, this is exactly what the agenda for the open meeting suggests is planned. Strong enforcement does not need to be done in an abusive manner, but these efforts to "streamline" investigations are highly questionable and undermine the confidence and legitimacy of the Commission.

The Chamber stands ready to work with you to address these issues.

Sincerely,

Jordan Crenshaw
Vice President,
Chamber Technology Engagement Center

Sean Heather
Senior Vice President,
U.S. Chamber International Division

[redacted]

From: Josh Withrow <[redacted]>
Sent: Wednesday, June 30, 2021 10:02 AM
To: JulyPublicComments
Subject: Comment on FTC July 1 Open Meeting from National Taxpayers Union Foundation
Attachments: NTUF FTC 7-1-2021 Open Meeting Comment.pdf; NTU 2021 Economist Antitrust Letter.pdf

Hi,

On behalf of the National Taxpayers Union Foundation, I would like to submit the attached written comment on the process and items on the agenda for the upcoming July 1 open meeting. A supporting document referenced in the comment has been attached as well.

Thank you,

JOSH WITHROW | DIRECTOR OF TECHNOLOGY POLICY
National Taxpayers Union Foundation

[redacted]

www.ntu.org | [redacted]

NATIONAL TAXPAYERS UNION FOUNDATION

June 30, 2021
Federal Trade Commission

Comment regarding items on the agenda of the July 1, 2021 open meeting of the Federal Trade Commission

National Taxpayers Union Foundation (NTUF) appreciates the opportunity to comment on the agenda for the July 1st open meeting and applauds newly appointed FTC Chair Lina Khan's commitment to holding such open meetings regularly in order to bring more transparency to the work of the Commission. At the same time, echoing the words of current FTC Commissioner Noah Phillips, "a mere week's notice on matters requiring serious deliberation, and a number of the policies themselves, undermine that very goal."[1]

In particular, we find the sudden move to revoke the 2015 "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" to be alarming. This Section 5 guideline was the product of a bi-partisan process under a Democratic-appointed majority FTC under the Obama Administration, and expresses as one of its principles the continuation of a decades-long bi-partisan consensus that the welfare of consumers should be paramount while considering antitrust enforcement. The point of creating this concise set of guidelines was to provide increased clarity with respect to how the FTC would define these unfair methods of competition (UMCs).

The National Taxpayers Union recently released an open letter to policymakers signed by over 70 economists and antitrust scholars highlighting the long-standing, non-partisan ideological consensus that has existed behind the consumer welfare standard for antitrust enforcement. The letter also warns against the sort of radical expansion of antitrust that this modest change in guidelines, given the expressed views FTC Chair Lina Khan,[2] seems to foreshadow. We've attached this letter along with our comment and hope that the Commission will take it into consideration.

As our letter argues, "...the harm and uncertainty posed to businesses from expanded or excessively broad interpretations of antitrust laws are significant. These destructive and ill-fated actions imperil the economy at a pivotal point in its progress toward full recovery from the effects of the pandemic."

---

[1] Commissioner Noah J. Phillips, @FTC Phillips, Twitter, June 25, 2021. https://twitter.com/FTCPhillips/status/1408459407134973955

[2] See: Lina M. Khan, "Book Review: The End of Antitrust History Revisited," *Harvard Law Review,* Mar. 10, 2020. https://harvardlawreview.org/wp-content/uploads/2020/03/1655-1682_Online.pdf

In addition, we are concerned that the rushed process under which these changes are being considered indicates a shift towards partisan decision-making with respect to how the FTC will enforce competition policy. This meeting was announced fewer than ten days after Commissioner Lina Khan was sworn in as the new Chair of the FTC, allowing less than a week for public comment, and little to no time for real debate or consideration by the whole of the Commission.[3] With Commissioner Chopra potentially leaving the FTC if confirmed in his nomination to head the Consumer Financial Protection Bureau, this sudden rush to a vote seems designed to quickly steamroll any potential opposition while the current ideological majority has this window in which to operate.

Similarly, we urge that the "streamlining" of Section 18 rulemaking procedures and of enforcement investigations (both of which are not defined in detail in the meeting agenda) should not curtail the ability of the public to provide input into these important activities of the commission. Certainly, any substantial changes in the FTC's rulemaking procedures ought to be subject to the same standard minimum of 30 days' advance notice to the public as any other federal regulatory proceeding.

If the true interest of the Chair is to promote more transparency regarding the FTC's approach to enforcing antitrust laws, we encourage a process that fosters more deliberation and consensus than this rushed proceeding suggests.

Respectfully,

Josh Withrow
Director of Technology Policy
National Taxpayers Union Foundation
[redacted]

[3] "FTC Announces Agenda for July 1 Open Commission Meeting," FTC.gov, June 24, 2021 https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting

NATIONAL TAXPAYERS UNION

June 23, 2021

An Open Letter to Public Officials: Consumer Welfare Standard Should Guide Antitrust Policy

We, the undersigned economists and legal experts, write to express concern regarding the government's approach toward antitrust and competition policy, embodied recently in federal and state litigation against tech firms, as well as legislative proposals to ban mergers or radically restructure industries. We urge public officials to be wary of antitrust activities that distort existing antitrust standards and do not focus on real harm to consumers. Such caution is especially critical now, as consumers here and around the world have benefited from the existing robust, adaptable business structures that have efficiently responded to the pandemic.

History shows that these antitrust actions and proposals have major potential to: deprive consumers of choices, limit the ability of entrepreneurs to innovate, deny workers and shareholders opportunities to build wealth, confer artificial benefits on competitors, drain "defendant" companies of capital due to legal expenses, and thwart potential growth in the economy as companies are forced to divert resources and attention to legal battles instead of innovation.

Ultimately taxpayers suffer from this heavy-handed approach as well -- a less vibrant economy not only means rising deficits from shrinking government revenues, but also less technological advancement that can make those governments operate more efficiently.

Perhaps most alarming are the notions that governments can engineer a superior "remedy" to the equilibrium markets will find, and that the consumer welfare standard should no longer guide policymakers. Proposed alternatives to this standard, such as forced break-ups, restructuring, or restrictions on business models do not serve the interests of the consumers whom public officials seek to protect.

Regardless of the particular firm under government scrutiny, the harm and uncertainty posed to businesses from expanded or excessively broad interpretations of antitrust laws are significant. These destructive and ill-fated actions imperil the economy at a pivotal point in its progress toward full recovery from the effects of the pandemic.

Long-form signatories (for identification purposes only):

- Charles W. Baird, California State University, East Bay
- Don Bellante, University of South Florida (emeritus)
- James T. Bennett, George Mason University
- Bruce L. Benson, Florida State University
- Geoffrey A. Black, Boise State University
- Michael Bond, University of Arizona
- Samuel L. Bostaph, University of Dallas
- Donald J. Boudreaux, George Mason University
- Scott Bradford, Brigham Young University
- Jason Brennan, Georgetown University
- Wayne T. Brough, R Street Institute
- Peter T. Calcagno, College of Charleston
- James H. Cardon, Brigham Young University
- Joe Cobb, Concordia University Irvine

- Joab N. Corey, University of California, Riverside
- Joseph S. DeSalvo, University of South Florida (emeritus)
- Gerald P. Dwyer, Clemson University
- Kenneth J. Elzinga, University of Virginia
- Richard A. Epstein, NYU Law School, University of Chicago
- Fred Esposto, Kutztown University
- John A. Flanders, Central Methodist University
- Judge Ferdinand, Glock Cicero Institute
- Robert James Gmeiner, Kennesaw State University
- Stephan F. Gohmann, University of Louisville
- Kenneth Greene, Binghamton University (emeritus)
- Stephen K. Happel, Arizona State University
- Dermot James Hayes, Iowa State University
- Jeff Haymond, Cedarville University
- David R. Henderson, Hoover Institute, Stanford University
- John P. Hoehn, Michigan State University
- Douglas Holtz-Eakin, American Action Forum
- Jeffrey Rogers Hummel, San Jose State University
- David Kalist, Shippensburg University
- Raymond J. Keating, Small Business and Entrepreneurship Council
- Daniel Klein, George Mason University
- Kishore G. Kulkarni, Metropolitan State University of Denver
- Richard N. Langlois, University of Connecticut
- Thomas E. Lehman, Indiana Wesleyan University
- Stan Liebowitz, University of Texas - Dallas
- Tony Lima, California State University, East Bay
- Christopher Lingle, Universidad Francisco Marroquin
- Abir Mandal, University of Mt. Olive
- Michael L. Marlow, California Polytechnic State University
- Scott E. Masten, University of Michigan
- John R. McArthur, Wofford College
- W. Douglas McMillin, Louisiana State University (emeritus)
- James C. Miller III, Former Chairman, FTC
- Michael C. Munger, Duke University
- Sam Peltzman, University of Chicago (emeritus)
- Arturo C. Porzecanski, American University
- Barry W. Poulson, University of Colorado
- Farhad Rassekh, University of Hartford
- Nancy Roberts, Arizona State University (emeritus)
- Paul H. Rubin, Emory University (emeritus)
- John G. Ruggiero, University of Dayton
- Joseph T. Salerno, Pace University
- Raymond D. Sauer, Clemson University
- Nilopa N.S. Shah, University of California, Irvine
- William F. Shughart II, Utah State University
- Daniel J. Smith, Middle Tennessee State University
- Vernon L. Smith, Chapman University
- Charles N. Starnes, Wayland Baptist University

- Daniel Sutter,
  Troy University
- Edward J. Timmons,
  St. Francis University
- Edward Tower,
  Duke University
- Michael Welker,
  Franciscan University of
  Steubenville
- Christopher Westley,
  Florida Gulf Coast
  University
- Bill Yang,
  Georgia Southern
  University
- Benjamin Zycher,
  American Enterprise
  Institute

[redacted]

From: Chris Marchese <[redacted]>
Sent: Wednesday, June 30, 2021 10:28 AM
To: JulyPublicComments
Cc: Trace Mitchell; Carl M. Szabo
Subject: NetChoice Comment for Open Meeting on July 1, 2021
Attachments: NetChoice Comment to FTC for Open Mtg on July 1, 2021.pdf

Hi,

Please find attached our comment for the record for the FTC's open meeting on July 1, 2021. Please let us know if pdfs are unacceptable and we'll remedy the problem.

Thank you,
NetChoice

NetChoice Comment for the Record: FTC Open Meeting, July 1, 2021

NetChoice[1] is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Introduction

We welcome the opportunity to provide the Federal Trade Commission with feedback about the many significant issues it will discuss at its open meeting on July 1st, 2021. As discussed below, we ask that the FTC:

1. Vote **against** "streamlining" Section 18 rulemaking procedures.
    - The proposal undermines the Magnuson-Moss Act and Congress's intent in passing it, and it greatly curtails public input in FTC rulemaking

2. Vote **against** rescinding or amending the adopted principles regarding "unfair methods of competition" under Section 5 of the FTC Act.
    - The 2015 Policy Statement provides affected parties and the public with notice of what conduct is permissible, supports the rule of law, and appropriately confines the FTC's discretion; and

3. Vote **against** changes to enforcement investigations.
    - Congress intentionally structured the FTC to be a multi-member, consensus-driven organization, and the proposed "streamlined" subpoena process would violate that structure

We appreciate the Commission's consideration of our views, and welcome the opportunity to provide any additional information or answer any questions.

[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org. The views expressed here do not necessarily represent the views of every NetChoice member.

Part 1. "Mag-Moss" Rulemaking

Section 18 of the FTC Act provides the Federal Trade Commission with the authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act.

Unlike traditional agency rulemaking under the Administrative Procedures Act (APA), rulemaking under Section 18, often referred to as "Magnuson-Moss" rulemaking after the Magnuson-Moss Warranty Act, comes with additional statutory requirements meant to curb the FTC's discretion. Those include requirements to provide interested parties with limited cross-examination rights during informal hearings and show that the practices the proposed rule seeks to regulate are "prevalent" before the rulemaking occurs.[2]

> These procedural safeguards are a benefit, not a drawback. The FTC should continue to adhere to them.

History Shows that Magnuson-Moss Rulemaking Authority is not Supposed to be "Streamlined."

To begin, the FTC likely does not have the authority to "streamline" Section 18 rulemaking procedures. Congress imposed these rulemaking requirements through explicit statutory text and intentionally curbed the FTC's discretion. While some may oppose the additional procedures, only Congress can substantively "streamline" or change them.

During the 1960s and 70s, the FTC's rulemaking activity became the subject of considerable controversy and debate. Many felt the Commission had become overzealous in its promulgation of rules. Consider the (in)famous example of the "Kid Vid" rule that would have basically prohibited any television advertising aimed at children.[3] This decision and the circumstances surrounding it resulted in the *Washington Post* dubbing the FTC the United States' "National Nanny."[4] As subsequent commentators have explained, "the FTC adopted the reformers' cause uncritically, seeing itself self-appointed champion of American children" such that "even its supporters acknowledge that the FTC made a serious political miscalculation."[5]

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[2] 15 U.S.C. § 57a(b)(3).
[3] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90 (1980).
[4] *The FTC as National Nanny*, Wash. Post (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.
[5] Robert H. Mnookin & Susan Bartlett Foote, *The "kid vid" Crusade*, 61 The Public Interest 90, 91-105 (1980).

Congress passed the Magnuson-Moss Warranty of 1975 and the FTC Improvements Act of 1980 to curb the FTC's excessive rulemaking activity. Congress did not hide its justification for limiting the Commission's powers. In a series of hearings held in the late 1970s, "Congress publicly lambasted the Commission for its activist programs branding these as 'regulatory abuse' by a 'runaway, controllable bureaucracy.'"[6] Together, these Acts greatly limited the Commission's ability to promulgate rules at will.

The Commission Cannot Supersede Statutory Limits & Even if it Could, It Shouldn't.

With such clear congressional intent and statutory language supporting the goal of erecting, not lowering, barriers to agency rulemaking, at best the Commission has only limited ability to "streamline" such procedures through its own internal processes. And even if the Commission can, it shouldn't.

First, the concerns that motivated Congress to impose the requirements are no less prevalent today than they were in the late 20th Century. In fact, with a clearly expressed desire on the part of some commissioners to divorce FTC enforcement from the guide of consumer welfare and to use its enforcement power to promote vague and often ill-defined social goals, these procedural safeguards and restrictions will likely be more important than ever.[7]

Second, the market is a dynamic and ever-evolving process that brings with it incredible, consumer-benefiting innovation that is difficult, and often impossible, to predict before it occurs. By artificially locking in *per se* rules that prohibit specific types of conduct, the Commission risks chilling consumer-welfare-enhancing innovation. In contrast, since the Section 18 rulemaking requirements took effect, the FTC has focused primarily on adjudicating cases against specific defendants based on particularized allegations of consumer harm. This has allowed the FTC to address instances of consumer harm without undermining market-driven innovation. The FTC should therefore continue to focus on its adjudicative approach, which maximizes consumer benefits without kneecapping American innovation and the United States' competitiveness in the global arena.

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[6] Mark J. Moran & Barry R. Weingast, *Congress as the source of regulatory decisions: The case of the Federal Trade Commission*, 72 American Economic Review 109 (1982).
[7] *FTC Announces Agenda for July 1 Open Commission Meeting*, Federal Trade Commission (Jun. 24, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale Law Journal 564 (Jan. 2017), https://www.yalelawjournal.org/note/amazons-antitrust-paradox; Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

Third, the FTC should consider that an increase in rulemaking would likely hurt small businesses and up-and-coming entrepreneurs.

More Rulemaking—Streamlined or Not—Will Hurt Small Businesses & the Economy.

Market entrants are already faced with an onslaught of overly restrictive rules and regulations. As of November 2019, for example, there were over 1 million regulatory restrictions in the U.S. Code of Federal Regulations.[8] Add to this the thousands of state regulations businesses must comply with: California and New York alone have over 695,000 regulatory restrictions.[9]

Small businesses and entrepreneurs have already taken a particularly tough hit as a result of the COVID-19 pandemic. Not only does the accumulation of rules hinder their ability to succeed, it strengthens the position of the dominant players by erecting artificial barriers to competition. The FTC's rulemaking ability is particularly threatening because it is not limited to one sector of the economy or confined to a particular social issue. Instead, the FTC has broad jurisdiction over the entire United States' economy. While the FTC's adjudicative approach focuses primarily on the largest players and those that pose the greatest risk of harm, rulemaking applies to all participants equally without regard to their particular needs or the context of their conduct.

The Proposal Discards the FTC's Consumer-First Focus.

As mentioned above, removing the restrictions on FTC rulemaking would open the door to a regulatory approach that focuses less on the welfare of consumers and more on the preferred policy considerations of a given commission. Rather than having to justify particular enforcement decisions or prove consumer harm in specific cases, the Commission could instead impose bright-line rules that govern commercial activity for the foreseeable future—whether or not consumers actually benefit.

Indeed, rules could be enacted because they advance unrelated social goals rather than out of some desire to protect consumers from anticompetitive conduct. While some social goals may be worthy of government attention, it is for Congress—not the FTC—to advance those goals.

For these reasons, we ask that you do not amend the statutorily-required procedures for Section 18 rulemaking.

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[8] James Broughel, Patrick McLaughlin & Michael Kotrous, *Quantifying Regulation in US States*, Mercatus Center (Nov. 13, 2019), https://www.mercatus.org/publications/regulation/quantifying-regulation-us-states.
[9] *Id.*

Part 2. UMC Policy Statement

When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself). While the statement is flexible—it allows the FTC to use its Section 5 authority for standalone claims, for example—it provides necessary guidance to both the FTC and the public. As the Commission surely knows, its authority under Section 5 has been controversial for decades. To be sure, most recognize that it encompasses the agency's antitrust authority under federal statutes like the Sherman Act. But whether it extends beyond those statutes was and is an open question.

> When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself).

But even confining Section 5 authority to the antitrust statutes is legally murky. The agency's organic statute—the FTC Act—fails to define "unfair," for example. Without statutory guidance, and without the UMC Policy Statement, "unfair" will mean whatever at least three commissioners want it to mean.

The FTC Shouldn't Abandon Clear, Uniform, Predictable, & Objective Standards that Protect Consumers & Promote Innovation.

The movement away from clear guidance is a cause for concern. ***For starters***, it is unclear whether today's Supreme Court, which is far more skeptical of agencies than earlier courts, would countenance Section 5 agency action without such guidance. Indeed, the Policy Statement seems to be the agency's own effort to ward off constitutional and legal attack. Repealing or broadening it risks invalidation or judicially constructed limitations. At least for now, the Statement aligns with the Supreme Court's antitrust doctrines and thus stands a decent chance of surviving judicial review.

Second, it is unclear whether Congress would countenance such open-ended authority. Even if the current Congress is poised to support the agency's actions, future Congresses are likely to take issue with it. And if history is any indicator, the FTC's abuse of broad statutory language will spur hearings, condemnations, and reforms.

In the meantime, businesses and consumers will be left guessing. Even if the courts and Congress turn a blind eye, the rest of the country will be vulnerable to unexpected and open-ended regulation. This regulatory environment will likely dampen investment and chill innovation—which will be even worse if the agency also "streamlines" its Section 18 rulemaking processes. Even worse, without the

Statement, the agency could return to the past, when it used vague enforcement actions to coerce private parties into settling even when the alleged "harm" was far from clear.

It is against this backdrop that the FTC adopted the UMC Policy Statement in 2015. And it is for these reasons that the agency should maintain—and even *strengthen*—the Statement.

The Existing Policy is Flexible Enough to Respond to New Market Realities & Even Critics Should Support It.

Consider also that the Statement is flexible enough to adapt to new market realities. In brief, it simply notes that when the agency decides to use its Section 5 authority, it will do so based on the consumer welfare standard and will use the rule of reason to evaluate potential action. None of this is radical. As the Commission knows, the consumer welfare standard has been the guiding light of antitrust enforcement for decades. The rule of reason, even longer. That these standards are so established in federal law and so familiar to interested parties is a plus, not a minus.

Even critics of the consumer welfare standard should rejoice: the Statement accommodates a more "aggressive" approach to enforcement.[10] For example, the Statement does not include former-Commissioner Joshua Wright's idea to create a "safe harbor" from UMC enforcement if any business efficiency is shown. By rejecting this proposal (sensible as it may be) and by adopting a balancing method instead, the Commission left wiggle room to exercise its UMC enforcement power even when defendant businesses provide evidence of procompetitive effects. Under this balancing approach, the Commission retains the ability to weigh in on many business practices. The sole limitation is simply that the Commission must identify *some* consumer harm. That is, by any objective standard, not asking much.

Nor does the Policy Statement tie the FTC's hands in defining "consumer harm." Far from being limited to prices, the consumer welfare standard—and the Statement's use of it—leaves the Commission free to enforce actions against businesses that harm quality, innovation, and inflict other harms on consumers identified by the Commission and economic literature. In other words, all the Statement does is require the Commission to make its decisions based on *consumers*—not competitors, not lofty social goals (no matter how well-meaning), and not individual policy preferences. This objective standard developed over decades and represents the accumulated wisdom of the courts, agencies, economists, and lawyers. It

[10] N.B. We disagree with critics who claim the agency's enforcement has been "lax" for the last decade or more. As evidence shows, that's far from true. But because "lax" has a subjective meaning and its meaning does not change our argument above, we'll assume the criticism matters.

shouldn't be abandoned simply because it requires the FTC to shift through evidence using an objective measure to guide (and sometimes abandon) its enforcement actions.

The Existing Policy Supports the Rule of Law.

By conforming its Section 5 powers to its antitrust enforcement powers, the FTC in 2015 promoted clarity, predictability, and uniformity. These benefits should not be taken for granted. By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges. And it gives businesses and consumers insight into what behavior may or may not be permissible. This, of course, helps businesses grow and innovate. Likewise, by promoting uniformity and predictability, the Statement protects against arbitrary or politicized enforcement. This supports the rule of law and fairness. Without guardrails that align with the agency's enforcement policies elsewhere, the Commission threatens to destabilize the law and raise questions about whether its Section 5 authority is even constitutionally or statutorily sound.

By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges.

Aside from those benefits, the 2015 Statement is good on its own merits. Because the FTC's authority extends so broadly, its actions can reshape entire markets and industries. As the old adage goes, with great power comes great responsibility. The Statement recognizes this, and reaches an appropriate balance between acting when necessary to protect consumers and leaving businesses free to innovate. And it appropriately situates the Commission's Section 5 powers: Instead of viewing "unfair methods of competition" as a standalone grant of power, the Statement treats it as a gapfiller to cover conduct that is not expressly prohibited by other federal antitrust statutes but that would, left unchecked, undermine the purposes of those statutes.

Part 3. Compulsory Process

When Congress created the FTC, it sought to fill the agency with independent experts and to insulate them from political pressure. As the Supreme Court long ago put it, the FTC was designed to be "non-partisan" and to "act with entire impartiality."[11] To be sure, the agency is not entirely separate from politics—presidents appoint commissioners based on their expertise *and* on their political affiliation. At any given time, for example, the Commission can have no more than three commissioners of the same political party. But even that small nod to

[11] *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935).

politics underscores the Commission's apolitical nature. Rather than let any party command the agency unfettered, Congress instead elevated bipartisanship and consensus.

Congress also double-downed on the agency's independence. Commissioners serve for staggered seven-year terms and can be removed only for cause. And Congress chose to make the FTC a multi-member Commission, not a unitary body like the CFPB. Had Congress wanted commissioners and the agency's staff to act unilaterally, it would not have gone through the trouble of structuring the agency this way. Whatever costs this multi-member, consensus-driven structure may impose on the Commission's speed, it more than makes up for in strengthening the Commission's reputation and insulating it from politics.

For that reason, the Commission should not "streamline" the subpoena process. By allowing staff to unilaterally ask a single commissioner to unilaterally approve compulsory process, the Commission risks undermining its reputation and undercutting public support for its decisions.

The FTC Should Not Empower a Single Commissioner To Unilaterally Approve Compulsory Process.

First, the FTC's portfolio is broad. It is both the nation's top consumer watchdog and its primary antitrust enforcer. Under these roles, the Commission touches almost every segment of our economy. And that sweeping jurisdiction—combined with the Commission's powers—means it has the potential to restructure entire markets and even overhaul the economy. With the exception of Congress and the possible exception of the Federal Reserve, few others have such capacity to affect so much so quickly.

Maintaining (or better yet, strengthening) the current process is therefore necessary to guard against claims—real or perceived—that the agency:

- Favors or disfavors certain markets, industries, or businesses;
- Does the bidding of the White House, Congress, or the opposition party; or
- Advances politics by other means.

It would indeed be strange to convert an independent agency into one that operates more likely an executive agency from the inside. Given Congress's intentional steps to insulate the FTC, those at its helm owe it to both their predecessors and successors to see to it that the agency lives up to Congress's ideals.

Second, the agency inevitably runs into politically thorny issues. When these issues arise, it is best for the agency to present a unified—or at least, mostly unified—front.

Consider the agency's current investigation into Stephen Bannon, former President Donald J. Trump's chief strategist.[12] Whether fair or not, the agency's investigation into Mr. Bannon is likely to elicit criticisms from those who believe the agency is politically motivated. Potential criticism should not sway the agency's actions, but common sense suggests that such criticism can be kept at bay through the current approach. By contrast, one that allows agency staff to get sign-off by a single commissioner (at their choosing) will be met with criticism—including from Congress.

Third, because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.

The Proposal is Ripe for Political Abuse (Real or Perceived).

Even if every sitting commissioner respects the rule of law and remains mindful of the agency's mission, mistakes happen. Acting on a staff report, a commissioner may accidentally overlook a key consideration or fail to rigorously review the request. And because the FTC's duties are "neither political nor executive," but instead rely on "the trained judgment of a body of experts,"[13] it makes sense to vest such decisions in the collective body rather than in a single expert. As everyone knows, having multiple sets of eyes on something can be exhausting, but it often produces better results. Even if it doesn't, however, consensus benefits the Commission's reputation and is consistent with its founding.

Because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.

And when FTC staffers do not know which commissioner may sign off on a subpoena application, they must tailor their arguments to the broader body and ensure their arguments are appealing to commissioners of both parties. This in turn supports Congress's vision for the FTC as an independent body of experts from across the political spectrum. But if a single commissioner can decide on behalf of the whole, the FTC will function less like a body of apolitical experts and more like an executive branch agency subject to unilateral dictates.

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[12] FTC, *Cases and Proceedings: Bannon, Stephen K.* (last updated Feb. 12, 2021), https://www.ftc.gov/enforcement/cases-proceedings/bannon-stephen-k.
[13] *Humphrey's Executor*, 295 U.S. at 624 (internal quotation marks omitted).

This is neither necessary nor appealing. Our Constitution and the government it establishes strongly prefers slow deliberation and painstaking consensus over quick and efficient lawmaking and law enforcement. But that does not mean every institution of government must operate the same way. While Congress designed the FTC to be independent and methodical, it allows executive agencies like the Department of Justice to act with greater speed. Given the overlapping jurisdiction between the FTC and DOJ, we needn't worry that procedural safeguards at the FTC will render bad actors outside the law's bounds. Far from it. The politically accountable branch may intervene quicker if the facts support doing so.

Conclusion

As always, we stand ready to work with the Commission to achieve beneficial outcomes that promote the interests of the United States and benefit American consumers and innovation. We appreciate your consideration of our views.

Sincerely,

Carl Szabo, Vice President & General Counsel
Chris Marchese, Counsel
Trace Mitchell, Policy Counsel
NetChoice

[redacted]

From: Tom Hebert <[redacted]>
Sent: Wednesday, June 30, 2021 11:20 AM
To: JulyPublicComments
Subject: Americans for Tax Reform public comment re: July 1 Open Meeting
Attachments: ATROCCDigital Liberty Comment on FTC's Possible Revocation of Section 5 Statement of Enforcement Principles .pdf

_____

Tom Hebert
Federal Affairs Manager, Americans for Tax Reform
Executive Director, Open Competition Center
[redacted]

The Honorable Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Comment on the Federal Trade Commission's Possible Revocation of the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"

Dear Chair Khan,

We write to express concern over the Federal Trade Commission's vote to revoke the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" at the July 1, 2021 Open Commission Meeting. If the Commission rescinds this bipartisan agreement, it would be a significant blow to consumer welfare and will hinder our economic growth as we recover from the COVID-19 pandemic.

Section 5 of the Federal Trade Commission Act outlaws "unfair methods of competition or in commerce." Section 5 does not list specific business practices that qualify as unfair methods of competition (UMC), instead leaving that determination to the FTC to evaluate on a case-by-case basis.

The Statement of Enforcement Principles is designed to limit the FTC's "standalone" UMC authority when addressing anticompetitive conduct outside of the scope of the Sherman or Clayton Acts. The agreement was approved by the FTC in 2015 in a 4-1 vote, with all three Democratic commissioners voting in support.

The agreement articulated the limits on the FTC's UMC authority in three ways.

First, the agreement emphasized the agency's commitment to prioritizing consumer welfare when applying antitrust law. The long-held consumer welfare standard has anchored antitrust law for over four decades. Under the standard, enforcement action is only taken if consumers are being harmed through tangible effects like higher prices, decreased quality, or lack of choice. The consumer welfare standard prevents judges and regulators from using antitrust law as a vehicle to advance unrelated social priorities.

Second, the statement said that Section 5 enforcement should target "harm to competition or the competitive process," but must consider whether there is a procompetitive justification for the conduct in question and whether it results in a countervailing benefit to consumers or competition. This is a key element of antitrust law under the consumer welfare standard, which protects the competitive process and consumers instead of protecting individual competitors in a marketplace. Robust competition among companies delivers better prices and better choices for all Americans.

Third, the agreement states that the FTC would be less likely to challenge business conduct as an unfair method of competition if "…enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice." This is an important limit that ensures that the FTC exercises its standalone UMC authority only when business conduct violates the spirit, if not the letter, of the Sherman or Clayton Acts.

Rescinding this bipartisan agreement would send two troubling signals. First, that the FTC is moving towards a European-style antitrust approach that props up inefficient competitors and disregards consumer harm. Second, that the FTC is actively working to shed all limits on its authority when it comes to antitrust enforcement.

Taken together, these changes will hamper economic growth as we attempt to rebound from the pandemic. Companies fearful of predatory antitrust litigation would pull their punches when competing with rivals, reducing choice and access to goods and services for shoppers across the country. Bureaucrats would win, American shoppers would lose.

For these reasons, we urge the FTC to leave the 2015 Statement of Section 5 Enforcement Principles in place.

Sincerely,

Grover Norquist
President, Americans for Tax Reform

Tom Hebert
Executive Director, Open Competition Center

Katie McAuliffe
Executive Director, Digital Liberty

[redacted]

From: Bob Coleman <[redacted]>
Sent: Wednesday, June 30, 2021 11:20 AM
To: JulyPublicComments
Subject: Public Comments FTC- July 1, 2021 Open Commission Meeting Submission
Attachments: FTC letter 6-30_.docx

Georgia Pharmacy ASSOCIATION

June 30, 2021

Commissionner Rohit Chopra
United States of America
Federal Trade Commission
Washington, D.C. 20580

Re: Pharmacy Benefits Manager Anti-Competitive Behavior

Dear Commission Chair Khan,

Thank you for the opportunity to offer written comment. Thank you also for your May 28, 2021 statement regarding pharmacy benefits manager ("PBM") practices, including PBM rebate walls. GPhA was encouraged by your statement drawing attention to PBM practices – practices that we believe are rife with conflicts of interest, a lack of transparency, and that appear to fall within the very definition of anti-competitive behavior.

Your statement rightfully focuses on the role rebate practices of PBMs play in increasing the cost of prescription drugs. It is also noteworthy that rebate and formulary practices reduce access to drugs and often force patients to obtain brand name drugs where generic equivalent drugs are available for less than the copay on the brand name drug for which the PBM is capturing a rebate.

While GPhA was pleased to see your attention to this matter the fact remains that, under the previous administrations, the FTC failed to identify anti-competitive risks associated with vertical integration in the health care space, including in mega mergers such as CVS' acquisition of Aetna and Cigna's acquisition of Express Scripts. Anti—competitive practices are not the outlier - they are the norm, and they are stamping out small businesses and compromising the care of millions of Americans.

Through virtually uncontested vertical integration, the big PBMs are not only affiliated with insurers, but also with pharmacies that compete with other non-PBM affiliated pharmacies such as Walgreens and independent community pharmacies whereby the PBMs are setting reimbursement rates for their

competitors. PBMs often reimburse non-affiliate pharmacies woefully under pharmacy acquisition cost while billing their clients for those same drugs significantly more money, a practice known as spread pricing.

In addition, PBMs often engage in the practice of recouping money retroactively from network pharmacies (often referred to as DIR fees) which has resulted in the closure of untold community pharmacies further reducing patient access to care. Ironically, or perhaps by design, many of these closures result in the PBM affiliated pharmacies purchasing the prescription files from the competitor pharmacy who closed for pennies on the dollar. In addition, the practice of imposing fees after the point of sale often results in patients and plans overpaying based upon the price at point of sale while PBMs enjoy the benefit of the post adjudication recoupment.

Aside from rebate practices that restrict choice and care, reimbursement practices that simultaneously under reimburse competitors while raising the cost of prescription drugs to their clients, and the imposition of retroactive fees that harm competitor pharmacies and inflate costs to patients and payors, PBMs engage in a far more insidious practice that is not only anti-competitive, but compromises patient care – PATIENT STEERING.

Everyday in this country our sickest patients, those fighting for their lives battling cancer, HIV, and other life-threatening diseases, are forced to use pharmacies owned or affiliated with PBMs delaying and compromising care while at the same time taking patients away from their choice of oncology and other specialty physicians practices and pharmacies that compete with the PBM owned/affiliated pharmacies. How are PBMs able to do this? They offer, design, and implement plans that mandate patients use PBM owned/affiliated pharmacies or that penalize or deny coverage to patients who seek to fill prescriptions at non-affiliate pharmacies.

In Georgia, steps have been taken to try and eliminate these practices. By way of example, in connection with the CVS Aetna merger, the Commissioner imposed certain preconditions via the Consent Order, including:

- CVS/Aetna allow Georgia patients to use any health care provider that is agreeable to applicable terms and conditions; and
- Aetna invite non-CVS health care providers (pharmacies, physicians, clinics, etc.) to join its networks, and allow patients to use any provider within their respective networks.

Additionally, in 2019 and 2020 the Georgia General Assembly passed legislation seeking to prohibit these self referral practices finding, amongst other things, that these practices:

> May limit or eliminate competitive alternatives in the health care services market, may result in overutilization of health care services, may increase costs to the health care system, may adversely affect the quality of health care, may disproportionately harm patients in rural and medically underserved areas of Georgia, and shall be against the public policy of this state.

Ga. Code § 26-4-119.

Despite these attempts to rein in anti-competitive PBM steering practices, PBMs continue to steer in the state, every day.

In light of the foregoing, we ask that the FTC make it a priority to rein in these anti-competitive practices through its considerable investigatory, prosecutorial, and rule-making powers as soon as possible. The harm to community pharmacies, oncology and other specialty practices, payors, and patients as a result of PBM anti-competitive practices is acute and as a result stopping these practices should be an FTC priority.

Sincerely,

Bob Coleman | CEO
Georgia Pharmacy Association
[redacted]

June 30, 2021

Commissionner Rohit Chopra
United States of America
Federal Trade Commission
Washington, D.C. 20580

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clients for those same drugs significantly more money, a practice known as spread pricing.

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Sincerely,

Bob Coleman
CEO, Georgia Pharmacy Association

[redacted]

From: K.J. Bagchi <[redacted]>
Sent: Wednesday, June 30, 2021 9:53 AM
To: JulyPublicComments
Subject: Chamber of Progress Comments for July 1, 2021 Open Meeting Agenda
Attachments: Chamber of Progress Comments to FTC re Section 5 Policy Statement.pdf

Dear FTC Staff,

Please find attached the Chamber of Progress' comments in response to the July 1, 2021 meeting agenda. Happy to answer any questions.

Thanks,
K.J.

--

Koustubh "K.J." Bagchi
Senior Director, Federal Public Policy
Chamber of Progress
[redacted]
progresschamber.org

June 30, 2021

Comments of Koustubh "K.J." Bagchi
Senior Director of Federal Public Policy, Chamber of Progress
Federal Trade Commission | July 1, 2021 Open Meeting
Response to "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"

The Chamber of Progress appreciates the opportunity to submit written comments in response to the Federal Trade Commission's July 1, 2021 agenda. Specifically, we seek to respond to the agenda item entitled, *"Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015)*.

The Chamber of Progress is a new tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Our organization works to ensure that all Americans benefit from technological leaps, and that the tech industry operates responsibly and fairly.

Most technology company leaders want to ensure that they use their power responsibly and fairly -- towards consumers, workers, and other companies. The government has a critical role to play in ensuring companies operate fairly, and Section 5's of the FTC Act is a critical tool for doing so.

The FTC's 2015 bipartisan policy statement provides companies with important guidance to ensure their own fair behavior; it sheds deeper light on what the FTC will consider fair and unfair behavior. And that in turn helps companies operate responsibly.

It is certainly within the Commission's purview to update its 2015 policy statement to include new advice to companies. In fact, technological advances since 2015 have posed new challenges that an updated policy statement could address. But in simply revoking the 2015 statement, and leaving nothing in its place, technology companies will have less overall guidance from the Commission on how to operate fairly and responsibly.

Given the level of scrutiny the tech industry currently faces from regulators and the public, clear guidelines around the application of Section 5 should be public and transparent. It's important for regulators and regulated companies to understand the same rules and act in good faith according to those rules.

Consumers want companies to play fair -- and companies want that too. The 2015 guidance has been a critical tool to ensure fair corporation behavior, and we encourage the FTC to amend rather than revoke its guidance.

[redacted]

From: Marianela Lopez-Galdos <[redacted]>
Sent: Wednesday, June 30, 2021 8:59 AM
To: JulyPublicComments
Subject: CCIA's Public Comment Submission Form for July 1, 2021 Open Commission Meeting
Attachments: CCIA's Section 5 FTC Act Comment.pdf

Dear Sir or Madam,

Please find attached the Computer & Communications Industry Association's (CCIA) public comments regarding the July 1 Open Commission Meeting.

Best,

Marianela.

--
Marianela López-Galdos, S.J.D.
Global Competition Counsel
Computer & Communications Industry Association
[redacted]

Before the
United States Federal Trade Commission
Washington, D.C.

In re

Comments submitted before the Federal Trade Commission with respect to consideration to rescind the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"

COMMENTS OF

THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

The Federal Trade Commission (FTC) has announced that it will hold an open meeting on Thursday, July 1, 2021 and has requested public commentary on the proposed agenda for such meeting.[1] In response to this announcement, the Computer & Communications Industry Association ("CCIA")[2] submits the following comments with respect to the consideration to rescind the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act"[3] issued by the FTC in 2015 (Section 5 Policy Statement). Due to the limited time period available for comment, CCIA's comments are necessarily brief and focus on one item of the proposed agenda. However, CCIA would be willing to expand its views should the FTC consider providing more time to explore these important matters around Section 5 and other relevant rulemaking procedural discussions pertaining to the FTC Act.

[1] FTC Announces Agenda for July 1 Open Commission Meeting, 24 June, 2021, https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting
[2] CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA's members employ nearly half a million workers and generate approximately a quarter of a trillion dollars in annual revenue. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries. A complete list of CCIA members is available at http://www.ccianet.org/members.
[3] Fed. Trade Comm'n, Statement of Enforcement Principles Regard "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

CCIA has been supportive of antitrust enforcement and has advocated for policies promoting competition in the tech industry since 1972. In this respect, CCIA supports the FTC's willingness to use the FTC's standalone authority under Section 5 of the FTC Act to address market concerns negatively impacting consumers. However, it is important to recall that in the 1970s, the FTC unsuccessfully attempted to expand the use of its standalone Section 5 authority and suffered numerous federal court losses. The FTC has not won a single standalone antitrust Section 5 case since then.

In August 2015, in response to concerns from Members of Congress that the FTC's standalone Section 5 authority was undefined, the FTC issued a bipartisan written framework for the application of this authority to acts or practices that fall outside the scope of Sherman Act or Clayton Act violations. The FTC recognized in its Section 5 Policy Statement that Congress had left the development of Section 5 to the FTC as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review. In this respect, the Section 5 Policy Statement affirmed that the Commission's standalone Section 5 authority extends to unilateral conduct that violates the spirit of the antitrust laws and conduct that, if allowed to mature or complete, could violate the Sherman or Clayton Act.

CCIA is of the view that the FTC's mandate to protect consumers will not be served by rescinding the Section 5 Policy Statement. First, another attempt to expand the use of Section 5 of the FTC Act beyond the scope established in the Section 5 Policy Statement risks repeating litigation losses of the past, which is a poor use of agency resources, to the detriment of consumers. Second, an attempt to shift a case-by-case adjudication system towards rulemaking would run against Congress's desire to establish a measure of flexibility with Section 5. Finally, adopting a rulemaking approach with respect to other sections of the FTC Act by rescinding established procedures as implied in the proposed agenda might raise concerns with respect to the FTC's procedural legitimacy when protecting consumers.

For all of the above reasons, CCIA encourages the FTC to preserve the Section 5 Policy Statement and to advance its enforcement actions under the bipartisan framework adopted therein. Similarly, CCIA discourages the FTC from favoring rulemaking over the adjudicative

process when enforcing the FTC Act overall, and to preserve its reputation as an enforcement agency under the highest standards of judicial review.

Respectfully submitted,

Marianela López-Galdos
Global Competition & Regulatory Counsel
Computer & Communications Industry Association
[redacted]

30 June 2021

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:30 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:29 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Chris
Last Name: Marchese
Affiliation: Lawyer for NetChoice, Trade Association Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
Submit written comment:
NetChoice Comment for the Record:
FTC Open Meeting, July 1, 2021

NetChoice is a trade association of leading internet businesses that promotes the value, convenience, and choice internet business models provide American consumers. Our mission is to make the internet safe for free enterprise and for free expression. We also work to promote the integrity and availability of the internet on a global stage, and are engaged on issues in the states, in Washington, D.C., and in international internet governance organizations.

Introduction
We welcome the opportunity to provide the Federal Trade Commission with feedback about the many significant issues it will discuss at its open meeting on July 1st, 2021. As discussed below, we ask that the FTC:

Vote against "streamlining" Section 18 rulemaking procedures.
The proposal undermines the Magnuson-Moss Act and Congress's intent in passing it, and it greatly curtails public input in FTC rulemaking

Vote against rescinding or amending the adopted principles regarding "unfair methods of competition" under Section 5 of the FTC Act.
The 2015 Policy Statement provides affected parties and the public with notice of what conduct is permissible, supports the rule of law, and appropriately confines the FTC's discretion; and

Vote against changes to enforcement investigations.
Congress intentionally structured the FTC to be a multi-member, consensus-driven organization, and the proposed "streamlined" subpoena process would violate that structure

We appreciate the Commission's consideration of our views, and welcome the opportunity to provide any additional information or answer any questions.

Part 1. "Mag-Moss" Rulemaking
Section 18 of the FTC Act provides the Federal Trade Commission with the authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act.

Unlike traditional agency rulemaking under the Administrative Procedures Act (APA), rulemaking under Section 18, often referred to as "Magnuson-Moss" rulemaking after the Magnuson-Moss Warranty Act, comes with additional statutory requirements meant to curb the FTC's discretion. Those include requirements to provide interested parties with limited cross-examination rights during informal hearings and show that the practices the proposed rule seeks to regulate are "prevalent" before the rulemaking occurs.
These procedural safeguards are a benefit, not a drawback. The FTC should continue to adhere to them.
History Shows that Magnuson-Moss Rulemaking Authority is not Supposed to be "Streamlined."
To begin, the FTC likely does not have the authority to "streamline"

Section 18 rulemaking procedures. Congress imposed these rulemaking requirements through explicit statutory text and intentionally curbed the FTC's discretion. While some may oppose the additional procedures, only Congress can substantively "streamline" or change them.

During the 1960s and 70s, the FTC's rulemaking activity became the subject of considerable controversy and debate. Many felt the Commission had become overzealous in its promulgation of rules. Consider the (in)famous example of the "Kid Vid" rule that would have basically prohibited any television advertising aimed at children. This decision and the circumstances surrounding it resulted in the Washington Post dubbing the FTC the United States' "National Nanny." As subsequent commentators have explained, "the FTC adopted the reformers' cause uncritically, seeing itself self-appointed champion of American children" such that "even its supporters acknowledge that the FTC made a serious political miscalculation."
Congress passed the Magnuson-Moss Warranty of 1975 and the FTC Improvements Act of 1980 to curb the FTC's excessive rulemaking activity. Congress did not hide its justification for limiting the Commission's powers. In a series of hearings held in the late 1970s, "Congress publicly lambasted the Commission for its activist programs branding these as 'regulatory abuse'
by a 'runaway, controllable bureaucracy.'" Together, these Acts greatly limited the Commission's ability to promulgate rules at will.
The Commission Cannot Supersede Statutory Limits & Even if it Could, It Shouldn't.
With such clear congressional intent and statutory language supporting the goal of erecting, not lowering, barriers to agency rulemaking, at best the Commission has only limited ability to "streamline" such procedures through its own internal processes. And even if the Commission can, it shouldn't.

First, the concerns that motivated Congress to impose the requirements are no less prevalent today than they were in the late 20th Century. In fact, with a clearly expressed desire on the part of some commissioners to divorce FTC enforcement from the guide of consumer welfare and to use its enforcement power to promote vague and often ill-defined social goals, these procedural safeguards and restrictions will likely be more important than ever.

Second, the market is a dynamic and ever-evolving process that brings with it incredible, consumer-benefiting innovation that is difficult, and often impossible, to predict before it occurs. By artificially locking in per se rules that prohibit specific types of conduct, the Commission risks chilling consumer-welfare-enhancing innovation. In contrast, since the Section 18 rulemaking requirements took effect, the FTC has focused primarily on adjudicating cases against specific defendants based on particularized allegations of consumer harm. This has allowed the FTC to address instances of consumer harm without undermining market-driven innovation. The FTC should therefore continue to focus on its adjudicative approach, which maximizes consumer benefits without kneecapping American innovation and the United States' competitiveness in the global arena.

Third, the FTC should consider that an increase in rulemaking would likely hurt small businesses and up-and-coming entrepreneurs.
More Rulemaking—Streamlined or Not—Will Hurt Small Businesses & the Economy.
Market entrants are already faced with an onslaught of overly restrictive rules and regulations. As of November 2019, for example, there were over 1 million regulatory restrictions in the U.S. Code of Federal Regulations. Add to this the thousands of state regulations businesses must comply with:
California and New York alone have over 695,000 regulatory restrictions.

Small businesses and entrepreneurs have already taken a particularly tough hit as a result of the COVID-19 pandemic. Not only does the accumulation of rules hinder their ability to succeed, it strengthens the position of the dominant players by erecting artificial barriers to competition. The FTC's rulemaking ability is particularly threatening because it is not limited to one sector of the economy or confined to a particular social issue. Instead, the FTC has broad jurisdiction over the entire United States' economy.
While the FTC's adjudicative approach focuses primarily on the largest players and those that pose the greatest risk of harm, rulemaking applies to all participants equally without regard to their particular needs or the context of their conduct.
The Proposal Discards the FTC's Consumer-First Focus.
As mentioned above, removing the restrictions on FTC rulemaking would open the door to a regulatory approach that focuses less on the welfare of consumers and more on the preferred policy considerations of a given commission. Rather than having to justify particular enforcement decisions or prove consumer harm in specific cases, the Commission could instead impose bright-line rules that govern commercial activity for the foreseeable future—whether or not consumers actually benefit.

Indeed, rules could be enacted because they advance unrelated social goals rather than out of some desire to protect consumers from anticompetitive conduct. While some social goals may be worthy of government attention, it is for Congress—not the FTC—to advance those goals.

For these reasons, we ask that you do not amend the statutorily-required procedures for Section 18 rulemaking.
Part 2. UMC Policy Statement
When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself). While the statement is flexible—it allows the FTC to use its Section 5 authority for standalone claims, for example—it provides necessary guidance to both the FTC and the public. As the Commission surely knows, its authority under Section 5 has been controversial for decades. To be sure, most recognize that it encompasses the agency's antitrust authority under federal statutes like the Sherman Act. But whether it extends beyond those statutes was and is an open question.
When the FTC approved its UMC Policy Statement in 2015, it saved itself (from itself).

But even confining Section 5 authority to the antitrust statutes is legally murky. The agency's organic statute—the FTC Act—fails to define "unfair," for example. Without statutory guidance, and without the UMC Policy Statement, "unfair" will mean whatever at least three commissioners want it to mean.
The FTC Shouldn't Abandon Clear, Uniform, Predictable, & Objective Standards that Protect Consumers & Promote Innovation.
The movement away from clear guidance is a cause for concern. For starters, it is unclear whether today's Supreme Court, which is far more skeptical of agencies than earlier courts, would countenance Section 5 agency action without such guidance. Indeed, the Policy Statement seems to be the agency's own effort to ward off constitutional and

legal attack. Repealing or broadening it risks invalidation or judicially constructed limitations. At least for now, the Statement aligns with the Supreme Court's antitrust doctrines and thus stands a decent chance of surviving judicial review.

Second, it is unclear whether Congress would countenance such open-ended authority. Even if the current Congress is poised to support the agency's actions, future Congresses are likely to take issue with it. And if history is any indicator, the FTC's abuse of broad statutory language will spur hearings, condemnations, and reforms.

In the meantime, businesses and consumers will be left guessing. Even if the courts and Congress turn a blind eye, the rest of the country will be vulnerable to unexpected and open-ended regulation. This regulatory environment will likely dampen investment and chill innovation—which will be even worse if the agency also "streamlines" its Section 18 rulemaking processes. Even worse, without the Statement, the agency could return to the past, when it used vague enforcement actions to coerce private parties into settling even when the alleged "harm" was far from clear.

It is against this backdrop that the FTC adopted the UMC Policy Statement in 2015. And it is for these reasons that the agency should maintain—and even strengthen—the Statement.

The Existing Policy is Flexible Enough to Respond to New Market Realities & Even Critics Should Support It.

Consider also that the Statement is flexible enough to adapt to new market realities. In brief, it simply notes that when the agency decides to use its Section 5 authority, it will do so based on the consumer welfare standard and will use the rule of reason to evaluate potential action. None of this is radical. As the Commission knows, the consumer welfare standard has been the guiding light of antitrust enforcement for decades. The rule of reason, even longer. That these standards are so established in federal law and so familiar to interested parties is a plus, not a minus.

Even critics of the consumer welfare standard should rejoice: the Statement accommodates a more "aggressive" approach to enforcement. For example, the Statement does not include former-Commissioner Joshua Wright's idea to create a "safe harbor" from UMC enforcement if any business efficiency is shown. By rejecting this proposal (sensible as it may be) and by adopting a balancing method instead, the Commission left wiggle room to exercise its UMC enforcement power even when defendant businesses provide evidence of procompetitive effects. Under this balancing approach, the Commission retains the ability to weigh in on many business practices. The sole limitation is simply that the Commission must identify some consumer harm. That is, by any objective standard, not asking much.

Nor does the Policy Statement tie the FTC's hands in defining "consumer harm." Far from being limited to prices, the consumer welfare standard—and the Statement's use of it—leaves the Commission free to enforce actions against businesses that harm quality, innovation, and inflict other harms on consumers identified by the Commission and economic literature. In other words, all the Statement does is require the Commission to make its decisions based on consumers—not competitors, not lofty social goals (no matter how well-meaning), and not individual policy preferences.

This objective standard developed over decades and represents the accumulated wisdom of the courts, agencies, economists, and lawyers. It shouldn't be abandoned simply because it requires the FTC to shift through evidence using an objective measure to guide (and sometimes abandon) its enforcement actions.

The Existing Policy Supports the Rule of Law.

By conforming its Section 5 powers to its antitrust enforcement powers, the FTC in 2015 promoted clarity, predictability, and uniformity. These benefits should not be taken for granted. By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges. And it gives businesses and consumers insight into what behavior may or may not be permissible. This, of course, helps businesses grow and innovate.

Likewise, by promoting uniformity and predictability, the Statement protects against arbitrary or politicized enforcement. This supports the rule of law and fairness. Without guardrails that align with the agency's enforcement policies elsewhere, the Commission threatens to destabilize the law and raise questions about whether its Section 5 authority is even constitutionally or statutorily sound.

By promoting clarity and predictability, the Policy Statement insulates the FTC—to a degree—from legal challenges.

Aside from those benefits, the 2015 Statement is good on its own merits.

Because the FTC's authority extends so broadly, its actions can reshape entire markets and industries. As the old adage goes, with great power comes great responsibility. The Statement recognizes this, and reaches an appropriate balance between acting when necessary to protect consumers and leaving businesses free to innovate. And it appropriately situates the Commission's Section 5 powers: Instead of viewing "unfair methods of competition" as a standalone grant of power, the Statement treats it as a gapfiller to cover conduct that is not expressly prohibited by other federal antitrust statutes but that would, left unchecked, undermine the purposes of those statutes.

Part 3. Compulsory Process

When Congress created the FTC, it sought to fill the agency with independent experts and to insulate them from political pressure. As the Supreme Court long ago put it, the FTC was designed to be "non-partisan" and to "act with entire impartiality." To be sure, the agency is not entirely separate from politics—presidents appoint commissioners based on their expertise and on their political affiliation. At any given time, for example, the Commission can have no more than three commissioners of the same political party. But even that small nod to politics underscores the Commission's apolitical nature. Rather than let any party command the agency unfettered, Congress instead elevated bipartisanship and consensus.

Congress also double-downed on the agency's independence. Commissioners serve for staggered seven-year terms and can be removed only for cause. And Congress chose to make the FTC a multi-member Commission, not a unitary body like the CFPB. Had Congress wanted commissioners and the agency's staff to act unilaterally, it would not have gone through the trouble of structuring the agency this way. Whatever costs this multi-member, consensus-driven structure may impose on the Commission's speed, it more than makes up for in strengthening the Commission's reputation and insulating it from politics.

For that reason, the Commission should not "streamline" the subpoena process. By allowing staff to unilaterally ask a single commissioner to unilaterally approve compulsory process, the Commission risks undermining its reputation and undercutting public support for its decisions.
The FTC Should Not Empower a Single Commissioner To Unilaterally Approve Compulsory Process.
First, the FTC's portfolio is broad. It is both the nation's top consumer watchdog and its primary antitrust enforcer. Under these roles, the Commission touches almost every segment of our economy. And that sweeping jurisdiction—combined with the Commission's powers—means it has the potential to restructure entire markets and even overhaul the economy. With the exception of Congress and the possible exception of the Federal Reserve, few others have such capacity to affect so much so quickly.

Maintaining (or better yet, strengthening) the current process is therefore necessary to guard against claims—real or perceived—that the agency:
Favors or disfavors certain markets, industries, or businesses; Does the bidding of the White House, Congress, or the opposition party; or Advances politics by other means.

It would indeed be strange to convert an independent agency into one that operates more likely an executive agency from the inside. Given Congress's intentional steps to insulate the FTC, those at its helm owe it to both their predecessors and successors to see to it that the agency lives up to Congress's ideals.

Second, the agency inevitably runs into politically thorny issues. When these issues arise, it is best for the agency to present a unified—or at least, mostly unified—front.
Consider the agency's current investigation into Stephen Bannon, former President Donald J. Trump's chief strategist.
Whether fair or not, the agency's investigation into Mr. Bannon is likely to elicit criticisms from those who believe the agency is politically motivated. Potential criticism should not sway the agency's actions, but common sense suggests that such criticism can be kept at bay through the current approach. By contrast, one that allows agency staff to get sign-off by a single commissioner (at their choosing) will be met with criticism—including from Congress.

Third, because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.
The Proposal is Ripe for Political Abuse (Real or Perceived).
Even if every sitting commissioner respects the rule of law and remains mindful of the agency's mission, mistakes happen. Acting on a staff report, a commissioner may accidentally overlook a key consideration or fail to rigorously review the request. And because the FTC's duties are "neither political nor executive," but instead rely on "the trained judgment of a body of experts," it makes sense to vest such decisions in the collective body rather than in a single expert. As everyone knows, having multiple sets of eyes on something can be exhausting, but it often produces better results.
Even if it doesn't, however, consensus benefits the Commission's reputation and is consistent with its founding.
Because compulsory process is ripe for abuse and mistakes, the FTC should require a majority of commissioners to approve a subpoena or other compulsory process.

And when FTC staffers do not know which commissioner may sign off on a subpoena application, they must tailor their arguments to the broader body and ensure their arguments are appealing to commissioners of both parties.
This in turn supports Congress's vision for the FTC as an independent body of experts from across the political spectrum. But if a single commissioner can decide on behalf of the whole, the FTC will function less like a body of apolitical experts and more like an executive branch agency subject to unilateral dictates.

This is neither necessary nor appealing. Our Constitution and the government it establishes strongly prefers slow deliberation and painstaking consensus over quick and efficient lawmaking and law enforcement. But that does not mean every institution of government must operate the same way. While Congress designed the FTC to be independent and methodical, it allows executive agencies like the Department of Justice to act with greater speed.
Given the overlapping jurisdiction between the FTC and DOJ, we needn't worry that procedural safeguards at the FTC will render bad actors outside the law's bounds. Far from it. The politically accountable branch may intervene quicker if the facts support doing so.
Conclusion
As always, we stand ready to work with the Commission to achieve beneficial outcomes that promote the interests of the United States and benefit American consumers and innovation. We appreciate your consideration of our views.

Sincerely,

Carl Szabo, Vice President & General Counsel Chris Marchese, Counsel Trace Mitchell, Policy Counsel

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/38

[redacted]

From: Sagar Golla <[redacted]>
Sent: Tuesday, June 29, 2021 9:42 PM
To: JulyPublicComments
Subject: Google Assistant app market issues

Hello Sir/Madam,

I spoke to Lina Khan last year, I wanted to update and pursue Google's self preferencing in the Assistant App Market with 100s of their own apps, linking all the major food brands.

Here is the link to video: https://youtu.be/clLAzaDLaQ0
Slide deck: https://docsend.com/view/c5waa9at4jbntdq5

Google's deceptive practices are detrimental to my young startup. I need immediate help, please advise.

--
Sagar Golla

Founder, CEO

Hostbuddy, Inc.
[redacted]
https://invited.hostbuddy.io

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 8:44 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 08:44 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Samuel
Last Name: Bowman
Affiliation: International Center for Law and Economics Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
In antitrust law, the Consumer Welfare Standard (CWS) directs courts to focus on the effects that challenged business practices have on consumers, rather than on alleged harms to specific competitors. Critics of the standard claim this focus on consumer welfare fails to capture a wide variety of harmful conduct. In addition to believing that harm to competitors is itself a valid concern, critics of the CWS believe it leads to harmful concentrations of political and economic power by biasing antitrust enforcement against intervention. Under this view, the CWS contributes to such harms as environmental degradation, income inequality, and bargaining disparities for labor.

But returning to a pre-CWS state of the law would lead antitrust enforcement to become confused, contradictory, and ineffective at promoting competition.
The CWS makes antitrust economically coherent and democratically accountable, and abandoning it would remove an important constraint on the FTC that helps to keep it focused on competition, and not other goals.

The CWS is agnostic about how much antitrust enforcement is necessary.
Indeed, many advocates of more vigorous antitrust enforcement are also defenders of the CWS. The standard uses objective economic analysis to identify actual harms and to recommend remedies when those harms are not outweighed by countervailing benefits to consumers. While the issues the CWS critics care about may be important, antitrust law is a bad way to address them.

Competition usually has to hurt competitors. Prioritizing competitor welfare over consumer welfare, as some proposals would, means abandoning competition as the goal of antitrust. Businesses want a quiet life and large profits. If one firm outcompetes another with a better product or a lower price, it disadvantages that competitor by lowering its profits or forcing it to work harder to maintain them. The consumer ultimately wins in this struggle. Basing antitrust liability on conduct that "materially disadvantages" competitors would impose liability for the act of competing itself.

The old model of antitrust was incoherent and unaccountable. Before the rise of the CWS, antitrust enforcement was incoherent and lacked underlying neutral principles. In the words of Justice Potter Stewart, the only consistency was that "the government always wins." Competitive practices could be condemned because they hurt the profitability of some businesses
(See:
https://laweconcenter.org/wp-content/uploads/2020/05/house_joint_antitrust_letter_20200514.pdf#page=5).
Sometimes courts would worry that prices were too low and would therefore permit "price floors" to protect small business (See:
https://casetext.com/case/brown-shoe-co-v-united-states?). This lack of consistency led to a body of law that was contradictory and unpredictable, and that regularly undermined competition. By entrusting enforcement and antitrust policy to the discretion of unelected enforcement officials, competition policy was effectively removed from democratic oversight.

The CWS grounds antitrust in objective economics and tractable evidence.
Adherence to the CWS renders antitrust judgments transparent and quantifiable by giving a clear benchmark for economic analysis. Without the CWS, courts might trade reduced competition and consumer welfare for a reduction in, for example, a business's political influence. While achieving the latter may (or may not) be a worthy goal, there is no objective way to assess trade-offs between the two priorities. The CWS requires testable claims and counterclaims as part of a competition case. It allows antitrust cases to focus on a question that can be answered objectively: "Is the challenged conduct likely to make consumers better or worse off?"

The CWS considers innovation and quality, as well as price. The CWS has always encompassed aspects of competition beyond price, including innovation, quality, and product variety. The CWS is thus fully compatible with markets where products are offered at a zero price to consumers, or where the alleged source of harm is the loss of

innovation. US v. Microsoft, for example, hinged on an innovation theory of harm, as did the U.S. Justice Department's lawsuit against the Visa/Plaid merger, which led to the merger being abandoned. As in other supply markets, anticompetitive conduct by businesses in the labor market has been ruled illegal under the CWS and both of the federal antitrust agencies have brought cases against this kind of conduct.

Antitrust is not a public policy swiss army knife. Antitrust is a bad tool to achieve goals other than increased competition, because it is often impossible to objectively compare the value of different competing ends.
Where difficult trade-offs must be made between competing social goals, such as balancing economic growth with the environment or workers' welfare, the legislative process is a better mechanism to weigh society's preferences than the judgement of a court. Trying to use antitrust to achieve these ends is often an attempt to bypass the democratic process when that process does not deliver the outcomes that advocates want.

For a more detailed discussion of the CWS, see ICLE's submission to the FTC's Hearings on Competition & Consumer Protection in the 21st Century:
https://laweconcenter.org/wp-content/uploads/2019/07/Antitrust-Principles-and-Evidence-Based-Antitrust-Under-the-Consumer-Welfare-Standard-FTC-Hearings-ICLE-Comment-5.pdf

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/10

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Tuesday, June 29, 2021 12:09 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Tuesday, June 29, 2021 - 12:08 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Jeff
Last Name: Chester
Affiliation: Executive Director
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: Yes
Link to web video statement:
Submit written comment:
Chairman Khan and Commissioners:

The Center for Digital Democracy (CDD) looks forward to the potential promise of the commission's work on the digital marketplace finally fulfilled– after decades of failures. There has been a lack of rigor in terms of analyzing online marketplace practices that impact all of our lives—including our privacy, the prices we pay, the kinds of services we can obtain, its impact on our next generation of youth and the very structure of our democratic experience. For many years, public interest, privacy, consumer protection and civil rights groups have told the commission, regardless of party in charge, about the data protection dangers, unfair business practices, manipulative ad tactics and insatiable appetite to swallow up rival and related companies large and small—to hardly any avail.

Indeed, the reason we in the U.S. have no privacy today in our digital environment is very much due to the FTC's political timidity that has operated for too long. The commission basically looked the other way as companies such as Google (and everyone else) developed a surveillance business model that tracks all of us all the time, across devices, applications, outside, inside and now uses sophisticated and unaccountable AI & machine learning systems to analyze and "activate" (and often manipulate) individuals and groups to engage with the retail, ecommerce, entertainment, health and political sectors, among other sectors. CDD and partners including EPIC, US PIRG, CFA and others have continually raised these concerns with commissioners and staffs, including about the failures of the commission's consent decrees to ensure Google and Facebook lived up to their commitments.

The FTC must now address the digital industry's moves to redo how it develops and operationalizes its "identity" management schemes in the "post-cookie" era, such as Google "FloC" and the Trade Desk-led "United ID Solution 2.0." We should not allow powerful private industry actors to define and determine what privacy means for Americans (and many others throughout the world).

We expect the commission to adopt a platform that will ensure greater competition in the digital market; protect privacy; promote fair consumer practices; and help foster a more robust and just economy. That includes long over-due action to ensure equity, opportunity and non-discrimination in the online marketplace. CDD stands ready to help.

Thank you,

Jeff Chester
Executive Director
Center for Digital Democracy
Washington, DC/Ventura, CA
www.democraticmedia.org

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 9:11 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 09:10 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Nancy
Last Name: Piwowar
Affiliation: Private Citizen
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Are the Commissioners and the FTC aware of the new tool in the healthcare monopolies tool box?

Medical non-compete restrictive covenants on former hospital real estate.

A for-profit developer was granted a redevelopment plan with mixed-uses including residential apartments and medical uses on a former non-profit hospital property by the local planning board. However, after a court hearing on the sale of the former hospital land and after the deed of transfer was recorded, five medical non-compete restrictive covenants that last for a decade were included on the deed. These restrictive medical non-compete covenants limit, hinder, and restrict the medical uses that can compete with the former (sellers) controlling entity's neighboring medical property. These restrictions deny medical competition to a demographically diverse community.

The same developer, has another proposed deed, not yet recorded, for a mental health facility, and the medical non-compete restrictive covenant would limit the use for as long as the proposed mental health use is in existence. The developer's neighboring medical mixed-use property cannot compete with this proposed state university mental health facility.

This appears to be a pattern, and both of these medical non-compete restriction covenants appear to be unconstitutional under the 1964 Civil Rights Act and the 14th Amendment because they unfairly limit medical uses and create medical monopolies on a local level in a medically underserved community that has a very diverse population which has essentially become a healthcare desert since the former hospital was closed.

Why should the FTC care about local deed restrictions? The original controlling entity that initiated the sale of the former hospital property for redevelopment still has a limited medical foot print on a neighboring property, and is one of the largest merged healthcare/hospital systems in New Jersey. Any of the current, proposed or restricted healthcare uses and entities would be eligible for federal funding under Medicare and federal health benefits plans. These two medical non-compete agreements placed by a private for-profit business entity and a non-profit healthcare system entity are not in the public interest, and create the possibility that medical non-compete restrictions will become a cancer, and these will serve as an example in the future of the healthcare industry. The merged healthcare system has a reach that extends across the State of New Jersey, and controls a lot of real estate. Medical non-compete agreements are common in an employer/employee relationship, but not when it comes to real estate. Has this occurred in other parts of the country or are these medical non-compete restrictive agreements specific to New Jersey?

The FTC has looked at local zoning, and has held public workshops on non-compete in the workplace, but now the FTC needs to investigate or regulate the use of non-compete restrictive covenants in real estate transfers in the healthcare industry in order to protect the public interest from healthcare monopolies.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/14

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 9:50 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 09:49 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Koustubh "KJ."
Last Name: Bagchi
Affiliation: Chamber of Progress
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
The Chamber of Progress appreciates the opportunity to submit written comments in response to the Federal Trade Commission's July 1, 2021 agenda. Specifically, we seek to respond to the agenda item entitled, "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015).

The Chamber of Progress is a new tech industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Our organization works to ensure that all Americans benefit from technological leaps, and that the tech industry operates responsibly and fairly.

Most technology company leaders want to ensure that they use their power responsibly and fairly – towards consumers, workers, and other companies. The government has a critical role to play in ensuring companies operate fairly, and Section 5's of the FTC Act is a critical tool for doing so.

The FTC's 2015 bipartisan policy statement provides companies with important guidance to ensure their own fair behavior; it sheds deeper light on what the FTC will consider fair and unfair behavior. And that in turn helps companies operate responsibly.

It is certainly within the Commission's purview to update its 2015 policy statement to include new advice to companies. In fact, technological advances since 2015 have posed new challenges that an updated policy statement could address. But in simply revoking the 2015 statement, and leaving nothing in its place, technology companies will have less overall guidance from the Commission on how to operate fairly and responsibly.

Given the level of scrutiny the tech industry currently faces from regulators and the public, clear guidelines around the application of Section 5 should be public and transparent. It's important for regulators and regulated companies to understand the same rules and act in good faith according to those rules.

Consumers want companies to play fair – and companies want that too. The 2015 guidance has been a critical tool to ensure fair corporation behavior, and we encourage the FTC to amend rather than revoke its guidance.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/18

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:38 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:38 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Nicholas
Last Name: Beale
Affiliation: Sciteb
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
May I draw your attention to the Unethical Optimization Principle - published by Royal Society Open Science (link below). This proves that If an artificial intelligence aims to maximize risk-adjusted return, then under mild conditions it is disproportionately likely to pick an unethical strategy unless the objective function allows sufficiently for this risk. Furthermore (except under exceptional conditions) the larger the strategy space in which the AI operates, the more likely it is to pick unethical strategies.

The implications most relevant to FTC may be:
1. Even if there is no intention by a company or its management to act unethically, delegating decisions to AI disproportionately raises the risk of unethical actions.
2. Increasing the size of the strategy space, eg by having multiple major platforms under the same overall control, will under fairly general conditions increase the likelihood of unethical strategies being selected.
Consequently there is a (mathematically verifiable) reason why substantial concentrations of ownership of major platforms is inherently likely to cause harm, even if there is no specific intention to do so. [Some comparison might be made to driving a car very fast indeed on a road. It would not be a sustainable position to suggest that no restraint on the speed of a vehicle could be justified unless it could be shown that the driver had actually caused a serious accident or was intending to do so.]

We would of course be delighted to work pro bono with FTC staff to elaborate any of these points.

The full scientific paper is at:
https://royalsocietypublishing.org/doi/10.1098/rsos.200462

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/42

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:15 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:14 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Greg
Last Name: Pence
Affiliation: Member of Congress (IN-06)
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
https://m.youtube.com/watch?v=pHboLM9BbN8&feature=youtu.be
Submit written comment:
Congressman Pence here on behalf of Indiana's Sixth District.

The extent to which Big Tech and their platforms engulf our lives is reminiscent to the all-encompassing entities we've seen over the past century.

From data security and labor concerns to exclusion and moderation practices – these platforms are becoming a destructive, rouge entity to our society because of their attacks on freedom of speech and the truth.

We cannot wait any longer.

It's time we find a viable solution consistent with the First Amendment that enables individuals to express themselves freely and protects the right of private companies to control their property.

We must address these urgent issues threatening free speech and encourage Big Tech to embrace our American values that support democracy.

My question for the FTC today – is it appropriate for Big Tech to make money off of Hoosier, and American's Intellectual Property?

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/30

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Tuesday, June 29, 2021 10:54 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Tuesday, June 29, 2021 - 10:53 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Aurelien
Last Name: Portuese
Affiliation: The Schumpeter Project (ITIF) Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
https://www.dropbox.com/s/fgx8jp5hqphrhf8/FTC%20Comments.mp4?dl=0
Submit written comment:
The FTC's intent to rescind the 2015 Section 5 policy statement is understandable as we agree with then-Commissioner Maureen K. Ohlhausen that the policy statement did not provide meaningful guidance.
However, current advocacy for rulemaking under Section 5 does not provide necessary clarification and constitutes application of the precautionary principle to antitrust: Ex-ante rules would prohibit some conduct that is pro-competitive and would undermine needed disruptive innovation.
The aversion of antitrust through adjudication represents a regrettable attempt to undermine the rule of reason in favor of rules of per se illegality. With no justification and with a reversed burden of proof, precautionary antitrust toward innovation would further develop through rulemaking.
The FTC has a mandate to determine unfair methods of competition, but the rapidly changing nature of today's markets should not lead to the FTC adopting precautionary ex-ante rules. The FTC must preserve the dynamic process of creative destruction, not preemptively inhibit it.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/18

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Tuesday, June 29, 2021 11:40 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Tuesday, June 29, 2021 - 23:39 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Jim
Last Name: Polucha
Affiliation: Valley Drug
[redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: I am an independent pharmacist wishing to discuss the anti-competitive nature of pharmacy benefits managers (PBMs). Over the past two decades, PBMs have created a 'take-it-or-leave-it' approach to contracting. They have created unique clauses that maximize their profitability while minimizing pharmacy's profits. Ever-changing MAC lists, DIR fees, network performance fees, and generic effective rates are SOME of the creative mechanisms they use to limit pharmacy's profits. This has resulted in many closures and communities without a pharmacy. PBMs also
funnel business to preferred providers through 'Preferred Networks'. How
much profit does a pharmacy have to give to get in a Preferred Network? Is the service level the same? Does CVS/caremark reimburse its pharmacies the same amount for the identical drug for the same patient vs. other pharmacies?
How would the FTC or a plan sponsor know? I have seen patients have a HIGHER co-pay at a national chain pharmacy vs. an independent for the identical NDC. How can that be? PBMs have Specialty Pharmacies with increased Gross Margins. That business has essentially been taken away from most retail pharmacies. That is the definition of anti-competitive. It simply is time for the FTC to look deeply at the damage PBMs have done to the market, its stakeholders, and divest from the current anti-competitive structure. It is time for pharmacy to have more control over its future rather than the PBMs dictating the terms of engagement.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/62

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:15 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:14 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Greg
Last Name: Pence
Affiliation: Member of Congress (IN-06)
Full Email Address: [redacted]
Telephone [redacted]
FTC-Related Topic:
- Consumer Protection
- FTC Operations
Register to speak during meeting: No
Link to web video statement:
https://m.youtube.com/watch?v=pHboLM9BbN8&feature=youtu.be
Submit written comment:
Congressman Pence here on behalf of Indiana's Sixth District.

The extent to which Big Tech and their platforms engulf our lives is reminiscent to the all-encompassing entities we've seen over the past century.

From data security and labor concerns to exclusion and moderation practices – these platforms are becoming a destructive, rouge entity to our society because of their attacks on freedom of speech and the truth.

We cannot wait any longer.

It's time we find a viable solution consistent with the First Amendment that enables individuals to express themselves freely and protects the right of private companies to control their property.

We must address these urgent issues threatening free speech and encourage Big Tech to embrace our American values that support democracy.

My question for the FTC today – is it appropriate for Big Tech to make money off of Hoosier, and American's Intellectual Property?

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/30

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 10:14 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 10:14 Submitted by anonymous user: [redacted] Submitted values are:

First Name: William
Last Name: Cade
Affiliation: Board Member, Repair.org
Full Email Address: [redacted] Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: Agriculture, a critical infrastructure of the United States, suffers from a lack of competition. John Deere is using its large market share, especially in precision agriculture, to restrict repair options, require post sale purchases, and charge excessive prices. The transition to computer-controlled products allows John Deere in concert with its dealers to exclusively "VIN Burn" parts to specific machines.
Additionally, the software-controlled repair process requires purchase of John Deere parts exclusively and only by John Deere dealers. This process is demanded by the requirement for "Payload" files which is the software necessary to connect hardware with the controlling software. John Deere dealers can only deliver the necessary files after submitting serial numbers, ownership, and other information to John Deere. Deere then process that information and encrypts the software that is delivered by a dealer technician's computer to the product. Only then is the repair functional.
This process eliminates any possibility of third-party parts or service for these kinds of repairs. Because of this system dealers can require extensive dealer technician time and costs to generate unwarranted fees. This unfair process eliminates the producer of agricultural products the opportunity to repair their equipment or hire a third party of their own choosing to do the repairs.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/26

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Tuesday, June 29, 2021 9:35 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Tuesday, June 29, 2021 - 21:34 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Sagar
Last Name: Golla
Affiliation: HostBuddy Inc
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: Yes
Link to web video statement: https://youtu.be/dLAzaDLaQ0 Submit written comment:
HostBuddy is no-code conversational commerce platform, leading the Assistant App Market, until Google released their own Food Ordering app. Google controls every single invocation of "Order Food" by consumer with Google Assistant, these orders are routed to their select partners. To become partner, I need to have ad manager account. Not only invocation, Google literally occupied Assistant App Market with "Web Apps" not Duplex they promised. Google apps don't follow the Assistant transaction policy, they are unfit. They removed my app 6-7 times and reinstated. Please check the demo videos for both for your own determination.

These choice choices belongs to consumers and restaurant owners, please check my slide deck for the details:
https://docsend.com/view/c5waa9at4jbntdq5

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/54

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 4:51 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 04:50 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Hunter
Last Name: Lee
Affiliation: Swarthmore College
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment: Warm congratulations to the newly appointed chair, and thank you for increased transparency into the FTC. I had two questions.
First, what is the FTC's stance on super-apps, like Grab in Southeast Asia and WeChat in China, found more and more prevalent around the world — does it stifle competition or enable innovation by scale, and how does it affect views on giants like Amazon and Google? Second, what is the FTC's view on the data economy — data being paramount to success in the machine learning sector, will the FTC urge Congress to ensure fair, equal access to data for both startups and established companies?

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/2

[redacted]

From: John Bodnovich <[redacted]>
Sent: Thursday, July 1, 2021 4:48 PM
To: JulyPublicComments
Subject: Public Comment Submission for July 1 Open Commission Meeting
Attachments: 21 7.1 FTC July Meeting Public Comment - ABL.pdf

To Whom it May Concern:
Please include the attached public comment for the record.
Thank you,
John

John Bodnovich | Executive Director
American Beverage Licensees (ABL)
America's Beer, Wine & Spirits Retailers
[redacted]

July 1, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20850

Re: Public Comment for July 1 Commission Meeting

Dear Chair Khan:

American Beverage Licensees (ABL) appreciates the opportunity to submit comment for the Federal Trade Commission (FTC) July 1 Commission Meeting. The ability to submit comment at this meeting is a welcome opportunity to bring important competition issues to the FTC's attention, and we encourage you to continue this practice.

ABL is a trade association representing the retail tier of the U.S. alcohol industry. Its members include thousands of bars, taverns, and package liquor stores that sell beer, wine and spirits in states across the country. As an important cog in the hospitality industry economic machine, direct retail beverage alcohol sales in the United States create more than 2.03 million well-paying jobs and generate over $27.9 billion in federal taxes and $20.0 billion in state and local taxes.

ABL members compete every day with their fellow beverage alcohol retailers under state-based three-tier systems which, when their integrity is maintained, foster a level playing field for beverage licensees large and small to the benefit of states, communities, businesses and, most importantly, consumers. This success story has been made possible by the delicate balancing of federal alcohol laws and states' primary authority to regulate how alcohol is distributed and sold within their borders.

Following the repeal of Prohibition, federal laws such as the Federal Alcohol Administration Act were enacted to prevent the retail tier of the alcohol industry from being subjected to tied-house and other market evils perpetrated by alcohol suppliers before Prohibition. However, retail consolidation has shifted alcohol market leverage to large, corporate fast-moving consumer goods (FMCG) retailers, who now wield meaningful power over other industry stakeholders.

Given their national footprints, and despite state-by-state laws that work effectively for intra-state alcohol commerce and create competitive markets that benefit consumers, these retailers can leverage their national business with distributors and suppliers to induce other parties in the three-tier ecosystem to act in anticompetitive ways. In some instances, this power has led to the inability of small retailers to access familiar products or receive a level of service afforded to large retail corporations.

Large FMCG retailers – at times abetted by other, non-retail alcohol industry stakeholders – have also sought to undermine pro-competitive state alcohol laws through recklessly deregulatory policy initiatives, all to the detriment of appropriately-regulated local beverage businesses and the customers they serve. These efforts, if successful, will ultimately lead to less consumer choice, higher prices and a homogenized beer, wine and spirits marketplace dominated by a handful of firms at each level of the three tiers.

ABL urges the FTC to evaluate and prioritize enforcement of the Robinson-Patman Act and other laws that ensure fair competition for small beverage alcohol businesses so they can meet the needs of their communities and operate in a fair and truly competitive marketplace. ABL thanks the FTC for creating a public forum for sharing important competition and antitrust matters.

Sincerely,

John Bodnovich
Executive Director
American Beverage Licensees

June 30, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

Dear Chair Khan, Commissioners Chopra, Phillips, Slaughter, and Wilson:

ACT | The App Association appreciates the opportunity to provide its views as part of the Federal Trade Commission's (FTC) July 1, 2021 open meeting.[1] The FTC's approach to competition and consumer protection policies and approach to enforcement directly affects each of the App Association's members and the consumers who use their products/services.

ACT | The App Association is a not-for-profit trade association representing thousands of small business software application development companies and technology firms located across every state. Alongside the rapid adoption of mobile technologies, our members compete by developing innovative applications and connected products that improve countless consumer and enterprise systems and experiences that are increasingly leveraging the Internet of Things effect. Today, the app ecosystem is worth more than $1.7 trillion annual, is responsible for 5.9 million American jobs, and serves as a key driver of the $8 trillion IoT revolution. Notably, Our members provide the consumer-facing or most-downloaded apps in the Apple App Store and Google Play store as well as connected IoT technologies, which is a small

[1] https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting.

fraction of the app economy. Our members also build software and connected technologies for other companies across countless use cases that are not consumer-facing, such as software management systems for internal use by a hospital, manufacturer, or brewery.

In light of the agenda items being addressed during the July 2021 open meeting, the App Association discusses below the need for FTC action to protect competition and innovation in the context of standard essential patent (SEP) abuse. We further offer views on a range of issue areas and developments related to agenda items, particularly those related to Unfair Methods of Competition under Section 5 of the FTC Act as well as enforcement investigations, in appended testimony and positions.

The FTC and Standard Essential Patent Abuse

Open and consensus standards will drive the development of the internet of things, and a successful standards system is essential to creating new products and services that further allow small businesses to innovate and compete. App Association members actively participate in the development of technical standards; additionally, App Association members create (sometimes through contributions that contain patented technologies), use, and sell products that implement those standards. The small business innovator community that we represent, more than any other, needs to be able to effectively utilize technical standards in order to build new products and innovate. Therefore, it is extremely important to make reasonable access to SEPs in standards a priority of the FTC. To this end, countless small business innovators rely on SEP holders' voluntary promises to license access to their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms for certainty in the research and development phases and other business planning. Our members need to know they can count on reasonable access to standards without risk of expensive and lengthy litigation that easily drive them out of business.

FTC action is absolutely necessary to end the effects of the anticompetitive behavior demonstrated to be in violation of U.S. competition law and to set a precedent our members need to continue to thrive. A continuation of abusive practices in the SEP context will harm the ability of countless small businesses to make necessary planning decisions, receive venture capital funding, and grow in markets often dominated by the biggest players. For example, our members have faced, and continue to face, refusals to license and other abusive practices in the SEP licensing context. Years of unchecked abusive patent licensing practices are emboldening further abusive patent licensing behavior and are stripping small businesses of vital capital, and will continue to do so should they be permitted to persist.

In the aftermath of the *FTC v. Qualcomm* decision in the Ninth Circuit Court of Appeals, it is more important than ever that the FTC continue to protect and advance the public interest through supporting the use of standards and the ability to use patents essential to those standards subject to the FRAND commitment. We call on the FTC to take action to give much-needed certainty to the entire SEP licensing stakeholder

community (particularly the small business community), and to provide FTC leadership in defending established, bipartisan policy approaches consistent with guidance to date from the U.S. courts.

We support the FTC's leadership in protecting consumers and advancing competition in the United States and urge your careful consideration of our views above and attached.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel
[redacted]

February 17, 2021

The Honorable Frank Pallone
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

The Honorable Cathy McMorris Rodgers
Republican Leader
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

Dear Chairman Pallone and Leader McMorris Rodgers,

We deeply appreciate your leadership as the House Committee on Energy and Commerce plots a course for the 117th Congress to address the COVID-19 pandemic and to get our economy back on track. As part of these efforts, we ask that you continue the bipartisan work of crafting a single set of rules governing the privacy practices of entities that generally fall under the Federal Trade Commission's (FTC's) jurisdiction. Recent events and the forced shift of daily and essential activities—especially core healthcare services—to the digital space underscore the need to act decisively on this issue.

ACT | The App Association (the App Association) is a trade group representing about 5,000 mobile software and connected device makers in the app economy. Our industry is a $1.7 trillion ecosystem led by U.S. companies and supporting about 5.9 million American jobs, including in New Jersey and Washington. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Strong privacy protections that meet evolving consumer expectations are a key component of developing consumer trust in tech-driven products and services. The App Association helps shape and promote adherence to privacy laws and best practices in a variety of contexts, including for apps directed to children and digital health tools.

The productive use of healthcare data no longer only occurs with healthcare providers and other entities under the jurisdiction of the Health Insurance Portability and Accountability Act (HIPAA). The creation and flow of healthcare data outside the HIPAA umbrella has accelerated, and although the FTC takes an active role in enforcing the prohibition on unfair or deceptive acts or practices (UDAP), it should have tools that adapt better to the risks healthcare data presents. From our perspective, the answer is not to extend HIPAA to cover healthcare tools and services not currently subject to HIPAA. HIPAA's overarching purpose is to ensure the portability of health data between covered entities and business associates, and it was not primarily designed to give consumers better control over their own healthcare. Instead of expanding this approach, we urge you to establish a set of federal requirements that puts in place baseline consumer rights and curbs data processing activities that exposes consumers to undue privacy risks. The Committee's bipartisan staff draft legislation circulated last Congress was a positive start representing substantial agreement on aspects of privacy that previously struggled for consensus. We urge you to continue the work on this effort, and we stand ready to support negotiations and oversight activities around it.

The recent settlement between the FTC and fertility and period tracking app Flo is emblematic of the FTC's limitations, as well as the health-related privacy risks future legislation should address. The FTC's complaint alleges that Flo shared the "health information of users with outside data

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analytics providers after promising that such information would be kept private."[1] The mischief here is reminiscent of previous activities the FTC punished. Not only did Flo mislead consumers about its data sharing practices, but it also allowed third parties to use the data it shared for their own purposes.[2] In some cases, this occurred in violation of the terms of service of those third parties, the data having been shared via software development kits (SDKs) they provided to Flo.[3] These privacy missteps are especially concerning given the sensitive nature of the health information at issue. A federal law more intentionally focused on curbing privacy harms should empower consumers to exert more control over their sensitive personal information, including the rights to access, correction, and deletion of such information. Sensitive personal information should also be subject to some flexible limits on processing activities that pose too great a risk to consumers.

Although Flo's core deceptive statements in this case enabled the FTC to enjoin further harmful conduct, the recurrence of these privacy harms involving health information highlight the need for risk-based privacy regulation at the federal level. Each and every headline detailing the deceptive conduct of firms using healthcare data outside the HIPAA umbrella threatens to further erode consumer trust, which is a key necessity for our member companies. The healthcare innovations our member companies produce—from heart health and chronic condition monitoring to simply managing digital health information across health systems—are far too important for us to let them fall victim to foundering consumer trust in digital health earned by bad actors. In this case, unlocking the innovative potential for life-saving technologies involves the establishment of a single set of strong, national privacy requirements. We look forward to working with you toward this goal in the 117th Congress.

Sincerely,

Morgan Reed
President
ACT | The App Association

[1] Press release, "Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data," Fed. Trade Comm'n (Jan. 13, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc.
[2] Fed. Trade Comm'n, *Flo Health, Inc.*, complaint (published Jan. 13, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf.
[3] *Id.*

April 20, 2021

The Honorable Amy Klobuchar
Chairwoman
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

The Honorable Mike Lee
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

Antitrust Applied: Examining Competition in the App Stores

Dear Chairwoman Klobuchar, Ranking Member Lee, and Members of the Subcommittee,

We applaud this Subcommittee for its examination of the competitive dynamics of tech-driven markets, including app stores, with tomorrow's hearing, "Antitrust Applied: Examining Competition in App Stores." ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a $1.7 trillion ecosystem led by U.S. companies and employing 108,260 in Minnesota and 65,520 in Utah alone.[1] Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

The witnesses in this hearing underscore highly publicized conflicts between large companies and software platforms (the app store / operating system combinations that facilitate app company-consumer transactions). However, while our member companies are always pushing software platforms to provide more value for the amounts they pay for developer services, they are concerned about how government intervention to solve disputes between well-resourced firms and software platforms will affect them. We appreciate that showcasing the breadth of views on app store competition presents challenges. However, the cross-section of issues these witnesses highlight provides only a narrow sliver of how competition is working in app store markets. To the extent that advocates are using perceived unfair treatment of multibillion-dollar firms like Spotify as evidence to support an expansion of antitrust law to protect non-platforms, our member companies have concerns and urge you to consider the impacts of such intervention on their businesses, the value they get from developer services, and their clients and consumers.

I. Competition is Alive and Well in the Markets Relevant to App Stores

The consumer-facing side of the market. Some commenters have argued that the major app stores do not compete with each other for consumers.[2] According to the proposed logic, the App Store does not compete with the Google Play store because an Apple customer cannot immediately access the Google Play store and vice versa.[3] However, dynamics like this do not insulate market actors like app stores from competition. For example, consider local markets for discount retail clubs or other services that require memberships. Costco members cannot

[1] ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), *available at* https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf.
[2] *See id.* at 95.
[3] *Id.*

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immediately access Sam's Club and vice versa (unless a consumer is a member of both simultaneously). A membership is generally required before you can begin using the services of either store, so there are some time and resource commitments that need to be made before you can switch. Similarly, an Apple iPhone owner must spend the time and resources to trade in their device for another smartphone that runs on Android instead, in order to access the Google Play store. These are properly viewed as switching costs—which are prevalent in markets where network effects are present—but these costs alone hardly justify a conclusion that the competitors in that market "do not compete against one another."[4] Critics cite logistical difficulties in switching, but in reality, switching is straightforward and assisted by the app store operators themselves.[5] In fact, a recent report indicates that it generally costs just $16 to switch from an iPhone to a Samsung device and $40 to switch from a Samsung device to an iPhone, including opportunity cost of time spent on switching.[6] Not only that, but it is also fairly common for someone to have a tablet that runs on Android and a smartphone that runs on iOS, or vice versa. Ultimately, these consumers are likely making their choices based on a combination of the app store offerings, operating systems, device features, and default apps on smart devices. That there are switching costs involved with leaving one app marketplace for another is simply not evidence that they do not compete with each other for consumers.

The developer services side of the market. The Google Play store and the App Store compete vigorously in the other side of the market, for developers and developer services. Google benefits a great deal from attracting the next great app and so does Apple[7] and the investments these platforms make to attract developers reflect this.[8] Moreover, Google and Apple have a history of trying to outdo one another with respect to the offerings they provide for developers. As "shopper's guides" to the two main app stores describe, the App Store and Google Play store respond to each other's offerings, vying to be the platform that provides better toolkits, APIs, and, of course, quicker (yet rigorous) app review processes.[9] In fact, over their respective lifespans, the

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[4] *See, e.g.,* Wing Man Wynne Lam, "Switching Costs in Two-Sided Markets," TOULOUSE SCHOOL OF ECON., Working Paper (Aug. 2014), *available at* http://publications.ut-capitole.fr/16551/1/wp_tse_517.pdf (examining the characteristics of competition between app stores for consumers, including the impacts on competition and consumer benefits when app stores adjust their various offerings).

[5] Avery Hartmans, "Here's the best and easiest way to switch from an Android device to an iPhone," Business Insider, (May 21, 2019), *available at* https://www.businessinsider.com/switching-from-android-to-iphone-how-to-2018-5#step-1-back-up-all-your-data-1.

[6] ELLIOTT LONG, WHY USERS AREN'T LOCKED INTO THEIR SMARTPHONE BRAND, PROGRESSIVE POLICY INSTITUTE (Apr. 8, 2021), *available at* https://eadn-wc05-3904069.nxedge.io/cdn/wp-content/uploads/2021/04/Why-Users-Arent-Locked-Into-Their-Smartphone-Brand4.8.21.pdf.

[7] *Ohio et al. v. Am. Express et al.*, 585 U.S. __ (2018) ("Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate.").

[8] Opposition brief of Apple Inc., *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-YGR, at 5 (N.D. Cal. 2020), *available at* https://www.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.73.0.pdf ("In the interest of stoking more creativity, and to bring more apps to its users, Apple supports developers in a variety of ways, investing billions in tools that simplify the development process, across Apple's iOS.").

[9] *See* Yana Poluliakh and Victor Osadchiy, "What to expect from the App Store and the Google Play Store When you Launch Your First App," YALANTIS, *available at* https://yalantis.com/blog/apple-app-store-and-google-play-store/; Nikita, "Apple App Store vs. Google Play Store: A Comparison," 21 TWELVE INTERACTIVE, Blog (Sept. 20, 2019), *available at* https://www.21twelveinteractive.com/apple-app-store-vs-google-play-store-a-comparison/; Priya Viswanathan, "iOS App Store vs. Google Play Store," LIFEWIRE (Mar. 9, 2020), *available at* https://www.lifewire.com/ios-app-store-vs-google-play-store-for-app-developers-2373130.

major app stores have demonstrated a clear track record of competing with each other for developers, as our recent report details.[10] Lastly, the analysis of the relevant developer-facing side of the market does not end with whether there is competition between those two app stores, as there are other software distribution options that can serve as alternatives: smart TV app stores, gaming console app stores, and even video conferencing platforms[11] (a development accelerated by the pandemic). The open internet can also be a workable alternative for developers and consumers to the two major app stores (especially for larger developers with an established customer base or market share).[12] And for consumers who favor less data-intensive apps (for example, because they have limited data plans) or want to access certain apps across devices and browsers, progressive web apps[13] are a means of accessing mobile content and services outside the major app stores. As described above, however, there is plenty of evidence that the general-purpose app stores do compete with each other both for consumers and for developers. And if they are competing, that means the app stores are a) driving better services and offerings for developers, while b) pushing each other to provide the most attractive, diverse, and safe marketplace for consumers. And consumers currently benefit from differentiated products, as the App Store provides a more "premium" offering with tighter privacy and security controls, while the Google Play store boasts a greater variety.

Platforms have helped create or expand markets like digital health services. Just as ridesharing fundamentally changed how we get around, developers and platforms also revolutionized how we access healthcare. Digital health capabilities are maturing at a critical time when the pandemic has forced American patients to rely on virtual visits and remote monitoring. Secure smart devices and the software platforms that animate them are foundational elements to our current ability to manage healthcare wherever we happen to be. But this would not be possible if not for software platforms performing a gating function and securing operating systems and app stores from fraudulent apps and other threats to healthcare data. Those functions make smart devices worthy of the trust we must place in them to keep sensitive health data or conduct virtual physician visits on them.

There is reason to believe digital health will continue to play a central role in care delivery in the United states. A current shortage of about 30,000 physicians in the United States—projected to increase to up to 90,000 in the next five years[14]—contributed to the need for caregivers and

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[10] ACT | The App Association, A Brief History of Time: The App Stores (Apr. 7, 2021), *available at* https://actonline.org/wp-content/uploads/A-Brief-History-of-Time-The-App-Stores.pdf.

[11] *See* Vishal Mathur, "Apple's Response Proves App Store Isn't Any More a Monopoly Than the Google Play Store," NEWS18 (May 30, 2019), *available at* https://www.news18.com/news/tech/apples-response-proves-app-store-isnt-any-more-a-monopoly-than-the-google-play-store-2164875.html; David Pierce, "Zoom has a plan to dominate the virtual events industry," PROTOCOL (Oct. 14, 2020), *available at* https://www.protocol.com/onzoom-virtual-events (describing Zoom's new Zapps app store).

[12] Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, hearing before the House Judiciary Committee, Subcommittee on Antitrust, Commercial, and Administrative Law (statement of Morgan Reed, President, ACT | The App Association) 7 (Jul. 17, 2019), *available at* https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf.

[13] Sam Richard and Pete LePage, "What are Progressive Web Apps?" WEB.DEV (Feb. 24, 2020), *available at* https://web.dev/what-are-pwas/.

[14] *See* Connected Health Initiative, "Testimony of Morgan Reed, Executive Director, The Connected Health Initiative, Before the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security," (Sept. 25, 2018), *available at* https://actonline.org/wp-content/uploads/CHI-Testimony-Health-Care-in-Rural-America.pdf.

patients to find new ways of communicating. Compounding the caregiver shortage, 133 million Americans currently live with chronic conditions—most of them residing in rural areas with long drives to their nearest provider.[15] Devices, sensors, and software are now capable of gathering and analyzing physiological data like movement, heart rate, electrocardiogram, or pulse oximetry so that physicians can better monitor their patients at home and address potential problems before they occur or worsen.[16] Studies show that preventive care regimes that use connected health tools are especially useful for patients with chronic conditions like diabetes and heart failure, which tend to affect underserved and rural communities in particular.[17] But how do these capabilities reach patients and consumers, specifically those who need them most? Most Americans already interact with platforms, through a variety of devices. We know that smartphone adoption rates are increasing among underserved populations in the United States and that for many, their handheld device is their only means of accessing the internet.[18] Here again, developers are leveraging the ubiquity and trusted framework of platforms to produce healthcare innovations that address a variety of health conditions. Moreover, in this case, the platform-developer dynamic helps caregivers reach patients in rural and underserved areas.

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[15] *See Id.*

[16] *Id.*

[17] *See, e.g.,* Clinical Outcomes, Care innovations, at 2, available at http://www.connectwithcare.org/wp-content/uploads/2017/06/2016_Outcomes_Clinical-1.pdf (showing the results of a study by Care innovations and University of Mississippi Medical Center, indicating that the first 100 patients with diabetes enrolled in a program with a remote monitoring component saved the state $336,184 in Medicaid dollars over six months); Testimony of Michael P. Adcock, Exec. Dir., University of Mississippi Med. Ctr., Hearing on "Telemedicine in the VA: Leveraging Technology to Increase Access, Improve Health Outcomes & Lower Costs," (May 4, 2017), available at https://www.appropriations.senate.gov/imo/media/doc/050417-Adcock-Testimony.pdf ("The Mississippi Division of Medicaid extrapolated this data to show potential savings of over $180 million per year if 20 percent of the diabetics on Mississippi Medicaid participated in this program").

[18] Charkarra Anderson-Lewis, MPH, PhD, et al, "mHealth Technology Use and Implications in Historically Underserved and Minority Populations in the United States: Systematic Literature Review," (Jun. 18, 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6028762/.

II. Developers are Pushing for More from the Platforms

Software platforms have historically responded to the needs of developers and consumer demands as those forces have evolved. Right now, app companies are pushing for several things from software platforms that government intervention would likely undermine. Specifically, app companies are seeking:

1. **Expedient removal of scam apps, fake reviews, and fraudulent actors.** Scam and fraud apps have slipped through the review and removal cracks,[19] and our member companies are concerned about these incidents. We strongly disagree, however, with suggestions that software platforms should give up on the exclusive app store model. The fact that app stores have such a high volume of apps to review, posing security review difficulties, is cited as a reason for steamrolling Apple's closed App Store system with a government prohibition on app store exclusivity. If our member companies choose to distribute through the App Store, they expect tough security reviews and fast removal of bad actors. A complete removal of the gatekeeping function would accomplish the exact opposite.

2. **Better security.** App companies depend on software platforms to provide a trusted marketplace. Software platforms ensure security by both reviewing proposed apps and by pushing out security updates for a device operating systems. These functions are exceptionally important for a trusted marketplace, and investment should reflect this importance.

3. **Better privacy.** App companies compete on privacy. They are working hard to produce tech-driven privacy features that address evolving consumer expectations and technical realities, and some of them provide products and services focused solely on privacy protections.[20] The privacy functions of software platforms, however, are also critical to foster a trusted ecosystem in which to operate.

4. **More investment in developer relations.** Software platforms have significantly lowered barriers to entry for software sellers. But the app stores can seem vast and impersonal for the smallest app companies, and rejections or other adverse decisions can seem impossible to surmount without proper explanations or personal interactions with software platform staff. A lack of personal attention can lead to dissatisfaction and resentment, so it is in software platforms' best interests to help developers find success on the platform. Conversely, individual attention for the smallest app companies helps nurture the truly robust app marketplace where the best ideas flourish from the most surprising corners—and that is what consumers, software platforms, and app companies alike want most.

Subjecting software platforms to substantially heightened antitrust liability for managing app stores to better protect privacy, security, remove fraudulent actors, and provide individual services would undermine everything our member companies are asking for from software platforms. Similarly, creating nondiscrimination or other regulatory regimes specifically for current incumbents would inadvertently create a regulatory moat around them, protecting each from known competitive

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[19] Statement of Morgan Reed, president, ACT | The App Association (Feb. 11, 2021), *available at* https://actonline.org/statements/.

[20] *See, e.g.*, "The Rise of Privacy Tech Helps Privacy Tech Founders Solve Their Biggest Pain Points," TROPT (Jun. 5, 2020), *available at* https://www.riseofprivacytech.com/tropt-helps-privacy-tech-founders-solve-pain-points/.

pressures and from potentially unforeseen entrants providing increasingly analogous services like Square. Such protection removes their incentives to respond to developer demands, supplanting it with bureaucracy and lobbying battles.

II. Antitrust Intervention to Limit Software Platform Functions Would Harm Small App Companies

In the software platform context, policymakers are considering a variety of structural or quasi-structural remedies from a Glass-Steagall-like separation of lines of business to prohibitions on specific kinds of exclusivity. Mostly, concerns about the economic health of these markets animate legislative interest, but policymakers are also examining possible political motives behind app store decisions. Some of those inquiries are already leading to broad ideas of exposing software platforms to additional liability related to speech or other causes of action for trial attorneys.[21] Although lawmakers are raising these concerns against a backdrop of concentrated markets, expanding antitrust law is not the optimal path to address perceived political externalities arising from app store rejections. We agree that departing from the consumer welfare standard could "cripple our economy at a time when millions are already struggling . . . and . . . undermine one of the foundational principles of our republic."[22] The last thing our member companies want is for app store functions to get bogged down in decade-long antitrust litigation over what are essentially political disagreements.

Aside from these concerns, there is a fair amount of interest in examining the ability and "incentive to impede competition in lines of business dependent on" platforms.[23] This is a worthy line of inquiry with a framework that should respect the fact-driven analysis involved with identifying and stopping harms to competition and consumers. Accordingly, an important step in this process is to examine the benefits for smaller software competitors of ongoing and recent activities by software platforms that have drawn antitrust scrutiny in light of proposals to separate them from adjacent markets or restrict their functions as platforms. Those in favor of structural separation and other competition remedies in software markets seem to target two areas of perceived "gatekeeper" power: 1) control over the kinds of software that can be downloaded onto a device's operating system; and 2) control over the kinds of software that can be offered via an app store. These are important functions for our member companies, which caution against weakening them too much to benefit other competitors.

Prohibitions on exclusivity. Several state legislatures have considered or are actively considering proposals that would impose a quasi-structural restriction at the operating system level by prohibiting software platforms from acting as gatekeeper for software installed on a device.[24] Among other things, the bills bar operating systems from accepting software unless it is distributed exclusively through a certain app store marketplace and prohibit "retaliation" against software developers that circumvent approval through that distribution channel.[25] Although this may sound

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[21] Republican Leader McMorris Rodgers, Big Tech Accountability Platform, House Committee on Energy and Commerce, Memorandum (Apr. 15, 2021), *available at* https://republicans-energycommerce.house.gov/wp-content/uploads/2021/01/Big-Tech-Accountability-Platform-Memo.pdf.

[22] Press Release, "Sen. Lee Sets Senate Republican Antitrust Agenda for 117th Congress," Sen. Mike Lee (Feb. 6, 2021), *available at* https://www.lee.senate.gov/public/index.cfm/2021/2/sen-lee-sets-senate-republican-antitrust-agenda-for-117th-congress.

[23] ACAL Report at 35 (citing report accompanying Antitrust Reform Act of 1992).

[24] *See, e.g.*, SB 2333, 67th North Dakota General Assembly (2021), *available at* https://www.legis.nd.gov/assembly/67-2021/documents/21-1044-01000.pdf.

[25] *Id.*

like it lowers a barrier to entry by weakening the platforms' gatekeeper capabilities, it does the exact opposite and removes a steppingstone to the market. Moreover, the proposals' supporters are some of the largest companies on the app stores that openly seek to avoid their obligations to pay *at all* for the software platforms' developer service bundles.[26] The bundles include a wide variety of services for developers and, contrary to how some are characterizing them, are not just a "payment processing fee."[27] Specifically, those services include:

- Immediate distribution to hundreds of millions of consumers across the globe;
- Marketing through the platform;
- Accessibility features;
- Platform level privacy controls;
- Assistance with intellectual property (IP) protection;
- Security features built into the platform;
- Developer tools;
- Access to hundreds of thousands of application programming interfaces, or APIs; and
- Payment processing.

From these services, small app companies obtain easy access to a global market, the ability to offload overhead (like managing payment options and preventing piracy), but most importantly, they can leverage consumer trust. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Larger firms, meanwhile, may have the resources to put together the bundle of services and generate consumer trust in a known brand name all on their own. Therefore, they might think of the software platform bundle as less valuable to them than it is to smaller companies, which may help explain their calls for government intervention to diminish those services. They simply have less to lose and more to gain from such intervention than do App Association members and consumers.

The state bills reflect a view that takes for granted the platform functions necessary to fuel a trusted ecosystem that lives on our smart devices now. Consumers now depend on mobile devices to store their most important information, and the ability to protect that data is vital. Banning software platforms' gatekeeping function puts users' most vital data at risk. App Association member companies—much more so than the large companies selling software on the app stores—depend on strong privacy, security, and IP protections at the platform level. Therefore, proposals to require platforms to allow circumvention of these protections would harm consumers and app economy competitors alike. Platforms currently work to keep apps that violate user trust out of their stores.

In one example, some bad actors market their device-monitoring apps designed to track children's mobile device use as a way to track anyone, including adults, without their knowledge or permission. These "stalker apps" operate outside the bounds of what is allowable in app stores or mobile operating systems by accessing troves of personal data including location, messaging, and

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[26] Order Granting in Part and Denying in Part Motion for Preliminary Injunction, Epic Games v. Apple Inc., Case No. 4:20-cv-05640-YGR (N.D. Cal. Oct. 9, 2020) ("Epic Games moves this Court to allow it to access Apple's platform for free while it makes money on each purchase made on the same platform. While the Court anticipates experts will opine that Apple's 30 percent take is anti-competitive, the Court doubts that an expert would suggest a zero percent alternative. Not even Epic Games gives away its products for free.").

[27] The full set of developer services software platforms provide includes immediate distribution to tens of millions of consumers globally; marketing through the platform; platform level privacy controls; assistance with intellectual property protection; security features built into the platform; developer tools; access to hundreds of thousands of application programming interfaces, or APIs; and payment processing.

calls. In 2019, the Federal Trade Commission (FTC) pointed to the important function software platforms perform in its first ever action against a purveyor of stalker apps, Rentina-X. The FTC stated in its enforcement action that "the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleges exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties."[28] Similarly, as the FTC has investigated and enforced against consumer protection harms on the app stores, the contemplated—and actual—remedies required the platform to act as gatekeeper.[29] Consumer protection efforts encounter difficulty in these marketplaces unless a platform is able to enforce the requirements it imposes on apps, including platform-level controls that prevent videogame companies from taking advantage of children's tendencies toward in-app purchasing if left unchecked.

Limitations on exclusionary conduct. To ameliorate perceived issues with self-preferencing on software platforms, policymakers are considering amendments to antitrust law that fall somewhat short of a set of nondiscrimination rules but expand liability for categories of exclusionary conduct. Again, pointing to the "incentive and ability to abuse"[30] their dominant position against third parties, policymakers are considering an "abuse of dominance" standard applied to software platforms (and generally).

Setting aside the particulars of existing proposals, we urge this Subcommittee to consider a couple of factors when contemplating such an expansion of liability. First, many of the actions of software platforms that have drawn antitrust criticism also have countervailing benefits. For example, Apple's decision to require opt-in consent for ad tracking between apps caught attention in the antitrust space but has a powerful justification in privacy protection. In a stark example of privacy versus antitrust interests, the French Competition Authority recently rejected a competition complaint to enjoin Apple's opt-in framework, noting that it is part of "Apple's long-standing strategy to protect the privacy of iOS users."[31] Second, self-preferencing activities on software platforms that appear to harm some competitors often benefit others and consumers. For example, the installation of pre-loaded apps on smart devices can greatly benefit developers by enabling them to rely on a single default functionality like a camera app while making the device itself more attractive to the consumers App Association members wish to reach. Said Parag Shah of App Association member company Vēmos in a recent antitrust panel discussion, consumers "want to be able to buy [a smart device] from a store, they want to be able to turn it on, and they want it to work on the basic levels of 'I can text someone, I can call someone, I can open up a web browser . . . I want some basic functionality.'" In this case, although the pre-installation of apps plainly advantages a software platform's own offerings over alternative camera, messaging, or browser apps, the benefits to consumers and other competitors of doing so are equally evident. The considerations here weigh against tilting liability for exclusionary conduct too far such that

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[28] Press Release, Fed. Trade Comm'n, FTC Brings First Case Against Developers of "Stalking" Apps (Oct. 22, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps.

[29] Press Release, "Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent," Fed. Trade Comm'n (Jan. 15, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

[30] ACAL Report.

[31] Press Release, "Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case," Autorité de la concurrence (Mar. 17, 2021), *available at* https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue.

conduct that appears to harm a certain class or classes of competitors is foreclosed or strongly discouraged, even though it is ultimately better for App Association members, competition, and consumers.

III. More Resources and Enforcement in Standards-Setting

We support recommendations to "[i]ncreas[e] the budgets of the Federal Trade Commission and the Antitrust Division."[32] Antitrust cases are a highly resource-intensive undertaking, and federal enforcers are underequipped to carry out their important task.

One area we urge the Subcommittee to focus on in particular, and where the federal enforcement agencies must bring those resources to bear, is the applicability of antitrust law to standard-essential patent (SEP) abuse. In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services, Congress must ensure that antitrust law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms.[33] These commitments balance the market power SEP owners obtain with the need for innovators to license the patented inventions essential to use the standard. When kept, FRAND commitments prevent anticompetitive licensing behavior by curtailing, in most cases, the ability of an SEP licensor to leverage its market power through exclusionary relief; by rewarding an SEP owner with damages for infringement of a valid patent that are commensurate with the scope of its patented invention; and by ensuring that an SEP licensor cannot discriminate between firms in the manufacturing supply chain when licensing its SEPs. The SEP context is distinct from situations where companies own unencumbered patents or are competing with each other to provide the best vertically integrated product or service. Through standards-setting, stakeholders supplant part of the competitive process with a mechanism for interoperability, necessitating closer antitrust involvement. Unfortunately, some SEP owners break their FRAND promises and engage in activities that harm competition and consumers by increasing prices, reducing the quality and variety of products and services, and diminishing innovation.[34] Breaking these promises implicates antitrust law, in addition to other sources of law.

Conclusion

As this Subcommittee continues its work on antitrust in tech-driven markets, we hope the perspective of small mobile software and connected device companies that leverage software platforms helps guide your work. Antitrust is rightfully a fact-intensive inquiry that must assure the competitive process serves consumers as well as possible. To that end, we support providing more resources for the two federal agencies tasked with enforcing antitrust law—they are woefully

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[32] ACAL Report, at 403.

[33] *See* Brian T. Yeh, "Availability of Injunctive Relief for Standard-Essential Patent Holders," CONG. RESEARCH SERV. Summary (Sept. 7, 2012), *available at* https://www.everycrsreport.com/files/20120907_R42705_9c71ac36b1c0030af0d1bd97b53e8b7ba6fd3e73.pdf.

[34] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007), *available at* https://caselaw.findlaw.com/us-3rd-circuit/1069408.html.

under-resourced to carry out the important and extremely costly task of stopping antitrust harms. In general, our member companies are worried that large, well-resourced companies may successfully create for themselves a new avenue for bending the market in their favor by reorienting antitrust law so that it protects certain (large, well-resourced) competitors to the detriment of smaller companies and consumers. We appreciate this opportunity to weigh in on your important inquiry and look forward to further engagement with you throughout the 117th Congress and beyond.

Sincerely,

Morgan W. Reed
President
ACT | The App Association

January 24, 2020

Comments of ACT | The App Association
House Committee on Energy and Commerce
Draft Framework of *Online Privacy Act of 2019*

ACT | The App Association appreciates your leadership on consumer privacy. The touchstone of privacy is trust. Members of your Committee noted repeatedly that individuals are beginning to mistrust technology, and any legislation Congress considers should help restore this consumer trust. The specific privacy lapses the Energy and Commerce Committee examines generally involve larger companies with business models that depend on complex data processing activities. To the extent Congress intends legislation to address these observed privacy issues, it should also proceed carefully so as to preserve competitive forces where they tend to improve privacy outcomes for consumers. Small companies, like our members, lead the way in developing competition-driven privacy tools to give consumers more control and mitigate privacy risks.

The App Association is a trade group representing about 5,000 small to mid-sized software and connected device companies across the globe. In the United States, our member companies are part of a $1.3 trillion industry, supporting about 5.7 million jobs. We regularly work to keep our member companies up to speed on the latest policy and legal developments and to translate those into practical and useable guidance to ease the burden of compliance.[1] Further, we commit to promoting proactive approaches to ensuring end-user privacy and participate frequently in the privacy debate at the federal level, including by serving on panels in Federal Trade Commission (FTC or Commission) workshops and filing comments with congressional committees.[2]

Commercial privacy is not a static concept, and yet products and services should, and are expected to, respect user privacy as part of their design. Often an ongoing dialogue with users that accounts for changing contexts and expectations is the only way to accomplish this. Our member companies compete with each other and larger companies to create better, more efficient privacy protection measures. They work hard to comply with privacy laws, best practices, and regulations. But they also know that their clients, customers, and users usually have a choice, and the kinds of privacy practices they employ inform that choice. This is a foundational concept that Congress must consider as it proceeds with negotiations over a federal privacy framework. It forms the core of our privacy philosophy and guides our policy recommendations, laid out in more detail in these comments.

I. Rulemakings

Numerous sections of the draft bill would require the FTC to promulgate rules using Administrative Procedure Act (APA) processes. In many of these instances, these provisions could be sharper to

[1] *See, e.g.,* ACT | The App Association, General Data Protection Regulation Guide (May 2018), *available at* https://actonline.org/wp-content/uploads/ACT_GDPR-Guide_interactive.pdf.
[2] *See, e.g.,* https://www.ntia.doc.gov/files/ntia/publications/2018-11-09_-_ntia_-_privacy_filing_-_final.pdf; http://actonline.org/wp-content/uploads/2018-04-10-FTR-ACT-the-App-Association-Facebook-Privacy-FINAL.pdf; https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop; Statement for the Record from ACT | The App Association to Senate Committee on Commerce, Science, and Transportation, hearing, "Small Business Perspectives on a Federal Data Privacy Framework," (Apr. 5, 2019).

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more narrowly authorize the Commission to "clarify" the rest of the section. For example, Section 3 includes a detailed list of items covered entities must include in privacy policies and further requires the FTC to conduct a potentially open-ended rulemaking imposing the requirements that appear in statute. It may be a bit redundant to require the FTC to issue rules that impose the same requirements that appear in statute, unless their purpose is simply to clarify those statutory provisions. As reflected in our redline, we recommend specifically stating that the purpose of the rules is to "clarify" the requirements that appear in the legislative or statutory provision. Otherwise, various constituencies may push and eventually convince the Commission to broadly read these rulemakings to give it more flexible authority to interpret the sections than the drafters intend.

II. Small Business Treatment

The App Association generally does not ask for carveouts for small companies when it comes to privacy. The typical App Association member competes with much larger companies for clients, often in highly regulated industries such as finance or healthcare. For some of our members, in order to remain competitive, they must show that they effectively comply with the major privacy laws like the General Data Protection Regulation (GDPR)—or have some sort of certification of compliance with private sector developed guidelines or best practices—so there is no perception of being less protective than their competitors. And if they win contracts with large clients (which may have an international or Californian customer base), they find themselves under contractual provisions that require them to meet GDPR and other compliance mandates that do not otherwise directly affect them.

Nonetheless, the provisions in Section 5, requiring covered entities to respond to requests to access and delete information about themselves, are complex and would require substantial resources to implement. The ability for small businesses to delete covered information in lieu of complying with the correction requirements of the draft is a positive step. However, you should also consider applying all of the requirements only to covered entities that generated $25,000,000 in the previous year. Whether one of our member companies would need to verify a consumer request to edit or delete that consumer's data, the virtual infrastructure would need to be in place to adequately verify the identity of the requesting consumer. Substantial resource costs would be incurred whether the request is to delete or to correct inaccurate information, so the allowance the staff draft provides does not save small companies all that much in compliance costs.

It is one thing that many of our member companies are now "complying by proxy" with GDPR's consumer rights provisions, and thus, answerable to contract damages or at least disciplined by competition. It is another thing, however, to subject the typical App Association member—which averages roughly between one and 10 employees—to these complicated requirements and, by extension, to the up to $43,000 per-individual-violation civil penalty if they get it wrong. Additionally, applying consumer rights only to larger companies would not *lessen* the "complying by proxy" effect we see now among smaller companies like App Association members—more likely, the competitive pressure would only increase. If you ultimately decide to maintain the Section 5(a)(4)(B) alternative option for small businesses to delete in lieu of correcting information (instead of a broader small business carve-out), a preemption provision becomes even more important for small businesses to avoid possibly conflicting differences in how they must honor consumer rights. Finally, you should consider providing more time for small businesses under the statute to become compliant with the deletion and access requirements. This would allow small businesses to plan for compliance over time as opposed to allocating essential capital to the cost of immediate compliance.

a. The Approved Compliance Guidelines Program

The approved compliance program in Section 13 of the draft bill may help alleviate some of the concerns described above. The App Association members who opt for the safe harbor may be slightly less terrified of business-ending civil penalties if the FTC must first show that they strayed from the compliance program that certified them. That buffer would provide a level of comfort and probably would result in more robust economic activity without its presence. However, the similar Safe Harbor Program under the Children's Online Privacy Protection Act (COPPA) was largely a failed experiment, so we should carefully avoid the pitfalls experienced in that exercise.

There are reasons to believe that the compliance guidelines program in your draft bill would not fail for the same reasons as COPPA's. First, no COPPA safe harbor program could avoid the insurmountable difficulty for regulated companies of requiring parents to provide "verifiable parental consent" (VPC). The requirements in your draft do not appear to require such onerous tasks of consumers themselves. Second, experience shows that companies are so loath to deal with VPC that they alter their products and services completely to appeal to general audiences, avoiding (or trying to avoid)[3] COPPA altogether. The scope of your draft bill is (rightly) so comprehensive that companies are not likely able to slip away from its requirements and find themselves under less onerous regulations. Ultimately, however, even if the approved compliance program successfully serves its purposes, the entire array of requirements in the draft bill (with a few exceptions) applies to the smallest and largest companies in equal measure. An approved compliance program must include almost every requirement, from providing a right to access and delete information to creating a comprehensive data security program with the eight main features described in Section 9. Realistically, an approved compliance program would not lighten the draft's substantial regulatory burden by much, but we support its inclusion as a meaningful incentive for small companies to compete and comply by providing limited protection from steep penalties.

III. Limitations on Processing Covered Information

The draft's treatment of consent as implied "to the extent the processing is consistent with the reasonable consumer expectations within the context of the interaction" is an appropriate and flexible standard. Although the Commission may have some trouble applying the standard in complex circumstances, such is the nature of privacy harms—and the examples of appropriate processing activities that are likely consistent with reasonable consumer expectations are helpful. We urge the Committee to include internal data analytics for the purposes of "product development and improvement" (the bracketed text) as an example of the kinds of processing activities that may be consistent within the context of a covered entity's interaction with consumers. Our app developer members use their clients' or customers' in-app activities (which may be covered information) to analyze how people with certain attributes use parts of their products and services and under which circumstances. Understanding user behavior is key not just to developing *better* versions of what they've already made, but also to developing new products, systems, and services. The last thing we want is to discourage app developers from using personal data to make better products and services.

[3] *See, e.g.*, https://www.ftc.gov/enforcement/cases-proceedings/172-3083/google-llc-youtube-llc.

IV. Prohibition on Discriminatory Use of Data

We agree that covered entities should not have permission to use personal information to discriminate against consumers on the basis of race, gender, sexual orientation, or other protected attributes. It may be more efficient, however, to require the FTC to enter a memorandum of understanding (MOU) with the agencies that enforce antidiscrimination laws. The draft appears to impose a separate prohibition on discriminatory activities and conscripts the FTC to act as a civil rights enforcement agency. The emerging issues we observed where companies are using personal data as part of a scheme to discriminate against consumers are mainly new ways of violating old laws that fall outside the Energy and Commerce Committee's jurisdiction. The problem Section 11 should set out to solve, then, is a problem of evidence rather than the creation of a new prohibition on discrimination. The FTC is better situated to understand and collect the evidence, while the respective enforcement agencies have more experience and a better shot at success in court.

V. Covered Information

The draft's definition of covered information includes information "linked or reasonably linkable to a specific . . . consumer device." We urge the Committee not to include consumer devices in the definition of covered information because doing so would discourage the use of certain privacy protective measures from which App Association members benefit. For example, some consumer device makers, including smartphone makers, use rotating, ephemeral, unique device identifiers (UDIDs) to pinpoint precise location. Smartphone owners know that devices have gotten better over time at locating their precise location. This improvement is thanks in part to the ability for device makers to continuously add device locations to an encrypted database. In this process, the precise location is associated with a given device for a transient period of time, using a randomly generated UDID. The UDID is then deleted, and the location data becomes part of the dataset, where it is no longer associated with a specific device.

App Association members never have to use this dataset, and yet it is enormously valuable because it makes any application on your device that depends on your location more accurate. Even more importantly, the dataset accomplishes this without identifying the device or the person to whom it belongs. And yet, because the data must link to a device for a brief period of time, it could be considered covered data under the draft's definition. The inclusion of consumer devices in the definition of covered information, therefore, would discourage the more privacy-protective measure of ephemerally linking key data to a person's device. With transient UDIDs included in covered information, businesses would likely abandon those resource-intensive measures and simply leave data associated with devices and consumers, subjecting themselves to the provisions of the draft. If you ultimately decide to keep consumer devices in the definition of covered information, an alternative way of dealing with this issue could be to clarify that ephemeral UDIDs, which are disposed of when the associated data is stored, are an example of deidentified information in the bill. We believe this would be consistent with the current deidentified information provision, which excludes information "for which an entity takes reasonable measures to . . . ensure that identifying information has been removed."

VI. Preemption and Private Right of Action

The prospect that congressional action on privacy alone might establish a single national standard is not a guarantee. Therefore, we recommend that any privacy legislation Congress drafts include a

provision explicitly preempting state laws and rules dealing with privacy within the framework of the legislation. We acknowledge that some Members of Congress want to avoid a discussion of preemption until after other provisions have been addressed. From a small business standpoint, however, preemption is one of the most important elements of a federal privacy framework. If legislation does include a preemptive provision, we agree with many advocates that state attorneys general should be authorized to enforce the provisions of the law. Similar laws like COPPA have benefited from empowering state attorneys general to police for prohibited conduct. Moreover, we believe that Congress should authorize additional funds for the FTC to police privacy practices under a new federal privacy framework.

If negotiators agree on a private right of action, we urge you to ensure there are a few protections in place to guard against abusive litigation. First, remedies should be limited. In this case, if a private right of action applies generally to most or all provisions of the bill, the drafters should avoid creating a honey pot like liquidated or statutory damages for plaintiffs' attorneys. Making injunctions available would empower individuals to stop prohibited behavior or compel required actions. Whether a company is large or small, its employees want to focus on the company's customers and clients instead of litigation. The availability of an injunction gives substantial leverage to individual consumers to bring companies of all sizes to the table. Second, a private right of action should require the plaintiff to show some level of scienter. We would encourage drafters to require private litigants to show that a putative defendant *knowingly* violated the provision of the draft at issue. The wide variety of requirements in any comprehensive privacy bill are simply too numerous not to become a game of "gotcha" by trial attorneys absent a requirement to show scienter. Third, covered entities (especially smaller companies) should be afforded a period of time to correct alleged violations before a court will consider a claim. Under such a provision, the court would likely stay the complaint pending the "correction" period. If the plaintiff believes the defendant failed to cure the alleged violation, the court could then consider the evidence of the violation itself along with the evidence that it had been remedied within the allotted time period. Fourth, the provision could require a court to impose sanctions on an attorney that is found to have violated Rule 11(b) of the Federal Rules of Civil Procedure. This provision could help deter lawsuits that are baseless or filed primarily to harass the putative defendant. These are some basic safeguards that could ameliorate the potential litigation burden and prevent abusive lawsuits from clogging the courts (potentially locking out legitimate claims).

VII. Conclusion

We appreciate this opportunity to comment on your proposed legislation. We look forward to keeping in contact as you work toward potential introduction and take further steps.

May 29, 2021

Rebecca Kelly Slaughter
Acting Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, D.C. 20580

Re: Comments of ACT | The App Association re the Federal Trade Commission's Request for Comment Regarding Topics to be Discussed at Dark Patterns Workshop

Dear Acting Chair Slaughter,

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) on its request for public comment in relation to its "Bringing Dark Patterns to Light" workshop. The App Association appreciates the Commission's interest in this important topic and urges the Commission to focus on outright deceptive design decisions as the Commission seeks to establish greater oversight of dark patterns going forward.

I. Introduction and Statement of Interest

The App Association represents approximately 5,000 small business software application development companies and technology firms globally that create the technologies driving internet of things (IoT) use cases across consumer and enterprise contexts. Today, the App Association represents an ecosystem valued at approximately $1.7 trillion and is responsible for 5.9 million American jobs. Our members create innovative solutions that drive the world's rapid embrace of mobile technology. Their products power consumer and enterprise markets across modalities and segments of the economy.

The App Association serves as a leading resource in the privacy space for thought leadership and education for the global small business technology developer community.[1] We regularly work to keep our members up to speed on the latest policy and legal developments and to translate those into practical and useable guidance to ease the burden of compliance.[2] Furthermore, through our Innovators Network Foundation Privacy Fellowship, we support thought-leadership that covers a wide range of privacy issues,

[1] *See e.g., ACT | The App Association, What is the California Consumer Privacy Act (January 2020),* available at: https://actonline.org/wp-content/uploads/What-is-CCPA.pdf

[2] *See e.g.*, *ACT | The App Association, General Data Protection Regulation Guide* (May 2018), available at: https://actonline.org/wp-content/uploads/ACT_GDPR-Guide_interactive.pdf;

including dark patterns.[3] Relevant output from current fellows that touches on dark patterns include Lourdes Turrecha's work exposing the deceptive design choices that undermine user privacy within the Clubhouse app,[4] as well as Lorrie Cranor's research into the design choices that make it difficult for consumers to exercise their privacy choices on many websites.[5]

II. Introduction and Statement of Interest

Generally, the App Association agrees with conceptual framework posed in Harry Brignull's oft-cited definition of dark patterns, though we advocate for a more expansive scope. Brignull writes that, "Dark Patterns are tricks used in websites and apps that make you buy or sign up for things that you didn't mean to."[6] He further refines his definition through a taxonomy of 12 different types of dark pattern, including "roach motel" and "confirmshaming", which helpfully elucidate the breadth and depth of the manipulation and deception under question.[7] Yet while these categorizations are a useful starting point, "dark patterns" remains a frustratingly elusive concept to define and arguably includes a far greater range of players than currently recognized.

Dark patterns are by no means a design tactic relegated exclusively to the domain of cutting-edge startups or mobile applications. Cranor's research found inconsistent and at-times misleading user opt-out controls for email communications within a sample of 150 websites drawn from Alexa's ranking of global top 10,000 websites. The list includes websites from industries as diverse as finance, health, media, sports, and of varying sophistication and user design prowess.[8]

It is also important to recognize that dark patterns are extensions of tactics used in the physical world. Brignull's "roach motel" category includes design choices that require users to take exhaustive steps to effectuate a preference that may conflict with the business' preference. As an example, when examining the email opt-out procedure at the *New York Times* Cranor and Habib found that, "deleting the data they'd gathered on us required completing 38 different actions, including finding and reading the privacy policy, following a link to the data deletion request form, selecting a request type, selecting up to 22 checkboxes, filling in eight form fields, selecting four additional confirmation boxes,

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[3] *ACT | The App Association, Innovators Network Foundation Announces 2020-21 Privacy Fellows* (December 2020), available at: https://actonline.org/2020/12/08/innovators-network-foundation-announces-2020-21-privacy-fellows/

[4] Lourdes Turrecha, "When FOMO Trumps Privacy: The Clubhouse Edition", February 19, 2021. https://medium.com/privacy-technology/when-fomo-trumps-privacy-the-clubhouse-edition-82526c6cd702

[5] Hannah Habib and Lorrie Cranor, "An Empirical Analysis of Data Deletion and Opt-Out Choices on 150 Websites", *Soups 2019,* August 2019. https://www.usenix.org/system/files/soups2019-habib.pdf

[6] Harry Brignull, "What are Dark Patterns." https://www.darkpatterns.org/

[7] Harry Brignull, "Types of Dark Patterns." https://www.darkpatterns.org/types-of-dark-pattern

[8] Lorrie Cranor and Hannah Habib, "An Empirical Analysis of Data Deletion and Opt-Out Choices on 150 Websites", *Soups 2019,* August 2019. https://www.usenix.org/system/files/soups2019-habib.pdf

and completing an "I am not a robot" test."[9] Of course, the roach motel model was pioneered and perfected for years outside of the website and app context. Casino designers, for example, are notorious for constructing floor plans that intentionally disguise exits with the goal of manipulating guests into spending extra time within the facility. Few would call that a dark pattern because it occurs within the physical world, yet it seems equally manipulative to the opt-out practices at the *New York Times*.

It might also be more useful to think of dark patterns as design choices in *any* type of business-to-user interaction that cause the consumer to purchase or sign up for things they didn't mean to. For example, the use of dark patterns in political advertising and fundraising, often conducted over email rather than through a website or app, is extremely well-documented. Examining a corpus of over 100,000 emails sent during the 2020 U.S. election cycle, researchers found manipulative tactics in 43 percent of communications, with 99 percent of campaigns using such tactics at least occasionally.[10] Insofar as the FTC seeks to bolster its monitoring of the marketplace for examples of dark patterns, it should remain aware that the practice is widespread, cross-cutting between industries, and endemic to many types of communication technologies.

Clearly, part of the issue in defining dark patterns stems from an ongoing migration of markets from analogue to digital spaces, across industries. Some dark patterns, such as "confirmshaming", are clearly holdovers from longstanding face-to-face sales tactics in which salespeople employ behavioral nudges in order to close a sale or upsell a service. As with such sales tactics, confirmshaming should be understood to encompass a wide range of activities that run from innocuous to outright deceptive, the latter of which should be the main source of attention from regulators. Confirmshaming, as currently understood, could include a prompt as simple as "are you sure you wish to opt-out", a necessary piece of developer due diligence that could be construed as guilting a customer. While certainly starker when presented plainly on a website or app than when spoken aloud in a sales context, such a prompt hardly seems out of place in the broader marketplace and surely does not constitute an unfair or deceptive trade practice. The App Association would urge the FTC to focus its attention on examples of dark patterns that clearly deceive and bring harm to a user.

III. Conclusion

The App Association urges the commission to carefully consider a definition of dark patterns. While there is a great opportunity to clarify and rid the market of harmful practices, an ambiguous or overinclusive definition may harm app developers simply seeking to do the right thing. The most prudent path may be to define dark patterns as

[9] Lorrie Cranor and Hannah Habib, "It's shockingly difficult to escape the web's most pervasive dark patterns", *Fast Company,* November 4, 2019. https://www.fastcompany.com/90425350/its-shockingly-difficult-to-escape-the-webs-most-pervasive-dark-patterns

[10] Hamin et al., "Manipulative Tactics are the Norm in Political Emails", Princeton University Center for Information Technology Policy, October 5, 2020. https://electionemails2020.org/assets/manipulative-political-emails-working-paper.pdf

technology-agnostic communication practices that outright deceive users into purchasing services the user did not intend to. We thank the Commission for the opportunity to comment and hope the information we provided assists its thinking on this important issue.

Sincerely,

Brian Scarpelli
Senior Policy Counsel

Matt Schwartz
Privacy Fellowship Coordinator

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ACT | The App Association

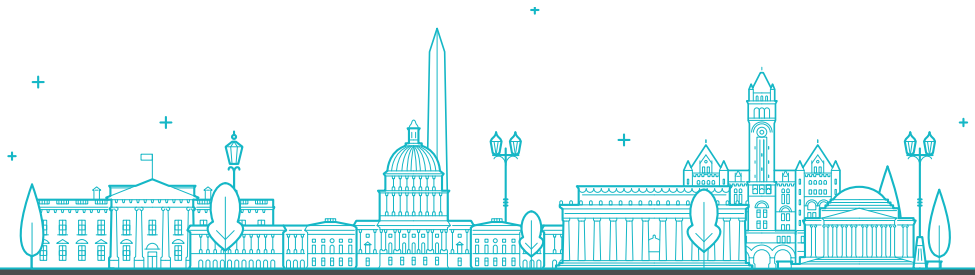
Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms

Testimony of

Morgan Reed
President
ACT | The App Association

Before the

U.S. Senate Judiciary Committee,
Subcommittee on Antitrust, Competition Policy and Consumer Rights



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I. Introduction

We thank the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights for holding this hearing on the effect large, technology-driven platform companies have on competition. This hearing provides an important venue for the debate around how certain public policy concepts, including competition law, apply in a variety of markets characterized by the presence of large companies with global reach. ACT | The App Association is the voice of small business tech entrepreneurs, and we appreciate the Subcommittee welcoming the views of our members on how best to safeguard innovative market activity and job creation in tech-driven industries.

The App Association is a trade group representing about 5,000 small to mid-sized software and connected device companies across the globe. In the United States, our member companies are part of a $1.7 trillion industry, supporting about 5.9 million jobs. If these seem like surprisingly high figures, it could be because there is a tendency to look only at the consumer-facing or most-downloaded apps in the Apple App Store or Google Play when referencing the market for apps. But these are a small fraction of the app economy. Most of our member companies make white label software—that is, they build software and provide services for other companies. If a member company makes an app for another firm, it's usually the client's logo that goes on the app. And the app itself may not be consumer-facing at all, it may be a management program for internal use by a brewery, hospital, or manufacturer. What virtually all of them have in common, though, is that they leverage software platforms to reach their clients and customers. We urge the Subcommittee to look beyond sales to consumers when thinking about the App Association's members and the app economy in general.

We actively facilitate engagement between app developers, investors, and platforms in fora across the country.[1] For example, just last month, we concluded a series of 12 events across the nation (Developed | The App Economy Tour) highlighting local success stories from the app ecosystem. Our destinations included Minneapolis, Charleston, and St. Louis. Our panelists ranged from founders of fledgling small mobile software companies to venture capitalists to legal experts discussing subjects like federal and state privacy legislation, access to funding, and workforce development.[2] The constituents of members of this Subcommittee drive competition in the app ecosystem, and with these events, we showcased the innovation happening everywhere in the United States. We urge this Subcommittee to carefully consider how any potential changes to relevant federal law would affect your constituents. As the App Economy Tour highlighted, competition is alive, well, and thriving in the states you represent. The tour itself, which featured small startups and innovators taking on major challenges, is a testament to how software platforms have helped democratize entrepreneurship, seeding thriving app ecosystems in every state across the nation.

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[1] *See, e.g.*, ACT | The App Association, "Queen City Mobile Summit highlights Cincinnati as mobile tech hub," (Feb. 23, 2016), *available at* https://actonline.org/2016/02/23/queen-city-mobile-summit-highlights-cincinnati-as-mobile-tech-hub/.

[2] *See* ACT | THE APP ASSOCIATION, DEVELOPED | THE APP ECONOMY TOUR, https://actonline.org/developed/ (last visited Mar. 9, 2020).

In this hearing, the Subcommittee is examining the characteristics of competition between larger companies that act as both platforms and competitors in adjacent markets. Our testimony focuses not on social media or retail platforms, but on software platforms. Software platforms are the app stores—which in some cases come with operating systems and smart devices—on which developers sell their apps and from which our member companies buy developer services. It is through this root system that the app economy has permeated and redefined the economy as a whole, rendering notions of a separate "tech industry" outdated. Software platforms and developers—leveraging ubiquitous connectivity and access to cloud computing—are superimposing a tech-driven element to virtually all industries across the economy from agriculture to healthcare. As a result, competition has new and dynamic characteristics not just in tech, but everywhere. App Association member companies are at the center of these market changes, and their continued ability to create jobs in your states depends on robust enforcement of antitrust laws where appropriate and allowing competition to take place where intervention is inappropriate.

We urge the Subcommittee to take a few important considerations into account in this inquiry. First, software platforms have reduced barriers to entry for tech entrepreneurs and enhanced choices for consumers. Second, software platforms help innovators enter and even create new markets. Third, the antitrust concerns that focus on software platforms are often overstated and should be weighed against other policy considerations. Fourth, software platforms are not perfect. Developers want more transparency and continued improvements to security and safety. Our member companies want platforms to compete for their business, and they want to ensure competition is robust.

II. Platforms Have Reduced Costs for Developers and Enhanced Competition and Choices for Consumers

Consumers and developers experienced significant changes since the introduction of various mobile software platforms. In addition to having more choices, consumers also benefit from lower prices for software and even access to new markets that did not previously exist. Similarly, developers benefit from lower overhead costs, built-in customer trust, and wider distribution and market access.

Choices proliferated because entry into the software market is much easier now than it was before platforms.[3] Before platforms, the nature of the marketplace forced software developers to take on tasks that were well beyond their core competencies—from marketing to protecting their intellectual property and negotiating with a variety of different types of companies to distribute their products. The transaction costs of taking

[3] Daniel Ershov, *The Effects of Consumer Search Costs on Entry and Quality in the Mobile App Market*, TOULOUSE SCHOOL OF ECON. (Apr. 18, 2018), *available at* https://www.cemfi.es/ftp/pdf/papers/wshop/DErshov_MobileAppCompetition_Jan2018.pdf.

on all these extra tasks were significant, and platforms have eliminated many of them. The resulting environment is one in which small companies like App Association members can retain their size, stay where they were founded, and thrive. Our member companies experience a wide variety of growth trajectories, meaning growth to the size of companies like Facebook or Uber is not the only measure of success. To fully appreciate the depth of the app economy and its potential, one must look well beyond the "Top 10" apps in the major app stores or the eye-catching headlines covering the initial public offerings of unicorn companies.

Before the ubiquity of mobile platforms, the software ecosystem ran on personal computers. This forced early app companies, often with teams of just one or two developers, to wear many hats to develop, market, and manage their products. App companies were not only required to write code for their products, but they were also responsible for: 1) managing their public websites, 2) hiring third parties to handle financial transactions, 3) employing legal teams to protect their intellectual property, and 4) contracting with distributors to promote and secure consumer trust in their product. App developers, trained in software coding and project management, were not well-equipped to carry out these tasks, and the additional steps cost them valuable time and money, with little tangible benefit.

Without platforms, developers had to take all of these additional steps, creating friction at each point, which meant that the only software titles that were available to the public were those that made the complicated journey from development to publishers to retailers like CompUSA or Best Buy. In 2003, CompUSA rolled out an early concept of a software platform consisting of a kiosk that burned made-to-order CDs containing software applications. With this system, the retailer could offer more software programs than it could fit on its shelves (which is how software was sold at that time), providing 1,200 titles from 200 different publishers.[4] Now, there are more than 317,673 companies active in the mobile app market in the United States[5] and more than 2 million apps available on the major app platforms. The kiosks are now in our smartphones—there are more than 5.28 billion mobile broadband subscriptions worldwide as of 2018[6]—which are attached to smartphones in the pockets of over 80 percent of Americans,[7] saving them the trip to Best Buy to purchase the box software.[8]

In the internet economy, immediate consumer trust is almost impossible without a substantial online reputation, and not attaining that trust spells death for any app company. However, what does "trust" mean? In this context, trust refers to an

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[4] Brian Osborne, "CompUSA offers software vending machines," GEEK.COM (Dec. 12, 2003), *available at* https://www.geek.com/news/compusa-offers-software-vending-machines-551706/.
[5] DELOITTE, THE APP ECONOMY IN THE UNITED STATES (Aug. 17, 2018), available at http://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-US.pdf.
[6] Mike Murphy, "Cellphones now outnumber the world's population, QUARTZ (Apr. 29, 2019), available at https://qz.com/1608103/there-are-now-more-cellphones-than-people-in-the-world/.
[7] Adam Lella, U.S. Smartphone Penetration Surpassed 80 Percent in 2016, COMSCORE (Feb. 3, 2017) Available at: http://bit.ly/2pT04qo.
[8] *See,* Ashley Durkin-Rixey, "Out of the Box: How Platforms Changed Software Distribution," (Sept. 28, 2018), *available at* https://actonline.org/2018/09/28/out-of-the-box-how-platforms-changed-software-distribution/.

established relationship between the app company and customer where the customer has the confidence to install the app and disclose otherwise personal information to an app company. Prior to platforms, software developers often handed over their products to companies with a significant reputation to break through the trust barrier.

At first, developers were reluctant to join platforms, worried that the model might not accommodate their ability to "launch fast and iterate"[9] their apps. But successful platforms changed the app ecosystem by providing app developers with ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users[10] worldwide. With lower costs and barriers to entry, both fledgling and established app developers can find success. For example, educational app company L'Escapadou secured 1.3 million downloads and earned more than $1.5 million from app sales between 2010 and 2014,[11] a success attributed to the centralized nature of platforms. Founder Pierre Abel specialized the language, content, and pricing of each of his apps based on consumer and market needs and marketed them on different platforms to reach a variety of consumers around the world.

III. There's a Platform for That

As successful as the past 12 years have been for the app economy, the next decade could be even better. In just the third quarter of 2019, the two major app stores generated $21.9 billion in revenue—a robust 23 percent year-over-year increase from the third quarter of 2018.[12] This growth suggests the developer-platform model is still succeeding. Moreover, app economy growth is likely to endure because developers are continuing to create new products, services, and markets that did not exist prior to platforms. Perhaps the most notable of these is the market for ridesharing. Connecting a driver—using his or her own car—to a potential passenger in real-time for an on-demand ride to a destination selected by the passenger was impossible before developers could use the GPS capabilities and data connections of smartphones. Ridesharing is an important example of how app developer ingenuity meets the capabilities, built-in trust, and developer services of platforms to create new options for consumers.

Just as ridesharing fundamentally changed how we get around, developers and platforms also revolutionized how we access healthcare. A current shortage of about 30,000 physicians in the United States—projected to increase to up to 90,000 in the

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[9] To launch fast and iterate is often used to describe a software developer's business plan, where software developers like to launch products as soon as they are finished and like to update newer iterations of their product actively. Paul Graham, "Apple's Mistake," PAULGRAHAM.COM (Nov. 2009), *available at* http://www.paulgraham.com/apple.html.

[10] Simon Kemp, "The global state of the internet in April 2017," TNW (Apr. 11, 2017), *available at* https://thenextweb.com/contributors/2017/04/11/current-global-state-internet/.

[11] Steve Young, "Making $1.5 Million with Educational Apps with Pierre Abel," APP MASTERS (Apr. 30, 2015), *available at* http://bit.ly/2hgDzZH.

[12] Craig Chapple, "Global App Revenue Grew 23% Year-Over-Year Last Quarter to $21.9 Billion," Sensor Tower Blog (Oct. 23, 2019), *available at* https://sensortower.com/blog/app-revenue-and-downloads-q3-2019.

next six years[13]—contributed to the need for caregivers and patients to find new ways of communicating. Compounding the caregiver shortage, 133 million Americans currently live with chronic conditions—most of them residing in rural areas with long drives to their nearest provider.[14] Devices, sensors, and software are now capable of gathering and analyzing physiological data like movement, heart rate, or blood oximetry so that physicians can better monitor their patients at home and address potential problems before they occur or worsen.[15] Studies show that preventive care regimes that use connected health tools are especially useful for patients with chronic conditions like diabetes and heart failure, which tend to affect underserved and rural communities especially.[16] But how do these capabilities reach patients and consumers, specifically those who need them most? Most Americans already interact with platforms, through a variety of devices. We know that smartphone adoption rates are increasing among underserved populations in the United States and that for many, their handheld device is their only means of accessing the internet.[17] Here again, developers are leveraging the ubiquity and trusted framework of platforms to produce healthcare innovations that address a variety of health conditions. Moreover, in this case, the platform-developer dynamic helps caregivers reach patients in rural and underserved areas.

One of the central markets at issue is the market for developer services, where a developer pays a platform for assorted services including distribution, marketing, etc. This market also experiences vigorous competition. There is a tendency to include only two platform companies, Apple and Google, in this category of competitors. But for developers, the market is much wider. A game developer can choose platforms like Epic or Steam, and enterprise developers can look to hundreds of proprietary, custom platforms or could create their own. For example, companies like App47 create app platforms for everything from "bulldozers to ultrasound devices."[18] Moreover, for developers looking to reach a general audience, using the web is an alternative, especially for companies that are looking for different kinds of distribution or search services than those available on platforms. Additionally, software developers could choose to advertise on Facebook or distribute their products through Amazon, or one of

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[13] *See* Connected Health Initiative, "Testimony of Morgan Reed, Executive Director, The Connected Health Initiative, Before the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security," (Sept. 25, 2018), *available at* https://actonline.org/wp-content/uploads/CHI-Testimony-Health-Care-in-Rural-America.pdf.

[14] *See Id.*

[15] *Id.*

[16] *See, e.g.,* Clinical Outcomes, Care innovations, at 2, available at http://www.connectwithcare.org/wp-content/uploads/2017/06/2016_Outcomes_Clinical-1.pdf (showing the results of a study by Care innovations and University of Mississippi Medical Center, indicating that the first 100 patients with diabetes enrolled in a program with a remote monitoring component saved the state $336,184 in Medicaid dollars over six months); Testimony of Michael P. Adcock, Exec. Dir., University of Mississippi Med. Ctr., Hearing on "Telemedicine in the VA: Leveraging Technology to Increase Access, Improve Health Outcomes & Lower Costs," (May 4, 2017), available at https://www.appropriations.senate.gov/imo/media/doc/050417-Adcock-Testimony.pdf ("The Mississippi Division of Medicaid extrapolated this data to show potential savings of over $180 million per year if 20 percent of the diabetics on Mississippi Medicaid participated in this program").

[17] Charkarra Anderson-Lewis, MPH, PhD, et al, "mHealth Technology Use and Implications in Historically Underserved and Minority Populations in the United States: Systematic Literature Review," (Jun. 18, 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6028762/.

[18] APP47, *available at* https://app47.com/.

the giant Chinese platforms. It is worth noting, however, that there are some important distinctions between software platforms—like the App Store or Google Play which provide a marketplace for software apps—and social media platforms or "aggregators" that connect people with information and run on data.[19] Aggregators like Facebook and Twitter, for example, connect people with information and other people (and generate valuable data in the process), while the Google Play store and the App Store provide a marketplace for consumers and app developers to transact directly. These differences illustrate the diversity in the market for distribution methods, as developers may prefer one model over another.

Perhaps most importantly, the universe of platforms is continuing to evolve and expand as diverse kinds of hardware connect to the network. New platforms are cropping up for wearables made by companies like Garmin. Connected home devices and cars drive cross-platform interoperability so that Alexa can communicate with your Samsung appliances or your Ford Fusion—further weighing against conceptions of platform markets where a single player wields market power. These characteristics tend to show that developer services will continue to improve and evolve along with demand. Federal intervention may be necessary where market power exists and raises prices undisciplined by competition or maintain a monopoly position in order to reduce quality or decrease output. But when those factors are not present and competition drives the market, as it does in developer services, intervention is unlikely to help and may harm competition or consumer welfare.

IV. Antitrust Concerns Specific to Software Platforms are Often Exaggerated and Should be Weighed Against Other Policy Considerations

Platforms play an important role not just in tech-driven markets but also across a variety of economic sectors. They exist to bundle together a set of services for sellers and connect those sellers with specific categories of buyers, thus "disintermediating" the market. Under a typical antitrust analysis, self-preferencing by platforms is in most cases procompetitive because it is an example of vertical integration.[20] Where vertical integration or self-preferencing lead to greater efficiency, better quality, or lower costs for consumers, there is no antitrust issue, and there is also no reason to consider extending antitrust law to bar such pro-consumer activity. For example, requiring Apple or Google to uninstall software supporting the cameras on smartphones would probably not be a pro-consumer development—the vertical integration of that feature into the platform is on balance a good thing for smartphone users. But make no mistake, vertical integration does not get a free pass. Antitrust authorities should analyze instances of self-preferencing and vertical integration generally and they have brought enforcement

[19] *See, e.g.,* Ben Thompson, "Tech's Two Philosophies," STRATECHERY (May 9, 2018).
[20] *See* Maurits Dolmans and Tobias Pesch, "Should We Disrupt Antitrust Law?" Cleary Gottlieb Steen & Hamilton LLP (Jul. 18, 2019), *available at* https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf.

actions against companies that apply the antitrust laws on the books, establishing important precedent that bars harmful vertical integration. Nonetheless, with smartphones serving as music players, cameras, and multimodal communications devices, a skeptical view of the integration of those features into the devices is incongruous with the way consumers experience them. Moreover, we can expect competition to discipline examples where self-preferencing is bad for consumers because they can leave the platform. Just like other categories of market activity, an antitrust inquiry into self-preferencing is generally only appropriate where the company at issue has market power (in other words, a lack of adequate competition) and where it is using that market power to harm competition and consumers. Unfortunately, the European Union (EU) has proposed flipping the burden to platforms to show that self-preferencing has "no long-run exclusionary effects" and "either the absence of adverse effects on competition or an overriding efficiency rationale."[21] We would discourage such a proposal in the United States because it would chill market activity that is likely to benefit consumers.[22] Although it would appear to help some of our member companies in the short run to target self-preferencing, the long-term effects of making procompetitive activity more difficult or illegal would tend to harm the economy and ultimately our member companies as well.

Some competitors are asking for an increase in the scope of antitrust law, but they tend to overstate the problems they identify. For example, advocates for legislative intervention point to the cost of the services software platforms provide to developers as evidence that Congress should expand antitrust law.[23] To show that paying for developer services is unfair, they compare the cost of software distribution to the cost of payment processing.[24] This is kind of like comparing the cost of a set of tires to the cost of a car. Yes, the tires are a part of the car, but nobody thinks a car is only a set of tires or that tires should always cost the same as a car. Similarly, payment processing is just one element of the array of services you get on a software platform, which include: immediate availability through hundreds of millions of people's devices; payment processing; marketing through the app store; privacy features embedded in the platform; assistance with intellectual property protection; and security features built into the platform. The stated problem, therefore, seems to be that software platform developer services are too expensive. But again, the problem is overstated because this cost is being compared to the cost of a much less substantial service. Therefore, it does not appear to be a compelling reason to expand antitrust law or create a regulatory regime with a purpose of reducing the price of developer services.

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[21] HEIKE SCHWEITZER, JACQUES CRÉMER AND YVES-ALEXANDRE DE MONTJOYE, COMPETITION POLICY FOR THE DIGITAL ERA: FINAL REPORT 7 (2019) (the "EU Report"), *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[22] It is unclear how the EU would apply this concept and researchers point to a lack of direct caselaw on the theory of harm as it was raised in a case against Google. *See* Beata Mäihäniemi (LL.D.), "Lessons from the Recent Commission's Decision on Google. To Favour Oneself or Not, That is the Question," Working Paper, The Legal Tech Lab, Univ. of Helsinki 13 ("This new theory of harm . . . is however, difficult to apply . . . in practice, as one cannot find any direct case law on the issue in question.").

[23] *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the H. Judiciary Comm., Subcomm. on Antitrust, Commercial, and Admin. L.*, 116th Cong. 7 (2020) (statement of David Heinemeier Hansson, CTO & Cofounder, Basecamp) ("Most mobsters would not be so brazen as to ask for such an exorbitant cut . . .") (Basecamp Testimony).

[24] *Id.* at 7.

The other evidence advocates offer to show harm to competition is that making software available on the open internet is free (it is not),[25] whereas software distribution on a platform generally costs money.[26] As alluded to above, selling software on the open internet requires the seller to take on several tasks the software platform bundles together (including marketing, intellectual property policing, privacy controls, security features, and payment processing). And even taking it at face value, the premise has the inconvenient characteristic of proving the opposite point—that is, selling software on the open internet can be a substitute for selling software on a platform. Not only that, detractors of software platforms say they have no choice but to submit to software platform demands and then in the next paragraph, admit that they need not submit to software platform demands because they sell their software on the open internet instead.[27] It is hard to imagine that this internal inconsistency goes unnoticed, and observers likely cannot help but discern from this that software sellers have options. Indeed, other developers have made the transition off platforms without claims of anticompetitive conduct.[28] Substitutes, even when they are not identical, are common in market economies and tend to signal healthy competition.

The other conclusion we can draw from these arguments is that policymakers should be wary of opportunistic behavior by well-resourced competitors disguised as antitrust concern. Those who are most vocal often imply they are speaking for the app economy as a whole,[29] but in reality, they tend to be larger companies seeking to use antitrust law or other policy levers to undermine competitors. Right now, the largest software platforms charge the same (as a percentage of revenue) for developer services regardless of the company's size or political clout. Smaller developers have the advantage in this arrangement because they do not have the leverage to negotiate better terms on their own, as larger companies do. Overtures to have Congress involve itself in developer-platform relations, therefore, may benefit the largest software companies on the platforms but may actually make small developers like App Association members worse off. If large software companies are able to convince Congress to require software platforms to give them a better deal, App Association members and their clients and customers are forced to subsidize the resulting discount for these larger companies. Adding insult to injury, many of our member companies

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[25] If a software company opts to reach its customers through the open internet instead of a software platform, the company still needs to invest in overhead costs the platform would otherwise handle, including marketing, intellectual property management, privacy and security features, and payment processing.

[26] *Id.*

[27] *See, e.g.,* Basecamp Testimony at 7.

[28] *See*, *e.g.*, Nick Statt, "Fortnite for Android will ditch Google Play Store for Epic's website," THE VERGE (Aug. 3, 2018), *available at* https://www.theverge.com/2018/8/3/17645982/epic-games-fortnite-android-version-bypass-google-play-store ("CEO Tim Sweeney says the primary motivation here is twofold. Epic wants to maintain its direct relationship with consumers."); Chris Welch, "Netflix stops offering in-app subscriptions for new and returning customers on iOS," THE VERGE (Dec. 28, 2018), *available at* https://www.theverge.com/2018/12/28/18159373/netflix-in-app-subscriptions-iphone-ipad-ios-apple.

[29] Daniel Ek, Founder and CEO, Spotify, "Consumers and Innovators Win on a Level Playing Field," Spotify (Mar. 13, 2019), *available at* https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/ ("So, let me be clear that this is not a Spotify-versus-Apple issue. We want the same fair rules for companies young and old, large and small.").

compete with these larger firms, so the advantage handed to the larger companies could directly disadvantage App Association members.

Even as the antitrust concerns expressed in this area are often overstated, a competition analysis of these dynamics is not always the final say, and antitrust concerns may conflict with countervailing policy priorities. For example, policymakers raised alarms over measures software platforms use to protect consumer privacy. In one instance, a software platform faced antitrust concerns after a decision to curtail apps' ability to track a consumer's location even when the app is not running unless the consumer clearly consents. Advocates exert a steady stream of pressure on software companies and platforms to improve their privacy practices, especially with respect to location data.[30] They often point to the opaque or even misleading manner in which companies collect such sensitive personal information. As one advocate argues, "[p]rivacy is often framed as a matter of personal responsibility, but a huge portion of the data in circulation isn't shared willingly—it's collected surreptitiously and with impunity."[31] Privacy controls at the platform level help ameliorate this perceived problem by making it easier to set collection rules for all or specific apps.

Policymakers at all levels have made it clear that companies should embed privacy into the design of their products and services.[32] Accordingly, the purpose of a privacy prompt from the platform's operating system should not be to confuse a consumer into selecting an option that gives away more data than they intended. It follows that requiring platforms to make it easier to provide location data (even when an app is not running) than it is to protect that data runs headlong into the policy imperative of privacy by design. Looking at the issue solely from a competition lens is, therefore, an incomplete view. Moreover, the more privacy protective approach of one software platform differentiates it competitively from other platforms that arguably make it easier for developers to collect sensitive data. In resolving these policy tangles, the focus should be on what works best for consumers. Antitrust law by itself rightfully addresses consumer welfare—it does not seek to benefit competitors. So, if a platform has an offering that a consumer prefers over the offering of an independent developer, policymakers should ask whether the complaints of powerful competitors necessitate legislating away that choice.

App Association members are selective about the markets they enter, but they compete aggressively. And the presence of a powerful and well-resourced competitor is not always enough to totally discourage entry. For example, our Minneapolis-based member company Vemos provides a dashboard for nightlife and event venues to manage the growth of their businesses.[33] The presence of incumbents like Eventbrite

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[30] *See, e.g.*, EPIC.ORG, LOCATIONAL PRIVACY, *available at* https://epic.org/privacy/location/.
[31] "EFF Report Exposes, Explains Big Tech's Personal Data Trackers Lurking on Social Media, Websites, and Apps," Press Release (Dec. 2, 2019), *available at* https://www.eff.org/press/releases/eff-report-exposes-explains-big-techs-personal-data-trackers-lurk-social-media (quoting Bennett Cyphers, EFF staff technologist and report author).
[32] *See, e.g.,* "FTC Issues Final Commission Report on Protecting Consumer Privacy," Press Release, FED. TRADE COMM'N (Mar. 26, 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/03/ftc-issues-final-commission-report-protecting-consumer-privacy.
[33] VEMOS, https://www.vemos.io/ (last visited Mar. 9, 2020).

was not a deterrent because Vemos differentiates itself from incumbents by compiling data from and interoperating with a variety of event management tools and analyzing the data to provide insights into how clients can improve their events and businesses. Having a lot of resources is an undeniable advantage as a competitor (whether it is a platform or not), but our member companies exist because they fill a niche with a differentiated product, they can compete on price, or they can simply outmaneuver the larger competitors. The continued existence and success of camera apps on the two largest app stores are an example of companies competing directly with a platform. Camera+ was an early app that exceeded the software capabilities of Apple's early camera app, pressing Apple to produce better camera software. Now, Camera+, ProCamera, Halide, and several other camera apps are all popular downloads and offer iPhone users a variety of options aside from the native app.[34] But that is not to say a company with a competing offering should never be purchased by a larger company. There are three main definitions of success for a small company: passing the company along to the next generation; being purchased by a larger company; or (much less often) an initial public offering (IPO). Being purchased is often the best of these three options for the business owner and consumers—after all, IPOs are expensive and fraught with risk.[35] A purchase that helps produce better products or services for consumers is both a natural and beneficial end for some companies and healthy from a competition perspective.

V. Platforms Aren't Perfect

Although developers can choose from multiple platforms, there is no such thing as a perfect platform. Our member companies pay a fee to platforms for developer services, and they expect those services to meet their needs. Just as online companies must clearly communicate their data practices to consumers, so must platforms clearly define the requirements and details of their terms of service to developers. For example, when platforms change their developer guidelines, they must communicate clearly and ensure developers understand what the changes mean for them and their customer relationships. Occasionally, we hear from a member company that an ill-defined change significantly impacted their business. For example, a software platform recently put a member company that provides a call blocking app on notice for temporary removal unless it made changes to how it obtained permission for gathering incoming call data.[36] The platform did not clearly explain how its policies changed or why they would necessitate action on the app's part, but it was the first removal notice of its kind in the

[34] *See* Tara Schatz, "10 best camera apps for iPhone that beat the iOS camera," MACPAW (Dec. 24, 2018, *updated* Feb. 13, 2019), *available at* https://macpaw.com/how-to/best-iphone-camera-apps.
[35] *See* Will Rinehart, "Welcome to the Kill Zone? A closer look at merger and start-up data suggests it's a cultivation zone," THE BENCHMARK (Feb. 27, 2020), *available at* https://medium.com/cgo-benchmark/welcome-to-the-kill-zone-852339601fbb ("For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year. Most IPOs perform worse than the overall market.").
[36] Graham Dufault and Madeline Zick, "What's More Control with Fewer Options?" ACT | THE APP ASSOCIATION (May 21, 2019), *available at* https://actonline.org/2019/05/21/whats-more-control-with-fewer-options/.

app's nine years on the platform. Ultimately, the platform did not remove the app, but the process for remaining on the store was opaque and difficult enough to navigate that the company looked to us, their trade association, for help. Relevantly, this occurred amid a major update to California's privacy laws, so it may be an example of the unintended consequences of government intervention.

Especially for enterprise app developers, a software platform's safety and security are essential elements of developer services. Software platforms' security features improved markedly over the course of their existence. Whereas unlocking a device used to require a four-digit passcode, devices are now capable of biometric-based authentication, and software platforms make these authentication measures available to developers as well so that they can also benefit from these heightened security measures. But the game of cat-and-mouse between cybersecurity professionals and hackers will never end, and security must continue to evolve to meet and beat the threats. Although some platforms do not control device security, developers want the platform's security features to work seamlessly with any relevant hardware and that they account for all attack vectors. Software platforms should continue to improve their threat sharing and gathering capabilities to ensure they protect developers across the platform, regardless of where threats originate. Moreover, they should approve and deploy software updates with important security updates rapidly to protect consumers as well as developers and their clients and users. The same is true when it comes to privacy controls. App developers strongly desire platform-level privacy controls they can adapt for their products and services. The types and nature of these controls vary among platforms and this variation should result in continuously improving options that iterate with end user expectations and privacy risks.

Similarly, software platforms play a significant role in helping small developers enforce their intellectual property (IP) rights. Our member companies' IP helps eliminate the inherent disadvantages of being a small, innovative company by enabling them to protect the fruits of their ingenuity from larger firms that might want to take it. Unfortunately, some of our member companies fall victim to IP thieves that succeed in selling the pirated content or using it to steal ad revenue on platforms. Ad networks can and do help mitigate the pirated ad revenue problem,[37] but platforms must also vigorously police their app stores for stolen content. With vast online stores, it is difficult for a platform to verify legitimate requests to remove allegedly pirated content. But a single app developer should not need the help of a legal team or trade association to resolve the issue. In one instance, an App Association member company, Busy Bee Studios, approached us when it was unable to convince the platform to investigate an app that appeared to have been stolen from Busy Bee. With our assistance, the platform investigated the issue and found that the infringing app was in fact stolen content.[38] But the time and resources it took our member company—which only has a few employees—to resolve the issue were significant and could have gone toward the development of their next app. Since this issue arose, IP resolution processes improved

[37] *See, e.g.,* Trustworthy Accountability Group, *available at* https://www.tagtoday.net/.
[38] *See* Alex Cooke, "Member Monday: How One Small Developer Fought a Rogue App," (Nov. 26, 2018), *available at* https://actonline.org/2018/11/26/member-monday-how-one-small-developer-fought-a-rogue-app/.

across the board, but the story is a reminder that they are important and in-demand developer services that platforms should improve in order to compete for developers.

VI. Congress Can Help Maintain a Level Playing Field

Our members' ability to create jobs and develop innovative software depends on strong IP protections, a stable standards-setting system, and access to talent. In order to ensure the growth of the app economy, small, innovative companies must be able to pursue IP claims affordably and challenge claims that should not have been granted in the first place. For instance, we applaud the House of Representatives' recent passage of the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (S. 1273), which would establish a voluntary small claims board at the Copyright Office, a less-expensive alternative for companies with important infringement claims but fewer resources. Similarly, when it comes to patents our members support the current process for *inter partes* review (IPR) because IPR proceedings cost on average in the low six-figure range versus up to $5 million for a typical patent in federal court. While the low six-figures is still out of reach financially for many small businesses, an IPR provides much-needed leverage to companies faced with the possibility of litigation in federal court.

Another IP-related issue important to our members is their ability to rely on technical standards like WiFi, 4G, and 5G. In the United States, the private sector leads standards setting, with the participation of government actors. For example, IEEE recently finalized the WiFi 6 (or IEEE 802.11ax) standard.[39] Like many technical standards, WiFi 6 consists of technologies, many of which are patented, volunteered by companies who seek to make their IP "essential" to the standard. In other words, in order to manufacture a device that interconnects to WiFi 6, the manufacturer must obtain a patent license from each of the companies with patents essential to WiFi 6. As a corollary, the companies that own these standard-essential patents (SEPs) must agree to license their SEPs to any willing licensee on terms that are fair, reasonable, and non-discriminatory (FRAND).[40] When SEP owners go back on these promises and instead refuse to license to manufacturers, and then seek exorbitant license fees from downstream companies, antitrust concerns are raised. This is an area where antitrust law certainly plays a role and should be appropriately enforced by regulators. The Federal Trade Commission (FTC) recently brought such an antitrust complaint against Qualcomm, and the App Association filed an amicus brief supporting the FTC's claims.[41] The case is on appeal with the 9th Circuit. If Qualcomm successfully overturns

[39] Robert Saracco, "WiFi 6 is Rolling," IEEE BLOG (Nov. 8, 2019), *available at* https://cmte.ieee.org/futuredirections/2019/11/08/wifi-6-is-rolling/.
[40] DEPT. OF JUSTICE, NAT'L INSTITUTE FOR STANDARDS AND TECH., AND UNITED STATES PATENT AND TRADEMARK OFFC., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download.
[41] Brief of Amicus Curiae ACT | The App Association in opposition to Qualcomm's Motion for Partial Stay Pending Appeal, *Fed. Trade Comm'n v. Qualcomm Inc.*, 9th Cir. No. 19-16122 (filed Jul. 19, 2019).

the ruling against it at the district court level, it could have dire consequences—not just for the smartphone ecosystem but for automakers and the IoT ecosystem generally[42]—as SEP owners adopt the licensing practices at issue in that case. We urge this Subcommittee to ensure antitrust law is enforced vigorously where SEP abuse harms competition and consumers.

VII. Conclusion

We appreciate this opportunity to provide testimony in this important hearing. Our member companies have a strong interest in maintaining a competitive app economy that enables them to compete with larger firms worldwide through innovative products and services for their customers and clients. The entry of platforms created novel opportunities for consumers and developers. But while platforms provide some of the infrastructure, developers bring smart devices to life. Without apps, a smartphone is just a phone. The symbiotic relationship between apps and platforms is not perfect, but it has created a powerful ecosystem that continues to benefit consumers. We look forward to discussing the pro-competitive effects and public policy concerns platforms have generated and welcome the discussion around how large, tech-driven firms affect smaller counterparts.

[42] "FTC v. Qualcomm – The Big Tech Case Nobody's Talking about," ACT | THE APP ASSOCIATION (Feb. 7, 2020), *available at* https://actonline.org/2020/02/07/ftc-v-qualcomm-the-big-tech-antitrust-case-nobodys-talking-about/.

Appendix: App Economy Innovators in Your Districts

Majority

Chairman Michael Lee (UT)
Company: 1564B
Located in Salt Lake City, 1564B is a one-man management consulting group that provides advice on marketing and content development as it relates to technical markets, like the internet of things (IoT). Founded in 2014, 1564B's clients range from startups and growing companies to global corporations.

Senator Chuck Grassley (IA)
Company: Higher Learning Technologies
Higher Learning Technologies (HLT) works to empower learners through easy-to-use textbook and test prep platforms spanning a variety of disciplines such as medical, dental, and business, as well as preparatory tests for college and military entrance exams. Located in Coralville, Iowa, and founded in 2012, HLT offers services on the App Store, Google Play store, and through web browsers.

Senator Mike Crapo (ID)
Company: TaxAct
Founded in 1998, TaxAct is a leading provider of affordable digital and downloadable tax preparation solutions for individuals, business owners, and tax professionals. Their flagship product promises users the highest degree of accuracy and was designed by their own in-house programmers and tax accountants. All available forms are IRS and state approved, and they introduced a mobile application in 2018.

Senator Joshua Hawley (MO)
Company: Topik
In 2015, two friends co-founded Topik, a mobile blogging application that makes it easy for anybody to create and share blog posts on an easy to use mobile platform. Based in St. Louis, Missouri, Topik is completely self-funded and, with only two employees, is set to launch their first mobile app later this year.

Senator Marsha Blackburn (TN)
Company: Quiet Spark
Established in 2011 in LaVergne, Tennessee, a wife and husband team founded Quiet Spark after noticing their son's issues with spelling. Their first app was SuperSpeller, an iOS app that makes learning spelling fun for children through learning games and reward features. They have also created other apps that help users keep track of their lives through categories like exercise, reading time, scheduling, homework, and more.

Minority

Ranking Member Amy Klobuchar (MN)
Company: VEMOS.io
Located in the Twin Cities and founded in 2013, Vemos is a platform solution for bars, restaurants, and other venues as a one-stop-shop for the digital tools needed to manage and grow their businesses. Operating with only eight full-time employees, Vemos found a way to harness and present a venue's data in a humanized way, which helps venues understand who their customers are and how to market to them effectively.

Senator Patrick Leahy (VT)
Company: Aprexis Health Solutions
Aprexis Health Solutions is a cloud-based software that helps patients with personalized services for Medication Therapy Management and includes more than 1,000 participating pharmacies and more than 1 million patients. Founded in 2009, Aprexis works with health plans, pharmacy networks, corporate employers, and providers to deliver improved, patient-centric health outcomes.

Senator Cory Booker (NJ)
Company: Micro Integration Services, Inc.
Founded in 1985, Micro Integration Services is a father and son team who transitioned from selling and maintaining hardware to an entirely software-based consulting business. MIS is focused on solving problems and helping their clients develop software for mobile and web turnkey business solutions. Although they have maintained their two-man team, Micro Integration Services works with major corporations like Kraft and the Philadelphia Eagles.

Senator Richard Blumenthal (CT)
Company: Pixellet
Located in Stamford, Connecticut, Pixellet is a full-service web and mobile development and design firm with dozens of offered services, including digital marketing and e-commerce. Founded in 2014, Pixellet only has one employee and has served a variety of industries including real estate, health care, financial services, and education, among others.

August 20, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, District of Columbia 20580

RE: *Federal Trade Commission Review of Health Breach Notification Rule*

ACT | The App Association's Connected Health Initiative (CHI)[1] appreciates the opportunity to provide input to the Federal Trade Commission (FTC) on whether changes should be made to a the Health Breach Notification Rule, which requires vendors of personal health records and related entities that are not covered by the Health Insurance Portability and Accountability Act (HIPAA) to notify individuals, the FTC, and, in some cases, the media of a breach of unsecured personally identifiable health data.[2]

CHI is the leading advocate for digital health policy and law advancements, representing a broad consensus of stakeholders across the healthcare and technology sectors. Our mission is to support the responsible and secure use of connected health innovations throughout the continuum of care to improve patients' and consumers' experiences and health outcomes. CHI is a long-time active advocate for the increased use of innovative technology in the delivery of healthcare and engages with a broad and diverse cross-section of industry stakeholders focused on advancing clinically validated digital medicine solutions.

CHI shares your commitment to advancing responsible health data stewardship and privacy throughout the continuum of care and recognizes that no data is more personal to Americans than their health data. CHI members acknowledge that significant threats to Americans' most sensitive data continue to evolve and put extensive resources into ensuring the security and privacy of health data to earn the trust of consumers, hospital systems, and providers. Breach notification requirements generally serve important functions. They not only notify the individual when their information has been

[1] http://www.connectedhi.com/.

[2] https://www.ftc.gov/news-events/press-releases/2020/05/ftc-seeks-comment-part-review-health-breach-notification-rule.

compromised, but they also provide insight into security issues that organizations may be facing.

However, digital health innovators do struggle to navigate the complex environment with respect to cybersecurity and privacy as they contend with HIPAA requirements at times and relevant FTC requirements at others, on top of state-specific requirements that can vary significantly.

As the FTC notes, it only lists two breaches of 500 or more individuals since this rule was put into place 10 years ago.[3] The FTC also notes that it never enforced its health data breach rules because "as the PHR [personal health record] market has developed over the past decade, most PHR vendors, related entities, and service providers have been HIPAA-covered entities or 'business associates' subject to HHS's rule."[4] This data indicates that most PHRs are subject to HIPAA with FTC health data breach rules governing the relatively few that are not.

Ultimately, CHI supports (and is currently leading efforts related to) the development of a new cross-sectoral privacy framework by Congress in the form of a general privacy bill that is intended to result in general privacy legislation. As part of such a solution, we support the proposition that any such general privacy bill treat health data as a subclass of "sensitive" personal information subject to heightened regulatory requirements, including with respect to breach notification requirements.

Until that time, innovators in the digital healthcare ecosystem will have to carefully navigate the different scopes and contexts of federal sector-specific laws and regulations. They will further have to continue to dedicate resources to tracking and complying with the range of state data breach laws and regulations, some of which conflict or overlap with FTC health data breach notification rules.

Building on the above, CHI offers the following views in response to various questions posed by FTC:

- We support Section 318.1 of the rule's providing that FTC health breach notification rules do not apply to HIPAA-covered entities or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity. We believe this bright line is critical and should be maintained to provide legal certainty to digital healthcare innovators.

[3] Health Breach Notification, 85 FR 31085 (May 22, 2020) (HBR RFI).

[4] *Id*. CHI also notes that thousands of breaches of HIPAA-covered impacting 500 or more patients have been reported over the years. *See* https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf.

- CHI does agree that, “as consumers turn towards direct-to-consumer technologies for health information and services (such as mobile health applications, virtual assistants, and platforms’ health tools), more companies may be covered by the FTC’s Rule.”[5] Developers of technology already subject to the FTC’s general consumer protection authority are, and will continue, inventing third-party apps that utilize consumer health information and will likely meet the definition of a PHR provider.
- CHI supports FTC evolving the requirements of notification in Section 318.5 of the rule. As the FTC notes, in-app messaging, text messages, and platform messaging are tools available today that are used widely and should be allowed to be utilized to more effectively communicate with consumers that consent to it. It is common sense that consumers should be able to consent to receiving communications under the rule via these modalities as well as email.
- FTC can reduce costs and burdens on small businesses by developing explanatory resources clearly explaining the purpose and requirements of the health data breach notification rule and offering guidance on compliance with it. We note that CHI has collaborated closely with the Department of Health and Human Services’ Office of Civil Rights on the development of its HIPAA portal for developers.[6] CHI offers to partner with FTC in the creation of such a resource, which would ease compliance burdens and reduce costs.

[5] HBR RFI at 31086.

[6] https://hipaaqsportal.hhs.gov/.

CHI thanks you in advance for your time and consideration of the input above.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel

Connected Health Initiative
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Washington, DC 20005
[redacted]

The Connected Health Initiative (CHI), an initiative of ACT | The App Association, is the leading multistakeholder spanning the connected health ecosystem seeking to effect policy changes that encourage the responsible use of digital health innovations throughout the continuum of care, supporting an environment in which patients and consumers can see improvements in their health. CHI is driven by the its Steering Committee, which consists of the American Medical Association, Apple, Bose Corporation, Boston Children's Hospital, Cambia Health Solutions, Dogtown Media, George Washington University Hospital, HIMSS, Intel Corporation, Kaia Health, Microsoft, Novo Nordisk, The Omega Concern, Otsuka Pharmaceutical, Podimetrics, Rimidi, Roche, United Health Group, the University of California-Davis, the University of Mississippi Medical Center (UMMC) Center for Telehealth, the University of New Orleans, and the University of Virginia Center for Telehealth.

For more information, see www.connectedhi.com.

December 11, 2019

Federal Trade Commission, Office of the Secretary
Constitution Center, 400 7th Ave, SW, 5th Floor, Suite 5610 (Annex B)
Washington, District of Columbia 20024

Re: Comments of ACT | The App Association regarding the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Act (COPPA) Rule Review, 16 CFR part 312, ***Project No. P195404****.*

Dear Acting Secretary Tabor,

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) on its request for public comment in the above-captioned proceeding.[1] The App Association appreciates the Commission's evaluation of its existing regulations pertaining to the Children's Online Privacy Protection Act (COPPA) Rule and its consideration to modify, retain, or eliminate parts of the Rule deemed ineffective for the constantly changing technology marketplace.

I. Introduction and Statement of Interest

The App Association represents approximately 5,000 small business software application development companies and technology firms globally that create the technologies driving internet of things (IoT) use cases across consumer and enterprise contexts. Today, the App Association represents an ecosystem valued at approximately $1.7 trillion and is responsible for 5.9 million American jobs. Our members create innovative solutions that drive the world's rapid embrace of mobile technology. Their products power consumer and enterprise markets across modalities and segments of the economy. Since COPPA's inception, the App Association has taken an active role in making sure that the small business community is aware of their responsibilities under the COPPA Rule. For example, the App Association created a checklist for apps that are made for children to ensure that there is a free accessible resource for small businesses to use as a guide to comply with the COPPA Rule.[2] Furthermore, our organization frequently participates in public forums on the issue of protecting children with respect to technology and mobile apps. We testified before the House Energy and Commerce Committee on "Protecting Children's Privacy in an Electronic World"[3];

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[1] Federal Trade Commission, *Request for Public Comment on the Implementation of Children's Online Privacy Protection Rule* (COPPA), 84 Fed. Reg. 35842 (July 25, 2019).

[2] *Checklist for apps that are made for children*, ACT | THE APP ASSOCATION, https://actonline.org/family-app-privacy/, (last visited December 11, 2019).

[3] U.S. House Energy & Commerce Committee, Hearing, Protecting Children's Privacy in an Electronic World (Oct. 5, 2011).

participated in the FTC's "The Future of the COPPA Rule" workshop[4]; and most recently spoke at the Family Online Safety Institute's (FOSI) 2019 Annual Conference.[5] While the App Association supports protecting children's privacy, over time, the current COPPA Rule disproportionally eliminates small developers out of the market for apps and software programs specifically designed with children in mind. We encourage the FTC to implement changes to the current rule that set reasonable and effective requirements for small software and app developers to become compliant with the COPPA Rule, while still providing new and novel technology for the next generation.

II. The Current State of Children's Online Usage and Parent Engagement Impacting Businesses' Compliance with COPPA

According to the App Association's research, 85 percent of parents have concerns about their children's digital privacy.[6] PricewaterhouseCoopers (PwC) says that children 12 to 15 years old consume 20 hours of screen time each week,[7] with other data suggesting that kids 8 to 18 years old consume seven hours of screen time per day.[8] Given these statistics and parents' growing concern about their children's privacy, it is important that parents take steps to actively monitor their children's time online. These steps include enabling parental control settings on their children's devices to make sure they do not have access to inappropriate information and reading privacy policies that the child likely does not understand due to their age. However, research shows that fewer than one in three parents use parental settings on their children's devices[9] and the Pew Research Center also says that 81 percent of parents knowingly let their children use General Audience (GA) YouTube without parental restrictions.[10]

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[4] The Federal Trade Commission, *The Future of COPPA Rule Workshop*: Morgan Reed, President, ACT | The App Association, *Developers and COPPA: Their Real-World Experience*, (Oct. 7, 2019), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop.

[5] Family Online Safety institute (FOSI), *2020 Vision: The Future of Online Safety*, (November 21, 2019) https://www.fosi.org/events/2019-annual-conference/.

[6] Morgan Reed, *Developers and COPPA: Their Real-World Experience*, F.T.C. COPPA WORKSHOP, https://www.ftc.gov/system/files/documents/public_events/1535372/slides-coppa-workshop-10-7-19.pdf (October 7, 2019) (F.T.C. COPPA Workshop Slides).

[7] *Kids Digital Media Report 2019*, PRICEWATERHOUSECOOPERS, 4, https://cdn2.hubspot.net/hubfs/5009836/PwC%202019/Kids%20Digital%20Media%20Report%202019%20.pdf? (May 2019).

[8] *New tools, old rules: limit screen-based recreational media at home*, AMERICAN HEART ASSOCIATION SCIENTIFIC ADVISORY, https://newsroom.heart.org/news/new-tools-old-rules-limit-screen-based-recreational-media-at-home (Aug. 6, 2018).

[9] F.T.C. COPPA Workshop Slides.

[10] Aaron Smith, et. al, *Many Turn to YouTube for Children's Content, News, How-To Lessons*, PEW RESEARCH CENTER, https://www.pewresearch.org/internet/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/ (Nov. 7, 2018).

These research results from a variety of sources demonstrate that while parents often say they care deeply about their children's privacy, their actions display a lesser degree of concern. They may also feel that they should not be the ones responsible for implementing parental controls to protect their child's online privacy. Instead some parents expect that app developers should provide free educational or child friendly applications that automatically include the necessary parental settings to protect their children's privacy. This expectation places an enormous financial burden on child app and software developers because they have to provide their products for a small or no fee; pay COPPA Rule compliance costs; and still continue to compete in a market that includes General Audience (GA) developers that have children using their products, but do not bear the financial implications of COPPA Rule compliance.

The COPPA Rule's burdensome compliance costs have resulted in many children-directed app and software developers closing down their businesses or deciding to target a general audience. Furthermore, others children-directed app and software developers will now only sell their products to schools that operate under Family Education Rights and Privacy Act (FERPA) because they are unable to keep up with the substantial costs of COPPA compliance. These examples demonstrate that the current COPPA Rule it is not being used in an effective manner to protect children's online privacy. Therefore, it is imperative that the FTC find a new and balanced approach between the importance of children's privacy and a reasonable cost of compliance with its current Rule.

III. The COPPA Definition of Personal Information Should Not Include a Child's Unidentifiable Biomarkers (Voice, Face, Fingerprints)

Under the current COPPA Rule, personal information is "individually identifiable information about an individual collected online, including: ... (8) a photograph, video, or audio file where such fie contains a child's image or voice."[11] In today's world across a variety of modalities, children are accessing (and contributing) online content at younger and younger ages for a variety of reasons. Many children have a video game console in their home, such as Microsoft's Xbox or Sony's PlayStation 4®, which allows the device to detect the child's voice to enable them to talk with other online users online. Additionally, many households use Apple's Siri ®, Amazon's Alexa ®, and Google's Google Home™, and it is inevitable that the device or an application on the device may pick up a child's voice, often times without knowing due to its inability to detect the difference. These devices while likely being intended for a general audience (GA) may now be subject to COPPA due to potentially having "actual knowledge" of children (under the age of 13) using their products. Furthermore, there are other applications that may be subject to COPPA that are made for individuals with learning or physical disabilities. For instance, autistic children may use an app to help them with their speech, which would require the collection of the child's voice in order to make their statement clearer; or a child who is blind may also speak to the virtual assistant software in their phone in order to use the phone's basic functions.

[11] 16 C.F.R. § 312.2 Definitions (2013).

Many new apps may collect biomarkers such as voice, facial features, and fingerprints in some form, and the App Association urges the FTC to consider how these latest technologies can fit into a law created nearly 20 years ago. We urge the FTC to recognize the extraordinary burdens associated with COPPA compliance, particularly for small business developers of such technology. For example, developing additional technology to identify the difference between an adult and child voice remains a need, and its implementation may be prohibitively expensive while providing no additional protections for the child if the biomarker is deidentified. While the App Association fully supports privacy protections for children, such protections will stifle inovation if we continue to disincentivize the development of child focused tech through potentially unfeasibly regulatory requirements. Therefore, the App Association strongly urges the FTC to consider modifying the definition of personal information to either exclude "biomarkers" or to only require that a business comply with COPPA when identifying, or reasonably identifying, the "biomarker" and specifically associating it with the child as opposed to the child's voice only being generally wrapped up in a data collection by an app.

IV. Incentivize Platforms to Provide Procedural Mechanisms for App Developers to Obtain Verifiable Parental Consent

A number of practical COPPA compliance challenges arise from the fact that many apps integrate into and operate through mobile communications platforms maintained by a different operator. As a result, certain information—such as the user's IP address, device ID, username, or screen name—sometimes shares automatically between the app developer and the platform provider when a user runs the application. This limited information sharing supports (and is often necessary for) the technical and operational functioning of the app.

The App Association urges the FTC to permit more efficient and practical solutions for COPPA Rule compliance that takes advantage of the latest pro-consumer developments in technology. As we mentioned in our testimony earlier this year, there has been a significant decline in the numer of app and software developers that create products spefically designed for children under the age of thirteen.[12] This is due to the often times insurmountable hurdle of COPPA Rule compliance for small businesses in the child app and software space. While the enactment of the COPPA Rule had the well intentioned goal of promoting children's online privacy, in its current state the Rule has instead eliminated an important set of child app developers from the marketplace due to the costs of compliance.

In order to change this result, we strongly encourage the FTC to consider providing incentives for platforms that supply procedural verifiable parental consent (VPC)

[12] Morgan Reed, *Developers and COPPA: Their Real-World Experience*, F.T.C. COPPA WORKSHOP, https://www.ftc.gov/system/files/documents/public_events/1535372/slides-coppa-workshop-10-7-19.pdf (October 7, 2019).

mechanisms to app developers that fall under the COPPA Rule. By providing these incentives the FTC would allow some of the costly expenses of designing a child app to be reduced for those small developers whose primary goal is to impact children with age appropriate content and resources.

The App Association envisions VPC in three separate but distinct categories with platforms supplying innovative procedural solutions for verifying and notifying consenting adults.

1. *Verifying that the person who will be providing consent is an adult.*

The App Association encourages the FTC to allow platforms to provide procedural mechanisms for child app developers to utilize when verifying a person's age and ability to consent to an app's privacy policy before the child's use. For example, the platform could require a platform user to provide their age as an initial step of creating an account when becoming a part of the platform's community. In turn, the child app developers that fall under COPPA's authority could then use this verification as a part of their VPC process to ensure a person is of the correct age to consent to the app's privacy policy. Furthermore, we encourage the FTC to allow the specific platform to determine the best procedural mechanisms for verification on their individual platform.

2. *Notifying the consenting adult of the intended collection, use, and disclosure of the child's personal information by the app developer, consistent with the disclosures made in the privacy notice*.

Additionally, we would support the FTC allowing platforms to provide notifications to the platform verified consenting adult/parent/guardian about the intended collection, use, or disclosure of the child's personal information. This could potentially be accomplished through the child-app developer using the platform's procedural mechanisms to explain their collection, use, or disclosure of the child's personal information. After providing this information to the platform, the platform could provide a notification to the consenting adult/parent/guardian when the app is opened to ensure that the consenting adult is aware of the privacy policy for the specific app.

3. *Obtaining consent from the adult before the app is permitted to collect, use, or disclose a child's (under the age of 13) personal information provided in the notice*.

Upon the platform's collaboration with the child app developer in categories one and two, we believe that in the final step of VPC, the child app developer must ensure that it properly obtained VPC before collecting, using, or disclosing any child's personal information. A platform may choose to assist a child app developer by providing an implementation VPC framework to the child app developer for ways in which the app developer may obtain VPC from the parent. However, the child app developer must ensure that their VPC method is compliant with the COPPA Rule.

Depending on the size of the company, the FTC could also encourage platforms to share their "age gate/screen" data with small child app developers—if requested—so that they can more easily identify children attempting to use their apps and ensure that each developer has obtained the proper VPC, in compliance with the COPPA Rule. While the App Association would not require that the FTC mandate platforms to take this additional step, it could provide platforms with additional incentives to provide this information to encourage start ups and small businesses to participate in the child-app development market.

By allowing platforms and child-app developers to conduct collaborative efforts to obtain VPC, parents can make informed decisions about the apps their children use in an exponentially streamlined and transparent fashion.

The App Association notes that some platforms already implement similar procedures to those proposed above. Some platforms offer family sign up plans that allow children to use a platform, but also provide parents optional settings for their children such as "asking to buy," rejecting or approving a purchase, monitoring content, or placing limits on screen time from the parent's device.[13] This allows a parent a simplified process to see what their kids are doing on their devices and decide what limits they want to set for their children.

This approach ensures that parents have meaningful notice of, and control over, how an app collects, uses, and discloses their children's personal information without imposing unnecessary burdens and costs on app developers.

V. Conclusion

The App Association's members work hard to positively change children's lives through smart device applications that help them learn, explore, and communicate. Our members include countless parents who are developers and they understand the need to protect children in the mobile and internet environment. There is no stronger group of people with the knowledge and the frontline experience to understand that privacy and innovation can coexist. What can create conflict is well-meaning regulation that errs on the side of proscribing innovation in the name of protecting privacy.

Currently, the COPPA Rule disincentivizes small businesses from educational or child-directed entertainment app development by requiring exorbitant amounts of time and energy interpreting unclear regulations. The Rule also eliminates the ability to collect non-personal information to assist in furthering the educational goals of apps and exposes many new parties to unexpected COPPA liability. The FTC should focus on creating flexible, simple to implement regulations that protect children, allow parents to

[13] *Keep Your Child's Screen Time Healthy and Happy*, QUSTODIO, qustodio.com/en/family/how-it-works/ (last visited December 11, 2019) (explaining how Qustodio's program helps parents manage and supervise their children's devices); *Family Privacy Disclosure for Children*, APPLE, https://www.apple.com/legal/privacy/en-ww/parent-disclosure/ (last visited December 11, 2019).

monitor and give parental consent, and allow operators to understand clearly their obligations under COPPA.

We thank the Commission for the opportunity to comment and hope the information we provided helps to further improve and simplify the regulations surrounding COPPA.

Sincerely,

Brian Scarpelli
Senior Policy Counsel

Alexandra McLeod
Associate Policy Counsel

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005

February 17, 2021

The Honorable Frank Pallone
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

The Honorable Cathy McMorris Rodgers
Republican Leader
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

Dear Chairman Pallone and Leader McMorris Rodgers,

We deeply appreciate your leadership as the House Committee on Energy and Commerce plots a course for the 117th Congress to address the COVID-19 pandemic and to get our economy back on track. As part of these efforts, we ask that you continue the bipartisan work of crafting a single set of rules governing the privacy practices of entities that generally fall under the Federal Trade Commission's (FTC's) jurisdiction. Recent events and the forced shift of daily and essential activities—especially core healthcare services—to the digital space underscore the need to act decisively on this issue.

ACT | The App Association (the App Association) is a trade group representing about 5,000 mobile software and connected device makers in the app economy. Our industry is a $1.7 trillion ecosystem led by U.S. companies and supporting about 5.9 million American jobs, including in New Jersey and Washington. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Strong privacy protections that meet evolving consumer expectations are a key component of developing consumer trust in tech-driven products and services. The App Association helps shape and promote adherence to privacy laws and best practices in a variety of contexts, including for apps directed to children and digital health tools.

The productive use of healthcare data no longer only occurs with healthcare providers and other entities under the jurisdiction of the Health Insurance Portability and Accountability Act (HIPAA). The creation and flow of healthcare data outside the HIPAA umbrella has accelerated, and although the FTC takes an active role in enforcing the prohibition on unfair or deceptive acts or practices (UDAP), it should have tools that adapt better to the risks healthcare data presents. From our perspective, the answer is not to extend HIPAA to cover healthcare tools and services not currently subject to HIPAA. HIPAA's overarching purpose is to ensure the portability of health data between covered entities and business associates, and it was not primarily designed to give consumers better control over their own healthcare. Instead of expanding this approach, we urge you to establish a set of federal requirements that puts in place baseline consumer rights and curbs data processing activities that exposes consumers to undue privacy risks. The Committee's bipartisan staff draft legislation circulated last Congress was a positive start representing substantial agreement on aspects of privacy that previously struggled for consensus. We urge you to continue the work on this effort, and we stand ready to support negotiations and oversight activities around it.

The recent settlement between the FTC and fertility and period tracking app Flo is emblematic of the FTC's limitations, as well as the health-related privacy risks future legislation should address. The FTC's complaint alleges that Flo shared the "health information of users with outside data

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analytics providers after promising that such information would be kept private."[1] The mischief here is reminiscent of previous activities the FTC punished. Not only did Flo mislead consumers about its data sharing practices, but it also allowed third parties to use the data it shared for their own purposes.[2] In some cases, this occurred in violation of the terms of service of those third parties, the data having been shared via software development kits (SDKs) they provided to Flo.[3] These privacy missteps are especially concerning given the sensitive nature of the health information at issue. A federal law more intentionally focused on curbing privacy harms should empower consumers to exert more control over their sensitive personal information, including the rights to access, correction, and deletion of such information. Sensitive personal information should also be subject to some flexible limits on processing activities that pose too great a risk to consumers.

Although Flo's core deceptive statements in this case enabled the FTC to enjoin further harmful conduct, the recurrence of these privacy harms involving health information highlight the need for risk-based privacy regulation at the federal level. Each and every headline detailing the deceptive conduct of firms using healthcare data outside the HIPAA umbrella threatens to further erode consumer trust, which is a key necessity for our member companies. The healthcare innovations our member companies produce—from heart health and chronic condition monitoring to simply managing digital health information across health systems—are far too important for us to let them fall victim to foundering consumer trust in digital health earned by bad actors. In this case, unlocking the innovative potential for life-saving technologies involves the establishment of a single set of strong, national privacy requirements. We look forward to working with you toward this goal in the 117th Congress.

Sincerely,

Morgan Reed
President
ACT | The App Association

[1] Press release, "Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data," Fed. Trade Comm'n (Jan. 13, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc.
[2] Fed. Trade Comm'n, *Flo Health, Inc.*, complaint (published Jan. 13, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf.
[3] *Id.*

[redacted]

From: Brian Scarpelli <[redacted]>
Sent: Wednesday, June 30, 2021 11:54 AM
To: JulyPublicComments
Subject: July 1 Open Meeting Written Comments - Brian Scarpelli, ACT | The App Association
Attachments: ACT Written Statement re FTC July 2021 Open Meeting (w attachments) 063021.pdf

Please find attached my written comments for the July 1 FTC open meeting. I am emailing them because they would exceed the character limit on the FTC's public comment submission form.

Best regards,

Brian Scarpelli
Senior Global Policy Counsel
[redacted] | [redacted]
ACT | The App Association
[redacted]
Washington, DC 20005

June 30, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

The Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

Dear Chair Khan, Commissioners Chopra, Phillips, Slaughter, and Wilson:

ACT | The App Association appreciates the opportunity to provide its views as part of the Federal Trade Commission's (FTC) July 1, 2021 open meeting.[1] The FTC's approach to competition and consumer protection policies and approach to enforcement directly affects each of the App Association's members and the consumers who use their products/services.

ACT | The App Association is a not-for-profit trade association representing thousands of small business software application development companies and technology firms located across every state. Alongside the rapid adoption of mobile technologies, our members compete by developing innovative applications and connected products that improve countless consumer and enterprise systems and experiences that are increasingly leveraging the Internet of Things effect. Today, the app ecosystem is worth more than $1.7 trillion annual, is responsible for 5.9 million American jobs, and serves as a key driver of the $8 trillion IoT revolution. Notably, Our members provide the consumer-facing or most-downloaded apps in the Apple App Store and Google Play store as well as connected IoT technologies, which is a small

[1] https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting.

fraction of the app economy. Our members also build software and connected technologies for other companies across countless use cases that are not consumer-facing, such as software management systems for internal use by a hospital, manufacturer, or brewery.

In light of the agenda items being addressed during the July 2021 open meeting, the App Association discusses below the need for FTC action to protect competition and innovation in the context of standard essential patent (SEP) abuse. We further offer views on a range of issue areas and developments related to agenda items, particularly those related to Unfair Methods of Competition under Section 5 of the FTC Act as well as enforcement investigations, in appended testimony and positions.

The FTC and Standard Essential Patent Abuse

Open and consensus standards will drive the development of the internet of things, and a successful standards system is essential to creating new products and services that further allow small businesses to innovate and compete. App Association members actively participate in the development of technical standards; additionally, App Association members create (sometimes through contributions that contain patented technologies), use, and sell products that implement those standards. The small business innovator community that we represent, more than any other, needs to be able to effectively utilize technical standards in order to build new products and innovate. Therefore, it is extremely important to make reasonable access to SEPs in standards a priority of the FTC. To this end, countless small business innovators rely on SEP holders' voluntary promises to license access to their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms for certainty in the research and development phases and other business planning. Our members need to know they can count on reasonable access to standards without risk of expensive and lengthy litigation that easily drive them out of business.

FTC action is absolutely necessary to end the effects of the anticompetitive behavior demonstrated to be in violation of U.S. competition law and to set a precedent our members need to continue to thrive. A continuation of abusive practices in the SEP context will harm the ability of countless small businesses to make necessary planning decisions, receive venture capital funding, and grow in markets often dominated by the biggest players. For example, our members have faced, and continue to face, refusals to license and other abusive practices in the SEP licensing context. Years of unchecked abusive patent licensing practices are emboldening further abusive patent licensing behavior and are stripping small businesses of vital capital, and will continue to do so should they be permitted to persist.

In the aftermath of the *FTC v. Qualcomm* decision in the Ninth Circuit Court of Appeals, it is more important than ever that the FTC continue to protect and advance the public interest through supporting the use of standards and the ability to use patents essential to those standards subject to the FRAND commitment. We call on the FTC to take action to give much-needed certainty to the entire SEP licensing stakeholder

community (particularly the small business community), and to provide FTC leadership in defending established, bipartisan policy approaches consistent with guidance to date from the U.S. courts.

We support the FTC's leadership in protecting consumers and advancing competition in the United States and urge your careful consideration of our views above and attached.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel
[redacted]

February 17, 2021

The Honorable Frank Pallone
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

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Republican Leader
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Morgan Reed
President
ACT | The App Association

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[2] Fed. Trade Comm'n, *Flo Health, Inc.*, complaint (published Jan. 13, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf.
[3] *Id.*

April 20, 2021

The Honorable Amy Klobuchar
Chairwoman
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

The Honorable Mike Lee
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Washington, District of Columbia 20510

Antitrust Applied: Examining Competition in the App Stores

Dear Chairwoman Klobuchar, Ranking Member Lee, and Members of the Subcommittee,

We applaud this Subcommittee for its examination of the competitive dynamics of tech-driven markets, including app stores, with tomorrow's hearing, "Antitrust Applied: Examining Competition in App Stores." ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a $1.7 trillion ecosystem led by U.S. companies and employing 108,260 in Minnesota and 65,520 in Utah alone.[1] Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

The witnesses in this hearing underscore highly publicized conflicts between large companies and software platforms (the app store / operating system combinations that facilitate app company-consumer transactions). However, while our member companies are always pushing software platforms to provide more value for the amounts they pay for developer services, they are concerned about how government intervention to solve disputes between well-resourced firms and software platforms will affect them. We appreciate that showcasing the breadth of views on app store competition presents challenges. However, the cross-section of issues these witnesses highlight provides only a narrow sliver of how competition is working in app store markets. To the extent that advocates are using perceived unfair treatment of multibillion-dollar firms like Spotify as evidence to support an expansion of antitrust law to protect non-platforms, our member companies have concerns and urge you to consider the impacts of such intervention on their businesses, the value they get from developer services, and their clients and consumers.

I. Competition is Alive and Well in the Markets Relevant to App Stores

The consumer-facing side of the market. Some commenters have argued that the major app stores do not compete with each other for consumers.[2] According to the proposed logic, the App Store does not compete with the Google Play store because an Apple customer cannot immediately access the Google Play store and vice versa.[3] However, dynamics like this do not insulate market actors like app stores from competition. For example, consider local markets for discount retail clubs or other services that require memberships. Costco members cannot

[1] ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), *available at* https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf.
[2] *See id.* at 95.
[3] *Id.*

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immediately access Sam's Club and vice versa (unless a consumer is a member of both simultaneously). A membership is generally required before you can begin using the services of either store, so there are some time and resource commitments that need to be made before you can switch. Similarly, an Apple iPhone owner must spend the time and resources to trade in their device for another smartphone that runs on Android instead, in order to access the Google Play store. These are properly viewed as switching costs—which are prevalent in markets where network effects are present—but these costs alone hardly justify a conclusion that the competitors in that market "do not compete against one another."[4] Critics cite logistical difficulties in switching, but in reality, switching is straightforward and assisted by the app store operators themselves.[5] In fact, a recent report indicates that it generally costs just $16 to switch from an iPhone to a Samsung device and $40 to switch from a Samsung device to an iPhone, including opportunity cost of time spent on switching.[6] Not only that, but it is also fairly common for someone to have a tablet that runs on Android and a smartphone that runs on iOS, or vice versa. Ultimately, these consumers are likely making their choices based on a combination of the app store offerings, operating systems, device features, and default apps on smart devices. That there are switching costs involved with leaving one app marketplace for another is simply not evidence that they do not compete with each other for consumers.

The developer services side of the market. The Google Play store and the App Store compete vigorously in the other side of the market, for developers and developer services. Google benefits a great deal from attracting the next great app and so does Apple[7] and the investments these platforms make to attract developers reflect this.[8] Moreover, Google and Apple have a history of trying to outdo one another with respect to the offerings they provide for developers. As "shopper's guides" to the two main app stores describe, the App Store and Google Play store respond to each other's offerings, vying to be the platform that provides better toolkits, APIs, and, of course, quicker (yet rigorous) app review processes.[9] In fact, over their respective lifespans, the

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[4] *See, e.g.,* Wing Man Wynne Lam, "Switching Costs in Two-Sided Markets," TOULOUSE SCHOOL OF ECON., Working Paper (Aug. 2014), *available at* http://publications.ut-capitole.fr/16551/1/wp_tse_517.pdf (examining the characteristics of competition between app stores for consumers, including the impacts on competition and consumer benefits when app stores adjust their various offerings).

[5] Avery Hartmans, "Here's the best and easiest way to switch from an Android device to an iPhone," Business Insider, (May 21, 2019), *available at* https://www.businessinsider.com/switching-from-android-to-iphone-how-to-2018-5#step-1-back-up-all-your-data-1.

[6] ELLIOTT LONG, WHY USERS AREN'T LOCKED INTO THEIR SMARTPHONE BRAND, PROGRESSIVE POLICY INSTITUTE (Apr. 8, 2021), *available at* https://eadn-wc05-3904069.nxedge.io/cdn/wp-content/uploads/2021/04/Why-Users-Arent-Locked-Into-Their-Smartphone-Brand4.8.21.pdf.

[7] *Ohio et al. v. Am. Express et al.*, 585 U.S. __ (2018) ("Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate.").

[8] Opposition brief of Apple Inc., *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-YGR, at 5 (N.D. Cal. 2020), *available at* https://www.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.73.0.pdf ("In the interest of stoking more creativity, and to bring more apps to its users, Apple supports developers in a variety of ways, investing billions in tools that simplify the development process, across Apple's iOS.").

[9] *See* Yana Poluliakh and Victor Osadchiy, "What to expect from the App Store and the Google Play Store When you Launch Your First App," YALANTIS, *available at* https://yalantis.com/blog/apple-app-store-and-google-play-store/; Nikita, "Apple App Store vs. Google Play Store: A Comparison," 21 TWELVE INTERACTIVE, Blog (Sept. 20, 2019), *available at* https://www.21twelveinteractive.com/apple-app-store-vs-google-play-store-a-comparison/; Priya Viswanathan, "iOS App Store vs. Google Play Store," LIFEWIRE (Mar. 9, 2020), *available at* https://www.lifewire.com/ios-app-store-vs-google-play-store-for-app-developers-2373130.

major app stores have demonstrated a clear track record of competing with each other for developers, as our recent report details.[10] Lastly, the analysis of the relevant developer-facing side of the market does not end with whether there is competition between those two app stores, as there are other software distribution options that can serve as alternatives: smart TV app stores, gaming console app stores, and even video conferencing platforms[11] (a development accelerated by the pandemic). The open internet can also be a workable alternative for developers and consumers to the two major app stores (especially for larger developers with an established customer base or market share).[12] And for consumers who favor less data-intensive apps (for example, because they have limited data plans) or want to access certain apps across devices and browsers, progressive web apps[13] are a means of accessing mobile content and services outside the major app stores. As described above, however, there is plenty of evidence that the general-purpose app stores do compete with each other both for consumers and for developers. And if they are competing, that means the app stores are a) driving better services and offerings for developers, while b) pushing each other to provide the most attractive, diverse, and safe marketplace for consumers. And consumers currently benefit from differentiated products, as the App Store provides a more "premium" offering with tighter privacy and security controls, while the Google Play store boasts a greater variety.

Platforms have helped create or expand markets like digital health services. Just as ridesharing fundamentally changed how we get around, developers and platforms also revolutionized how we access healthcare. Digital health capabilities are maturing at a critical time when the pandemic has forced American patients to rely on virtual visits and remote monitoring. Secure smart devices and the software platforms that animate them are foundational elements to our current ability to manage healthcare wherever we happen to be. But this would not be possible if not for software platforms performing a gating function and securing operating systems and app stores from fraudulent apps and other threats to healthcare data. Those functions make smart devices worthy of the trust we must place in them to keep sensitive health data or conduct virtual physician visits on them.

There is reason to believe digital health will continue to play a central role in care delivery in the United states. A current shortage of about 30,000 physicians in the United States—projected to increase to up to 90,000 in the next five years[14]—contributed to the need for caregivers and

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[10] ACT | The App Association, A Brief History of Time: The App Stores (Apr. 7, 2021), *available at* https://actonline.org/wp-content/uploads/A-Brief-History-of-Time-The-App-Stores.pdf.

[11] *See* Vishal Mathur, "Apple's Response Proves App Store Isn't Any More a Monopoly Than the Google Play Store," NEWS18 (May 30, 2019), *available at* https://www.news18.com/news/tech/apples-response-proves-app-store-isnt-any-more-a-monopoly-than-the-google-play-store-2164875.html; David Pierce, "Zoom has a plan to dominate the virtual events industry," PROTOCOL (Oct. 14, 2020), *available at* https://www.protocol.com/onzoom-virtual-events (describing Zoom's new Zapps app store).

[12] Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, hearing before the House Judiciary Committee, Subcommittee on Antitrust, Commercial, and Administrative Law (statement of Morgan Reed, President, ACT | The App Association) 7 (Jul. 17, 2019), *available at* https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf.

[13] Sam Richard and Pete LePage, "What are Progressive Web Apps?" WEB.DEV (Feb. 24, 2020), *available at* https://web.dev/what-are-pwas/.

[14] *See* Connected Health Initiative, "Testimony of Morgan Reed, Executive Director, The Connected Health Initiative, Before the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security," (Sept. 25, 2018), *available at* https://actonline.org/wp-content/uploads/CHI-Testimony-Health-Care-in-Rural-America.pdf.

patients to find new ways of communicating. Compounding the caregiver shortage, 133 million Americans currently live with chronic conditions—most of them residing in rural areas with long drives to their nearest provider.[15] Devices, sensors, and software are now capable of gathering and analyzing physiological data like movement, heart rate, electrocardiogram, or pulse oximetry so that physicians can better monitor their patients at home and address potential problems before they occur or worsen.[16] Studies show that preventive care regimes that use connected health tools are especially useful for patients with chronic conditions like diabetes and heart failure, which tend to affect underserved and rural communities in particular.[17] But how do these capabilities reach patients and consumers, specifically those who need them most? Most Americans already interact with platforms, through a variety of devices. We know that smartphone adoption rates are increasing among underserved populations in the United States and that for many, their handheld device is their only means of accessing the internet.[18] Here again, developers are leveraging the ubiquity and trusted framework of platforms to produce healthcare innovations that address a variety of health conditions. Moreover, in this case, the platform-developer dynamic helps caregivers reach patients in rural and underserved areas.

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[15] *See Id.*

[16] *Id.*

[17] *See, e.g.,* Clinical Outcomes, Care innovations, at 2, available at http://www.connectwithcare.org/wp-content/uploads/2017/06/2016_Outcomes_Clinical-1.pdf (showing the results of a study by Care innovations and University of Mississippi Medical Center, indicating that the first 100 patients with diabetes enrolled in a program with a remote monitoring component saved the state $336,184 in Medicaid dollars over six months); Testimony of Michael P. Adcock, Exec. Dir., University of Mississippi Med. Ctr., Hearing on "Telemedicine in the VA: Leveraging Technology to Increase Access, Improve Health Outcomes & Lower Costs," (May 4, 2017), available at https://www.appropriations.senate.gov/imo/media/doc/050417-Adcock-Testimony.pdf ("The Mississippi Division of Medicaid extrapolated this data to show potential savings of over $180 million per year if 20 percent of the diabetics on Mississippi Medicaid participated in this program").

[18] Charkarra Anderson-Lewis, MPH, PhD, et al, "mHealth Technology Use and Implications in Historically Underserved and Minority Populations in the United States: Systematic Literature Review," (Jun. 18, 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6028762/.

II. Developers are Pushing for More from the Platforms

Software platforms have historically responded to the needs of developers and consumer demands as those forces have evolved. Right now, app companies are pushing for several things from software platforms that government intervention would likely undermine. Specifically, app companies are seeking:

1. **Expedient removal of scam apps, fake reviews, and fraudulent actors.** Scam and fraud apps have slipped through the review and removal cracks,[19] and our member companies are concerned about these incidents. We strongly disagree, however, with suggestions that software platforms should give up on the exclusive app store model. The fact that app stores have such a high volume of apps to review, posing security review difficulties, is cited as a reason for steamrolling Apple's closed App Store system with a government prohibition on app store exclusivity. If our member companies choose to distribute through the App Store, they expect tough security reviews and fast removal of bad actors. A complete removal of the gatekeeping function would accomplish the exact opposite.

2. **Better security.** App companies depend on software platforms to provide a trusted marketplace. Software platforms ensure security by both reviewing proposed apps and by pushing out security updates for a device operating systems. These functions are exceptionally important for a trusted marketplace, and investment should reflect this importance.

3. **Better privacy.** App companies compete on privacy. They are working hard to produce tech-driven privacy features that address evolving consumer expectations and technical realities, and some of them provide products and services focused solely on privacy protections.[20] The privacy functions of software platforms, however, are also critical to foster a trusted ecosystem in which to operate.

4. **More investment in developer relations.** Software platforms have significantly lowered barriers to entry for software sellers. But the app stores can seem vast and impersonal for the smallest app companies, and rejections or other adverse decisions can seem impossible to surmount without proper explanations or personal interactions with software platform staff. A lack of personal attention can lead to dissatisfaction and resentment, so it is in software platforms' best interests to help developers find success on the platform. Conversely, individual attention for the smallest app companies helps nurture the truly robust app marketplace where the best ideas flourish from the most surprising corners—and that is what consumers, software platforms, and app companies alike want most.

Subjecting software platforms to substantially heightened antitrust liability for managing app stores to better protect privacy, security, remove fraudulent actors, and provide individual services would undermine everything our member companies are asking for from software platforms. Similarly, creating nondiscrimination or other regulatory regimes specifically for current incumbents would inadvertently create a regulatory moat around them, protecting each from known competitive

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[19] Statement of Morgan Reed, president, ACT | The App Association (Feb. 11, 2021), *available at* https://actonline.org/statements/.

[20] *See, e.g.*, "The Rise of Privacy Tech Helps Privacy Tech Founders Solve Their Biggest Pain Points," TROPT (Jun. 5, 2020), *available at* https://www.riseofprivacytech.com/tropt-helps-privacy-tech-founders-solve-pain-points/.

pressures and from potentially unforeseen entrants providing increasingly analogous services like Square. Such protection removes their incentives to respond to developer demands, supplanting it with bureaucracy and lobbying battles.

II. Antitrust Intervention to Limit Software Platform Functions Would Harm Small App Companies

In the software platform context, policymakers are considering a variety of structural or quasi-structural remedies from a Glass-Steagall-like separation of lines of business to prohibitions on specific kinds of exclusivity. Mostly, concerns about the economic health of these markets animate legislative interest, but policymakers are also examining possible political motives behind app store decisions. Some of those inquiries are already leading to broad ideas of exposing software platforms to additional liability related to speech or other causes of action for trial attorneys.[21] Although lawmakers are raising these concerns against a backdrop of concentrated markets, expanding antitrust law is not the optimal path to address perceived political externalities arising from app store rejections. We agree that departing from the consumer welfare standard could "cripple our economy at a time when millions are already struggling . . . and . . . undermine one of the foundational principles of our republic."[22] The last thing our member companies want is for app store functions to get bogged down in decade-long antitrust litigation over what are essentially political disagreements.

Aside from these concerns, there is a fair amount of interest in examining the ability and "incentive to impede competition in lines of business dependent on" platforms.[23] This is a worthy line of inquiry with a framework that should respect the fact-driven analysis involved with identifying and stopping harms to competition and consumers. Accordingly, an important step in this process is to examine the benefits for smaller software competitors of ongoing and recent activities by software platforms that have drawn antitrust scrutiny in light of proposals to separate them from adjacent markets or restrict their functions as platforms. Those in favor of structural separation and other competition remedies in software markets seem to target two areas of perceived "gatekeeper" power: 1) control over the kinds of software that can be downloaded onto a device's operating system; and 2) control over the kinds of software that can be offered via an app store. These are important functions for our member companies, which caution against weakening them too much to benefit other competitors.

Prohibitions on exclusivity. Several state legislatures have considered or are actively considering proposals that would impose a quasi-structural restriction at the operating system level by prohibiting software platforms from acting as gatekeeper for software installed on a device.[24] Among other things, the bills bar operating systems from accepting software unless it is distributed exclusively through a certain app store marketplace and prohibit "retaliation" against software developers that circumvent approval through that distribution channel.[25] Although this may sound

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[21] Republican Leader McMorris Rodgers, Big Tech Accountability Platform, House Committee on Energy and Commerce, Memorandum (Apr. 15, 2021), *available at* https://republicans-energycommerce.house.gov/wp-content/uploads/2021/01/Big-Tech-Accountability-Platform-Memo.pdf.

[22] Press Release, "Sen. Lee Sets Senate Republican Antitrust Agenda for 117th Congress," Sen. Mike Lee (Feb. 6, 2021), *available at* https://www.lee.senate.gov/public/index.cfm/2021/2/sen-lee-sets-senate-republican-antitrust-agenda-for-117th-congress.

[23] ACAL Report at 35 (citing report accompanying Antitrust Reform Act of 1992).

[24] *See, e.g.*, SB 2333, 67th North Dakota General Assembly (2021), *available at* https://www.legis.nd.gov/assembly/67-2021/documents/21-1044-01000.pdf.

[25] *Id.*

like it lowers a barrier to entry by weakening the platforms' gatekeeper capabilities, it does the exact opposite and removes a steppingstone to the market. Moreover, the proposals' supporters are some of the largest companies on the app stores that openly seek to avoid their obligations to pay *at all* for the software platforms' developer service bundles.[26] The bundles include a wide variety of services for developers and, contrary to how some are characterizing them, are not just a "payment processing fee."[27] Specifically, those services include:

- Immediate distribution to hundreds of millions of consumers across the globe;
- Marketing through the platform;
- Accessibility features;
- Platform level privacy controls;
- Assistance with intellectual property (IP) protection;
- Security features built into the platform;
- Developer tools;
- Access to hundreds of thousands of application programming interfaces, or APIs; and
- Payment processing.

From these services, small app companies obtain easy access to a global market, the ability to offload overhead (like managing payment options and preventing piracy), but most importantly, they can leverage consumer trust. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Larger firms, meanwhile, may have the resources to put together the bundle of services and generate consumer trust in a known brand name all on their own. Therefore, they might think of the software platform bundle as less valuable to them than it is to smaller companies, which may help explain their calls for government intervention to diminish those services. They simply have less to lose and more to gain from such intervention than do App Association members and consumers.

The state bills reflect a view that takes for granted the platform functions necessary to fuel a trusted ecosystem that lives on our smart devices now. Consumers now depend on mobile devices to store their most important information, and the ability to protect that data is vital. Banning software platforms' gatekeeping function puts users' most vital data at risk. App Association member companies—much more so than the large companies selling software on the app stores—depend on strong privacy, security, and IP protections at the platform level. Therefore, proposals to require platforms to allow circumvention of these protections would harm consumers and app economy competitors alike. Platforms currently work to keep apps that violate user trust out of their stores.

In one example, some bad actors market their device-monitoring apps designed to track children's mobile device use as a way to track anyone, including adults, without their knowledge or permission. These "stalker apps" operate outside the bounds of what is allowable in app stores or mobile operating systems by accessing troves of personal data including location, messaging, and

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[26] Order Granting in Part and Denying in Part Motion for Preliminary Injunction, Epic Games v. Apple Inc., Case No. 4:20-cv-05640-YGR (N.D. Cal. Oct. 9, 2020) ("Epic Games moves this Court to allow it to access Apple's platform for free while it makes money on each purchase made on the same platform. While the Court anticipates experts will opine that Apple's 30 percent take is anti-competitive, the Court doubts that an expert would suggest a zero percent alternative. Not even Epic Games gives away its products for free.").

[27] The full set of developer services software platforms provide includes immediate distribution to tens of millions of consumers globally; marketing through the platform; platform level privacy controls; assistance with intellectual property protection; security features built into the platform; developer tools; access to hundreds of thousands of application programming interfaces, or APIs; and payment processing.

calls. In 2019, the Federal Trade Commission (FTC) pointed to the important function software platforms perform in its first ever action against a purveyor of stalker apps, Rentina-X. The FTC stated in its enforcement action that "the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleges exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties."[28] Similarly, as the FTC has investigated and enforced against consumer protection harms on the app stores, the contemplated—and actual—remedies required the platform to act as gatekeeper.[29] Consumer protection efforts encounter difficulty in these marketplaces unless a platform is able to enforce the requirements it imposes on apps, including platform-level controls that prevent videogame companies from taking advantage of children's tendencies toward in-app purchasing if left unchecked.

Limitations on exclusionary conduct. To ameliorate perceived issues with self-preferencing on software platforms, policymakers are considering amendments to antitrust law that fall somewhat short of a set of nondiscrimination rules but expand liability for categories of exclusionary conduct. Again, pointing to the "incentive and ability to abuse"[30] their dominant position against third parties, policymakers are considering an "abuse of dominance" standard applied to software platforms (and generally).

Setting aside the particulars of existing proposals, we urge this Subcommittee to consider a couple of factors when contemplating such an expansion of liability. First, many of the actions of software platforms that have drawn antitrust criticism also have countervailing benefits. For example, Apple's decision to require opt-in consent for ad tracking between apps caught attention in the antitrust space but has a powerful justification in privacy protection. In a stark example of privacy versus antitrust interests, the French Competition Authority recently rejected a competition complaint to enjoin Apple's opt-in framework, noting that it is part of "Apple's long-standing strategy to protect the privacy of iOS users."[31] Second, self-preferencing activities on software platforms that appear to harm some competitors often benefit others and consumers. For example, the installation of pre-loaded apps on smart devices can greatly benefit developers by enabling them to rely on a single default functionality like a camera app while making the device itself more attractive to the consumers App Association members wish to reach. Said Parag Shah of App Association member company Vēmos in a recent antitrust panel discussion, consumers "want to be able to buy [a smart device] from a store, they want to be able to turn it on, and they want it to work on the basic levels of 'I can text someone, I can call someone, I can open up a web browser . . . I want some basic functionality.'" In this case, although the pre-installation of apps plainly advantages a software platform's own offerings over alternative camera, messaging, or browser apps, the benefits to consumers and other competitors of doing so are equally evident. The considerations here weigh against tilting liability for exclusionary conduct too far such that

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[28] Press Release, Fed. Trade Comm'n, FTC Brings First Case Against Developers of "Stalking" Apps (Oct. 22, 2019), *available at* https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps.

[29] Press Release, "Apple Inc. Will Provide Full Consumer Refunds of At Least $32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent," Fed. Trade Comm'n (Jan. 15, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million.

[30] ACAL Report.

[31] Press Release, "Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case," Autorité de la concurrence (Mar. 17, 2021), *available at* https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue.

conduct that appears to harm a certain class or classes of competitors is foreclosed or strongly discouraged, even though it is ultimately better for App Association members, competition, and consumers.

III. More Resources and Enforcement in Standards-Setting

We support recommendations to "[i]ncreas[e] the budgets of the Federal Trade Commission and the Antitrust Division."[32] Antitrust cases are a highly resource-intensive undertaking, and federal enforcers are underequipped to carry out their important task.

One area we urge the Subcommittee to focus on in particular, and where the federal enforcement agencies must bring those resources to bear, is the applicability of antitrust law to standard-essential patent (SEP) abuse. In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services, Congress must ensure that antitrust law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms.[33] These commitments balance the market power SEP owners obtain with the need for innovators to license the patented inventions essential to use the standard. When kept, FRAND commitments prevent anticompetitive licensing behavior by curtailing, in most cases, the ability of an SEP licensor to leverage its market power through exclusionary relief; by rewarding an SEP owner with damages for infringement of a valid patent that are commensurate with the scope of its patented invention; and by ensuring that an SEP licensor cannot discriminate between firms in the manufacturing supply chain when licensing its SEPs. The SEP context is distinct from situations where companies own unencumbered patents or are competing with each other to provide the best vertically integrated product or service. Through standards-setting, stakeholders supplant part of the competitive process with a mechanism for interoperability, necessitating closer antitrust involvement. Unfortunately, some SEP owners break their FRAND promises and engage in activities that harm competition and consumers by increasing prices, reducing the quality and variety of products and services, and diminishing innovation.[34] Breaking these promises implicates antitrust law, in addition to other sources of law.

Conclusion

As this Subcommittee continues its work on antitrust in tech-driven markets, we hope the perspective of small mobile software and connected device companies that leverage software platforms helps guide your work. Antitrust is rightfully a fact-intensive inquiry that must assure the competitive process serves consumers as well as possible. To that end, we support providing more resources for the two federal agencies tasked with enforcing antitrust law—they are woefully

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[32] ACAL Report, at 403.

[33] *See* Brian T. Yeh, "Availability of Injunctive Relief for Standard-Essential Patent Holders," CONG. RESEARCH SERV. Summary (Sept. 7, 2012), *available at* https://www.everycrsreport.com/files/20120907_R42705_9c71ac36b1c0030af0d1bd97b53e8b7ba6fd3e73.pdf.

[34] *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 318 (3d Cir. 2007), *available at* https://caselaw.findlaw.com/us-3rd-circuit/1069408.html.

under-resourced to carry out the important and extremely costly task of stopping antitrust harms. In general, our member companies are worried that large, well-resourced companies may successfully create for themselves a new avenue for bending the market in their favor by reorienting antitrust law so that it protects certain (large, well-resourced) competitors to the detriment of smaller companies and consumers. We appreciate this opportunity to weigh in on your important inquiry and look forward to further engagement with you throughout the 117th Congress and beyond.

Sincerely,

Morgan W. Reed
President
ACT | The App Association

January 24, 2020

Comments of ACT | The App Association
House Committee on Energy and Commerce
Draft Framework of *Online Privacy Act of 2019*

ACT | The App Association appreciates your leadership on consumer privacy. The touchstone of privacy is trust. Members of your Committee noted repeatedly that individuals are beginning to mistrust technology, and any legislation Congress considers should help restore this consumer trust. The specific privacy lapses the Energy and Commerce Committee examines generally involve larger companies with business models that depend on complex data processing activities. To the extent Congress intends legislation to address these observed privacy issues, it should also proceed carefully so as to preserve competitive forces where they tend to improve privacy outcomes for consumers. Small companies, like our members, lead the way in developing competition-driven privacy tools to give consumers more control and mitigate privacy risks.

The App Association is a trade group representing about 5,000 small to mid-sized software and connected device companies across the globe. In the United States, our member companies are part of a $1.3 trillion industry, supporting about 5.7 million jobs. We regularly work to keep our member companies up to speed on the latest policy and legal developments and to translate those into practical and useable guidance to ease the burden of compliance.[1] Further, we commit to promoting proactive approaches to ensuring end-user privacy and participate frequently in the privacy debate at the federal level, including by serving on panels in Federal Trade Commission (FTC or Commission) workshops and filing comments with congressional committees.[2]

Commercial privacy is not a static concept, and yet products and services should, and are expected to, respect user privacy as part of their design. Often an ongoing dialogue with users that accounts for changing contexts and expectations is the only way to accomplish this. Our member companies compete with each other and larger companies to create better, more efficient privacy protection measures. They work hard to comply with privacy laws, best practices, and regulations. But they also know that their clients, customers, and users usually have a choice, and the kinds of privacy practices they employ inform that choice. This is a foundational concept that Congress must consider as it proceeds with negotiations over a federal privacy framework. It forms the core of our privacy philosophy and guides our policy recommendations, laid out in more detail in these comments.

I. Rulemakings

Numerous sections of the draft bill would require the FTC to promulgate rules using Administrative Procedure Act (APA) processes. In many of these instances, these provisions could be sharper to

[1] *See, e.g.,* ACT | The App Association, General Data Protection Regulation Guide (May 2018), *available at* https://actonline.org/wp-content/uploads/ACT_GDPR-Guide_interactive.pdf.
[2] *See, e.g.,* https://www.ntia.doc.gov/files/ntia/publications/2018-11-09_-_ntia_-_privacy_filing_-_final.pdf; http://actonline.org/wp-content/uploads/2018-04-10-FTR-ACT-the-App-Association-Facebook-Privacy-FINAL.pdf; https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop; Statement for the Record from ACT | The App Association to Senate Committee on Commerce, Science, and Transportation, hearing, "Small Business Perspectives on a Federal Data Privacy Framework," (Apr. 5, 2019).

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more narrowly authorize the Commission to "clarify" the rest of the section. For example, Section 3 includes a detailed list of items covered entities must include in privacy policies and further requires the FTC to conduct a potentially open-ended rulemaking imposing the requirements that appear in statute. It may be a bit redundant to require the FTC to issue rules that impose the same requirements that appear in statute, unless their purpose is simply to clarify those statutory provisions. As reflected in our redline, we recommend specifically stating that the purpose of the rules is to "clarify" the requirements that appear in the legislative or statutory provision. Otherwise, various constituencies may push and eventually convince the Commission to broadly read these rulemakings to give it more flexible authority to interpret the sections than the drafters intend.

II. Small Business Treatment

The App Association generally does not ask for carveouts for small companies when it comes to privacy. The typical App Association member competes with much larger companies for clients, often in highly regulated industries such as finance or healthcare. For some of our members, in order to remain competitive, they must show that they effectively comply with the major privacy laws like the General Data Protection Regulation (GDPR)—or have some sort of certification of compliance with private sector developed guidelines or best practices—so there is no perception of being less protective than their competitors. And if they win contracts with large clients (which may have an international or Californian customer base), they find themselves under contractual provisions that require them to meet GDPR and other compliance mandates that do not otherwise directly affect them.

Nonetheless, the provisions in Section 5, requiring covered entities to respond to requests to access and delete information about themselves, are complex and would require substantial resources to implement. The ability for small businesses to delete covered information in lieu of complying with the correction requirements of the draft is a positive step. However, you should also consider applying all of the requirements only to covered entities that generated $25,000,000 in the previous year. Whether one of our member companies would need to verify a consumer request to edit or delete that consumer's data, the virtual infrastructure would need to be in place to adequately verify the identity of the requesting consumer. Substantial resource costs would be incurred whether the request is to delete or to correct inaccurate information, so the allowance the staff draft provides does not save small companies all that much in compliance costs.

It is one thing that many of our member companies are now "complying by proxy" with GDPR's consumer rights provisions, and thus, answerable to contract damages or at least disciplined by competition. It is another thing, however, to subject the typical App Association member—which averages roughly between one and 10 employees—to these complicated requirements and, by extension, to the up to $43,000 per-individual-violation civil penalty if they get it wrong. Additionally, applying consumer rights only to larger companies would not *lessen* the "complying by proxy" effect we see now among smaller companies like App Association members—more likely, the competitive pressure would only increase. If you ultimately decide to maintain the Section 5(a)(4)(B) alternative option for small businesses to delete in lieu of correcting information (instead of a broader small business carve-out), a preemption provision becomes even more important for small businesses to avoid possibly conflicting differences in how they must honor consumer rights. Finally, you should consider providing more time for small businesses under the statute to become compliant with the deletion and access requirements. This would allow small businesses to plan for compliance over time as opposed to allocating essential capital to the cost of immediate compliance.

a. The Approved Compliance Guidelines Program

The approved compliance program in Section 13 of the draft bill may help alleviate some of the concerns described above. The App Association members who opt for the safe harbor may be slightly less terrified of business-ending civil penalties if the FTC must first show that they strayed from the compliance program that certified them. That buffer would provide a level of comfort and probably would result in more robust economic activity without its presence. However, the similar Safe Harbor Program under the Children's Online Privacy Protection Act (COPPA) was largely a failed experiment, so we should carefully avoid the pitfalls experienced in that exercise.

There are reasons to believe that the compliance guidelines program in your draft bill would not fail for the same reasons as COPPA's. First, no COPPA safe harbor program could avoid the insurmountable difficulty for regulated companies of requiring parents to provide "verifiable parental consent" (VPC). The requirements in your draft do not appear to require such onerous tasks of consumers themselves. Second, experience shows that companies are so loath to deal with VPC that they alter their products and services completely to appeal to general audiences, avoiding (or trying to avoid)[3] COPPA altogether. The scope of your draft bill is (rightly) so comprehensive that companies are not likely able to slip away from its requirements and find themselves under less onerous regulations. Ultimately, however, even if the approved compliance program successfully serves its purposes, the entire array of requirements in the draft bill (with a few exceptions) applies to the smallest and largest companies in equal measure. An approved compliance program must include almost every requirement, from providing a right to access and delete information to creating a comprehensive data security program with the eight main features described in Section 9. Realistically, an approved compliance program would not lighten the draft's substantial regulatory burden by much, but we support its inclusion as a meaningful incentive for small companies to compete and comply by providing limited protection from steep penalties.

III. Limitations on Processing Covered Information

The draft's treatment of consent as implied "to the extent the processing is consistent with the reasonable consumer expectations within the context of the interaction" is an appropriate and flexible standard. Although the Commission may have some trouble applying the standard in complex circumstances, such is the nature of privacy harms—and the examples of appropriate processing activities that are likely consistent with reasonable consumer expectations are helpful. We urge the Committee to include internal data analytics for the purposes of "product development and improvement" (the bracketed text) as an example of the kinds of processing activities that may be consistent within the context of a covered entity's interaction with consumers. Our app developer members use their clients' or customers' in-app activities (which may be covered information) to analyze how people with certain attributes use parts of their products and services and under which circumstances. Understanding user behavior is key not just to developing *better* versions of what they've already made, but also to developing new products, systems, and services. The last thing we want is to discourage app developers from using personal data to make better products and services.

[3] *See, e.g.*, https://www.ftc.gov/enforcement/cases-proceedings/172-3083/google-llc-youtube-llc.

IV. Prohibition on Discriminatory Use of Data

We agree that covered entities should not have permission to use personal information to discriminate against consumers on the basis of race, gender, sexual orientation, or other protected attributes. It may be more efficient, however, to require the FTC to enter a memorandum of understanding (MOU) with the agencies that enforce antidiscrimination laws. The draft appears to impose a separate prohibition on discriminatory activities and conscripts the FTC to act as a civil rights enforcement agency. The emerging issues we observed where companies are using personal data as part of a scheme to discriminate against consumers are mainly new ways of violating old laws that fall outside the Energy and Commerce Committee's jurisdiction. The problem Section 11 should set out to solve, then, is a problem of evidence rather than the creation of a new prohibition on discrimination. The FTC is better situated to understand and collect the evidence, while the respective enforcement agencies have more experience and a better shot at success in court.

V. Covered Information

The draft's definition of covered information includes information "linked or reasonably linkable to a specific . . . consumer device." We urge the Committee not to include consumer devices in the definition of covered information because doing so would discourage the use of certain privacy protective measures from which App Association members benefit. For example, some consumer device makers, including smartphone makers, use rotating, ephemeral, unique device identifiers (UDIDs) to pinpoint precise location. Smartphone owners know that devices have gotten better over time at locating their precise location. This improvement is thanks in part to the ability for device makers to continuously add device locations to an encrypted database. In this process, the precise location is associated with a given device for a transient period of time, using a randomly generated UDID. The UDID is then deleted, and the location data becomes part of the dataset, where it is no longer associated with a specific device.

App Association members never have to use this dataset, and yet it is enormously valuable because it makes any application on your device that depends on your location more accurate. Even more importantly, the dataset accomplishes this without identifying the device or the person to whom it belongs. And yet, because the data must link to a device for a brief period of time, it could be considered covered data under the draft's definition. The inclusion of consumer devices in the definition of covered information, therefore, would discourage the more privacy-protective measure of ephemerally linking key data to a person's device. With transient UDIDs included in covered information, businesses would likely abandon those resource-intensive measures and simply leave data associated with devices and consumers, subjecting themselves to the provisions of the draft. If you ultimately decide to keep consumer devices in the definition of covered information, an alternative way of dealing with this issue could be to clarify that ephemeral UDIDs, which are disposed of when the associated data is stored, are an example of deidentified information in the bill. We believe this would be consistent with the current deidentified information provision, which excludes information "for which an entity takes reasonable measures to . . . ensure that identifying information has been removed."

VI. Preemption and Private Right of Action

The prospect that congressional action on privacy alone might establish a single national standard is not a guarantee. Therefore, we recommend that any privacy legislation Congress drafts include a

provision explicitly preempting state laws and rules dealing with privacy within the framework of the legislation. We acknowledge that some Members of Congress want to avoid a discussion of preemption until after other provisions have been addressed. From a small business standpoint, however, preemption is one of the most important elements of a federal privacy framework. If legislation does include a preemptive provision, we agree with many advocates that state attorneys general should be authorized to enforce the provisions of the law. Similar laws like COPPA have benefited from empowering state attorneys general to police for prohibited conduct. Moreover, we believe that Congress should authorize additional funds for the FTC to police privacy practices under a new federal privacy framework.

If negotiators agree on a private right of action, we urge you to ensure there are a few protections in place to guard against abusive litigation. First, remedies should be limited. In this case, if a private right of action applies generally to most or all provisions of the bill, the drafters should avoid creating a honey pot like liquidated or statutory damages for plaintiffs' attorneys. Making injunctions available would empower individuals to stop prohibited behavior or compel required actions. Whether a company is large or small, its employees want to focus on the company's customers and clients instead of litigation. The availability of an injunction gives substantial leverage to individual consumers to bring companies of all sizes to the table. Second, a private right of action should require the plaintiff to show some level of scienter. We would encourage drafters to require private litigants to show that a putative defendant *knowingly* violated the provision of the draft at issue. The wide variety of requirements in any comprehensive privacy bill are simply too numerous not to become a game of "gotcha" by trial attorneys absent a requirement to show scienter. Third, covered entities (especially smaller companies) should be afforded a period of time to correct alleged violations before a court will consider a claim. Under such a provision, the court would likely stay the complaint pending the "correction" period. If the plaintiff believes the defendant failed to cure the alleged violation, the court could then consider the evidence of the violation itself along with the evidence that it had been remedied within the allotted time period. Fourth, the provision could require a court to impose sanctions on an attorney that is found to have violated Rule 11(b) of the Federal Rules of Civil Procedure. This provision could help deter lawsuits that are baseless or filed primarily to harass the putative defendant. These are some basic safeguards that could ameliorate the potential litigation burden and prevent abusive lawsuits from clogging the courts (potentially locking out legitimate claims).

VII. Conclusion

We appreciate this opportunity to comment on your proposed legislation. We look forward to keeping in contact as you work toward potential introduction and take further steps.

May 29, 2021

Rebecca Kelly Slaughter
Acting Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, D.C. 20580

Re: Comments of ACT | The App Association re the Federal Trade Commission's Request for Comment Regarding Topics to be Discussed at Dark Patterns Workshop

Dear Acting Chair Slaughter,

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) on its request for public comment in relation to its "Bringing Dark Patterns to Light" workshop. The App Association appreciates the Commission's interest in this important topic and urges the Commission to focus on outright deceptive design decisions as the Commission seeks to establish greater oversight of dark patterns going forward.

I. Introduction and Statement of Interest

The App Association represents approximately 5,000 small business software application development companies and technology firms globally that create the technologies driving internet of things (IoT) use cases across consumer and enterprise contexts. Today, the App Association represents an ecosystem valued at approximately $1.7 trillion and is responsible for 5.9 million American jobs. Our members create innovative solutions that drive the world's rapid embrace of mobile technology. Their products power consumer and enterprise markets across modalities and segments of the economy.

The App Association serves as a leading resource in the privacy space for thought leadership and education for the global small business technology developer community.[1] We regularly work to keep our members up to speed on the latest policy and legal developments and to translate those into practical and useable guidance to ease the burden of compliance.[2] Furthermore, through our Innovators Network Foundation Privacy Fellowship, we support thought-leadership that covers a wide range of privacy issues,

[1] *See e.g., ACT | The App Association, What is the California Consumer Privacy Act (January 2020),* available at: https://actonline.org/wp-content/uploads/What-is-CCPA.pdf

[2] *See e.g.*, *ACT | The App Association, General Data Protection Regulation Guide* (May 2018), available at: https://actonline.org/wp-content/uploads/ACT_GDPR-Guide_interactive.pdf;

including dark patterns.[3] Relevant output from current fellows that touches on dark patterns include Lourdes Turrecha's work exposing the deceptive design choices that undermine user privacy within the Clubhouse app,[4] as well as Lorrie Cranor's research into the design choices that make it difficult for consumers to exercise their privacy choices on many websites.[5]

II. Introduction and Statement of Interest

Generally, the App Association agrees with conceptual framework posed in Harry Brignull's oft-cited definition of dark patterns, though we advocate for a more expansive scope. Brignull writes that, "Dark Patterns are tricks used in websites and apps that make you buy or sign up for things that you didn't mean to."[6] He further refines his definition through a taxonomy of 12 different types of dark pattern, including "roach motel" and "confirmshaming", which helpfully elucidate the breadth and depth of the manipulation and deception under question.[7] Yet while these categorizations are a useful starting point, "dark patterns" remains a frustratingly elusive concept to define and arguably includes a far greater range of players than currently recognized.

Dark patterns are by no means a design tactic relegated exclusively to the domain of cutting-edge startups or mobile applications. Cranor's research found inconsistent and at-times misleading user opt-out controls for email communications within a sample of 150 websites drawn from Alexa's ranking of global top 10,000 websites. The list includes websites from industries as diverse as finance, health, media, sports, and of varying sophistication and user design prowess.[8]

It is also important to recognize that dark patterns are extensions of tactics used in the physical world. Brignull's "roach motel" category includes design choices that require users to take exhaustive steps to effectuate a preference that may conflict with the business' preference. As an example, when examining the email opt-out procedure at the *New York Times* Cranor and Habib found that, "deleting the data they'd gathered on us required completing 38 different actions, including finding and reading the privacy policy, following a link to the data deletion request form, selecting a request type, selecting up to 22 checkboxes, filling in eight form fields, selecting four additional confirmation boxes,

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[3] *ACT | The App Association, Innovators Network Foundation Announces 2020-21 Privacy Fellows* (December 2020), available at: https://actonline.org/2020/12/08/innovators-network-foundation-announces-2020-21-privacy-fellows/

[4] Lourdes Turrecha, "When FOMO Trumps Privacy: The Clubhouse Edition", February 19, 2021. https://medium.com/privacy-technology/when-fomo-trumps-privacy-the-clubhouse-edition-82526c6cd702

[5] Hannah Habib and Lorrie Cranor, "An Empirical Analysis of Data Deletion and Opt-Out Choices on 150 Websites", *Soups 2019,* August 2019. https://www.usenix.org/system/files/soups2019-habib.pdf

[6] Harry Brignull, "What are Dark Patterns." https://www.darkpatterns.org/

[7] Harry Brignull, "Types of Dark Patterns." https://www.darkpatterns.org/types-of-dark-pattern

[8] Lorrie Cranor and Hannah Habib, "An Empirical Analysis of Data Deletion and Opt-Out Choices on 150 Websites", *Soups 2019,* August 2019. https://www.usenix.org/system/files/soups2019-habib.pdf

and completing an "I am not a robot" test."[9] Of course, the roach motel model was pioneered and perfected for years outside of the website and app context. Casino designers, for example, are notorious for constructing floor plans that intentionally disguise exits with the goal of manipulating guests into spending extra time within the facility. Few would call that a dark pattern because it occurs within the physical world, yet it seems equally manipulative to the opt-out practices at the *New York Times*.

It might also be more useful to think of dark patterns as design choices in *any* type of business-to-user interaction that cause the consumer to purchase or sign up for things they didn't mean to. For example, the use of dark patterns in political advertising and fundraising, often conducted over email rather than through a website or app, is extremely well-documented. Examining a corpus of over 100,000 emails sent during the 2020 U.S. election cycle, researchers found manipulative tactics in 43 percent of communications, with 99 percent of campaigns using such tactics at least occasionally.[10] Insofar as the FTC seeks to bolster its monitoring of the marketplace for examples of dark patterns, it should remain aware that the practice is widespread, cross-cutting between industries, and endemic to many types of communication technologies.

Clearly, part of the issue in defining dark patterns stems from an ongoing migration of markets from analogue to digital spaces, across industries. Some dark patterns, such as "confirmshaming", are clearly holdovers from longstanding face-to-face sales tactics in which salespeople employ behavioral nudges in order to close a sale or upsell a service. As with such sales tactics, confirmshaming should be understood to encompass a wide range of activities that run from innocuous to outright deceptive, the latter of which should be the main source of attention from regulators. Confirmshaming, as currently understood, could include a prompt as simple as "are you sure you wish to opt-out", a necessary piece of developer due diligence that could be construed as guilting a customer. While certainly starker when presented plainly on a website or app than when spoken aloud in a sales context, such a prompt hardly seems out of place in the broader marketplace and surely does not constitute an unfair or deceptive trade practice. The App Association would urge the FTC to focus its attention on examples of dark patterns that clearly deceive and bring harm to a user.

III. Conclusion

The App Association urges the commission to carefully consider a definition of dark patterns. While there is a great opportunity to clarify and rid the market of harmful practices, an ambiguous or overinclusive definition may harm app developers simply seeking to do the right thing. The most prudent path may be to define dark patterns as

[9] Lorrie Cranor and Hannah Habib, "It's shockingly difficult to escape the web's most pervasive dark patterns", *Fast Company,* November 4, 2019. https://www.fastcompany.com/90425350/its-shockingly-difficult-to-escape-the-webs-most-pervasive-dark-patterns

[10] Hamin et al., "Manipulative Tactics are the Norm in Political Emails", Princeton University Center for Information Technology Policy, October 5, 2020. https://electionemails2020.org/assets/manipulative-political-emails-working-paper.pdf

technology-agnostic communication practices that outright deceive users into purchasing services the user did not intend to. We thank the Commission for the opportunity to comment and hope the information we provided assists its thinking on this important issue.

Sincerely,

Brian Scarpelli
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Matt Schwartz
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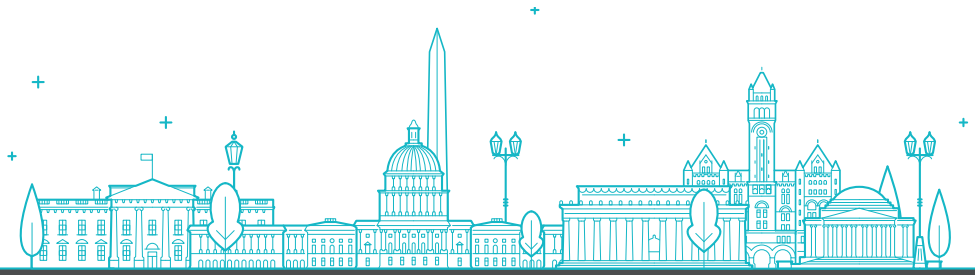
Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms

Testimony of

Morgan Reed
President
ACT | The App Association

Before the

U.S. Senate Judiciary Committee,
Subcommittee on Antitrust, Competition Policy and Consumer Rights



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I. Introduction

We thank the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights for holding this hearing on the effect large, technology-driven platform companies have on competition. This hearing provides an important venue for the debate around how certain public policy concepts, including competition law, apply in a variety of markets characterized by the presence of large companies with global reach. ACT | The App Association is the voice of small business tech entrepreneurs, and we appreciate the Subcommittee welcoming the views of our members on how best to safeguard innovative market activity and job creation in tech-driven industries.

The App Association is a trade group representing about 5,000 small to mid-sized software and connected device companies across the globe. In the United States, our member companies are part of a $1.7 trillion industry, supporting about 5.9 million jobs. If these seem like surprisingly high figures, it could be because there is a tendency to look only at the consumer-facing or most-downloaded apps in the Apple App Store or Google Play when referencing the market for apps. But these are a small fraction of the app economy. Most of our member companies make white label software—that is, they build software and provide services for other companies. If a member company makes an app for another firm, it's usually the client's logo that goes on the app. And the app itself may not be consumer-facing at all, it may be a management program for internal use by a brewery, hospital, or manufacturer. What virtually all of them have in common, though, is that they leverage software platforms to reach their clients and customers. We urge the Subcommittee to look beyond sales to consumers when thinking about the App Association's members and the app economy in general.

We actively facilitate engagement between app developers, investors, and platforms in fora across the country.[1] For example, just last month, we concluded a series of 12 events across the nation (Developed | The App Economy Tour) highlighting local success stories from the app ecosystem. Our destinations included Minneapolis, Charleston, and St. Louis. Our panelists ranged from founders of fledgling small mobile software companies to venture capitalists to legal experts discussing subjects like federal and state privacy legislation, access to funding, and workforce development.[2] The constituents of members of this Subcommittee drive competition in the app ecosystem, and with these events, we showcased the innovation happening everywhere in the United States. We urge this Subcommittee to carefully consider how any potential changes to relevant federal law would affect your constituents. As the App Economy Tour highlighted, competition is alive, well, and thriving in the states you represent. The tour itself, which featured small startups and innovators taking on major challenges, is a testament to how software platforms have helped democratize entrepreneurship, seeding thriving app ecosystems in every state across the nation.

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[1] *See, e.g.*, ACT | The App Association, "Queen City Mobile Summit highlights Cincinnati as mobile tech hub," (Feb. 23, 2016), *available at* https://actonline.org/2016/02/23/queen-city-mobile-summit-highlights-cincinnati-as-mobile-tech-hub/.

[2] *See* ACT | THE APP ASSOCIATION, DEVELOPED | THE APP ECONOMY TOUR, https://actonline.org/developed/ (last visited Mar. 9, 2020).

In this hearing, the Subcommittee is examining the characteristics of competition between larger companies that act as both platforms and competitors in adjacent markets. Our testimony focuses not on social media or retail platforms, but on software platforms. Software platforms are the app stores—which in some cases come with operating systems and smart devices—on which developers sell their apps and from which our member companies buy developer services. It is through this root system that the app economy has permeated and redefined the economy as a whole, rendering notions of a separate "tech industry" outdated. Software platforms and developers—leveraging ubiquitous connectivity and access to cloud computing—are superimposing a tech-driven element to virtually all industries across the economy from agriculture to healthcare. As a result, competition has new and dynamic characteristics not just in tech, but everywhere. App Association member companies are at the center of these market changes, and their continued ability to create jobs in your states depends on robust enforcement of antitrust laws where appropriate and allowing competition to take place where intervention is inappropriate.

We urge the Subcommittee to take a few important considerations into account in this inquiry. First, software platforms have reduced barriers to entry for tech entrepreneurs and enhanced choices for consumers. Second, software platforms help innovators enter and even create new markets. Third, the antitrust concerns that focus on software platforms are often overstated and should be weighed against other policy considerations. Fourth, software platforms are not perfect. Developers want more transparency and continued improvements to security and safety. Our member companies want platforms to compete for their business, and they want to ensure competition is robust.

II. Platforms Have Reduced Costs for Developers and Enhanced Competition and Choices for Consumers

Consumers and developers experienced significant changes since the introduction of various mobile software platforms. In addition to having more choices, consumers also benefit from lower prices for software and even access to new markets that did not previously exist. Similarly, developers benefit from lower overhead costs, built-in customer trust, and wider distribution and market access.

Choices proliferated because entry into the software market is much easier now than it was before platforms.[3] Before platforms, the nature of the marketplace forced software developers to take on tasks that were well beyond their core competencies—from marketing to protecting their intellectual property and negotiating with a variety of different types of companies to distribute their products. The transaction costs of taking

[3] Daniel Ershov, *The Effects of Consumer Search Costs on Entry and Quality in the Mobile App Market*, TOULOUSE SCHOOL OF ECON. (Apr. 18, 2018), *available at* https://www.cemfi.es/ftp/pdf/papers/wshop/DErshov_MobileAppCompetition_Jan2018.pdf.

on all these extra tasks were significant, and platforms have eliminated many of them. The resulting environment is one in which small companies like App Association members can retain their size, stay where they were founded, and thrive. Our member companies experience a wide variety of growth trajectories, meaning growth to the size of companies like Facebook or Uber is not the only measure of success. To fully appreciate the depth of the app economy and its potential, one must look well beyond the "Top 10" apps in the major app stores or the eye-catching headlines covering the initial public offerings of unicorn companies.

Before the ubiquity of mobile platforms, the software ecosystem ran on personal computers. This forced early app companies, often with teams of just one or two developers, to wear many hats to develop, market, and manage their products. App companies were not only required to write code for their products, but they were also responsible for: 1) managing their public websites, 2) hiring third parties to handle financial transactions, 3) employing legal teams to protect their intellectual property, and 4) contracting with distributors to promote and secure consumer trust in their product. App developers, trained in software coding and project management, were not well-equipped to carry out these tasks, and the additional steps cost them valuable time and money, with little tangible benefit.

Without platforms, developers had to take all of these additional steps, creating friction at each point, which meant that the only software titles that were available to the public were those that made the complicated journey from development to publishers to retailers like CompUSA or Best Buy. In 2003, CompUSA rolled out an early concept of a software platform consisting of a kiosk that burned made-to-order CDs containing software applications. With this system, the retailer could offer more software programs than it could fit on its shelves (which is how software was sold at that time), providing 1,200 titles from 200 different publishers.[4] Now, there are more than 317,673 companies active in the mobile app market in the United States[5] and more than 2 million apps available on the major app platforms. The kiosks are now in our smartphones—there are more than 5.28 billion mobile broadband subscriptions worldwide as of 2018[6]—which are attached to smartphones in the pockets of over 80 percent of Americans,[7] saving them the trip to Best Buy to purchase the box software.[8]

In the internet economy, immediate consumer trust is almost impossible without a substantial online reputation, and not attaining that trust spells death for any app company. However, what does "trust" mean? In this context, trust refers to an

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[4] Brian Osborne, "CompUSA offers software vending machines," GEEK.COM (Dec. 12, 2003), *available at* https://www.geek.com/news/compusa-offers-software-vending-machines-551706/.
[5] DELOITTE, THE APP ECONOMY IN THE UNITED STATES (Aug. 17, 2018), available at http://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-US.pdf.
[6] Mike Murphy, "Cellphones now outnumber the world's population, QUARTZ (Apr. 29, 2019), available at https://qz.com/1608103/there-are-now-more-cellphones-than-people-in-the-world/.
[7] Adam Lella, U.S. Smartphone Penetration Surpassed 80 Percent in 2016, COMSCORE (Feb. 3, 2017) Available at: http://bit.ly/2pT04qo.
[8] *See,* Ashley Durkin-Rixey, "Out of the Box: How Platforms Changed Software Distribution," (Sept. 28, 2018), *available at* https://actonline.org/2018/09/28/out-of-the-box-how-platforms-changed-software-distribution/.

established relationship between the app company and customer where the customer has the confidence to install the app and disclose otherwise personal information to an app company. Prior to platforms, software developers often handed over their products to companies with a significant reputation to break through the trust barrier.

At first, developers were reluctant to join platforms, worried that the model might not accommodate their ability to "launch fast and iterate"[9] their apps. But successful platforms changed the app ecosystem by providing app developers with ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users[10] worldwide. With lower costs and barriers to entry, both fledgling and established app developers can find success. For example, educational app company L'Escapadou secured 1.3 million downloads and earned more than $1.5 million from app sales between 2010 and 2014,[11] a success attributed to the centralized nature of platforms. Founder Pierre Abel specialized the language, content, and pricing of each of his apps based on consumer and market needs and marketed them on different platforms to reach a variety of consumers around the world.

III. There's a Platform for That

As successful as the past 12 years have been for the app economy, the next decade could be even better. In just the third quarter of 2019, the two major app stores generated $21.9 billion in revenue—a robust 23 percent year-over-year increase from the third quarter of 2018.[12] This growth suggests the developer-platform model is still succeeding. Moreover, app economy growth is likely to endure because developers are continuing to create new products, services, and markets that did not exist prior to platforms. Perhaps the most notable of these is the market for ridesharing. Connecting a driver—using his or her own car—to a potential passenger in real-time for an on-demand ride to a destination selected by the passenger was impossible before developers could use the GPS capabilities and data connections of smartphones. Ridesharing is an important example of how app developer ingenuity meets the capabilities, built-in trust, and developer services of platforms to create new options for consumers.

Just as ridesharing fundamentally changed how we get around, developers and platforms also revolutionized how we access healthcare. A current shortage of about 30,000 physicians in the United States—projected to increase to up to 90,000 in the

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[9] To launch fast and iterate is often used to describe a software developer's business plan, where software developers like to launch products as soon as they are finished and like to update newer iterations of their product actively. Paul Graham, "Apple's Mistake," PAULGRAHAM.COM (Nov. 2009), *available at* http://www.paulgraham.com/apple.html.

[10] Simon Kemp, "The global state of the internet in April 2017," TNW (Apr. 11, 2017), *available at* https://thenextweb.com/contributors/2017/04/11/current-global-state-internet/.

[11] Steve Young, "Making $1.5 Million with Educational Apps with Pierre Abel," APP MASTERS (Apr. 30, 2015), *available at* http://bit.ly/2hgDzZH.

[12] Craig Chapple, "Global App Revenue Grew 23% Year-Over-Year Last Quarter to $21.9 Billion," Sensor Tower Blog (Oct. 23, 2019), *available at* https://sensortower.com/blog/app-revenue-and-downloads-q3-2019.

next six years[13]—contributed to the need for caregivers and patients to find new ways of communicating. Compounding the caregiver shortage, 133 million Americans currently live with chronic conditions—most of them residing in rural areas with long drives to their nearest provider.[14] Devices, sensors, and software are now capable of gathering and analyzing physiological data like movement, heart rate, or blood oximetry so that physicians can better monitor their patients at home and address potential problems before they occur or worsen.[15] Studies show that preventive care regimes that use connected health tools are especially useful for patients with chronic conditions like diabetes and heart failure, which tend to affect underserved and rural communities especially.[16] But how do these capabilities reach patients and consumers, specifically those who need them most? Most Americans already interact with platforms, through a variety of devices. We know that smartphone adoption rates are increasing among underserved populations in the United States and that for many, their handheld device is their only means of accessing the internet.[17] Here again, developers are leveraging the ubiquity and trusted framework of platforms to produce healthcare innovations that address a variety of health conditions. Moreover, in this case, the platform-developer dynamic helps caregivers reach patients in rural and underserved areas.

One of the central markets at issue is the market for developer services, where a developer pays a platform for assorted services including distribution, marketing, etc. This market also experiences vigorous competition. There is a tendency to include only two platform companies, Apple and Google, in this category of competitors. But for developers, the market is much wider. A game developer can choose platforms like Epic or Steam, and enterprise developers can look to hundreds of proprietary, custom platforms or could create their own. For example, companies like App47 create app platforms for everything from "bulldozers to ultrasound devices."[18] Moreover, for developers looking to reach a general audience, using the web is an alternative, especially for companies that are looking for different kinds of distribution or search services than those available on platforms. Additionally, software developers could choose to advertise on Facebook or distribute their products through Amazon, or one of

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[13] *See* Connected Health Initiative, "Testimony of Morgan Reed, Executive Director, The Connected Health Initiative, Before the U.S. Senate Committee on Health, Education, Labor, and Pensions (HELP) Subcommittee on Primary Health and Retirement Security," (Sept. 25, 2018), *available at* https://actonline.org/wp-content/uploads/CHI-Testimony-Health-Care-in-Rural-America.pdf.

[14] *See Id.*

[15] *Id.*

[16] *See, e.g.,* Clinical Outcomes, Care innovations, at 2, available at http://www.connectwithcare.org/wp-content/uploads/2017/06/2016_Outcomes_Clinical-1.pdf (showing the results of a study by Care innovations and University of Mississippi Medical Center, indicating that the first 100 patients with diabetes enrolled in a program with a remote monitoring component saved the state $336,184 in Medicaid dollars over six months); Testimony of Michael P. Adcock, Exec. Dir., University of Mississippi Med. Ctr., Hearing on "Telemedicine in the VA: Leveraging Technology to Increase Access, Improve Health Outcomes & Lower Costs," (May 4, 2017), available at https://www.appropriations.senate.gov/imo/media/doc/050417-Adcock-Testimony.pdf ("The Mississippi Division of Medicaid extrapolated this data to show potential savings of over $180 million per year if 20 percent of the diabetics on Mississippi Medicaid participated in this program").

[17] Charkarra Anderson-Lewis, MPH, PhD, et al, "mHealth Technology Use and Implications in Historically Underserved and Minority Populations in the United States: Systematic Literature Review," (Jun. 18, 2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6028762/.

[18] APP47, *available at* https://app47.com/.

the giant Chinese platforms. It is worth noting, however, that there are some important distinctions between software platforms—like the App Store or Google Play which provide a marketplace for software apps—and social media platforms or "aggregators" that connect people with information and run on data.[19] Aggregators like Facebook and Twitter, for example, connect people with information and other people (and generate valuable data in the process), while the Google Play store and the App Store provide a marketplace for consumers and app developers to transact directly. These differences illustrate the diversity in the market for distribution methods, as developers may prefer one model over another.

Perhaps most importantly, the universe of platforms is continuing to evolve and expand as diverse kinds of hardware connect to the network. New platforms are cropping up for wearables made by companies like Garmin. Connected home devices and cars drive cross-platform interoperability so that Alexa can communicate with your Samsung appliances or your Ford Fusion—further weighing against conceptions of platform markets where a single player wields market power. These characteristics tend to show that developer services will continue to improve and evolve along with demand. Federal intervention may be necessary where market power exists and raises prices undisciplined by competition or maintain a monopoly position in order to reduce quality or decrease output. But when those factors are not present and competition drives the market, as it does in developer services, intervention is unlikely to help and may harm competition or consumer welfare.

IV. Antitrust Concerns Specific to Software Platforms are Often Exaggerated and Should be Weighed Against Other Policy Considerations

Platforms play an important role not just in tech-driven markets but also across a variety of economic sectors. They exist to bundle together a set of services for sellers and connect those sellers with specific categories of buyers, thus "disintermediating" the market. Under a typical antitrust analysis, self-preferencing by platforms is in most cases procompetitive because it is an example of vertical integration.[20] Where vertical integration or self-preferencing lead to greater efficiency, better quality, or lower costs for consumers, there is no antitrust issue, and there is also no reason to consider extending antitrust law to bar such pro-consumer activity. For example, requiring Apple or Google to uninstall software supporting the cameras on smartphones would probably not be a pro-consumer development—the vertical integration of that feature into the platform is on balance a good thing for smartphone users. But make no mistake, vertical integration does not get a free pass. Antitrust authorities should analyze instances of self-preferencing and vertical integration generally and they have brought enforcement

[19] *See, e.g.,* Ben Thompson, "Tech's Two Philosophies," STRATECHERY (May 9, 2018).
[20] *See* Maurits Dolmans and Tobias Pesch, "Should We Disrupt Antitrust Law?" Cleary Gottlieb Steen & Hamilton LLP (Jul. 18, 2019), *available at* https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf.

actions against companies that apply the antitrust laws on the books, establishing important precedent that bars harmful vertical integration. Nonetheless, with smartphones serving as music players, cameras, and multimodal communications devices, a skeptical view of the integration of those features into the devices is incongruous with the way consumers experience them. Moreover, we can expect competition to discipline examples where self-preferencing is bad for consumers because they can leave the platform. Just like other categories of market activity, an antitrust inquiry into self-preferencing is generally only appropriate where the company at issue has market power (in other words, a lack of adequate competition) and where it is using that market power to harm competition and consumers. Unfortunately, the European Union (EU) has proposed flipping the burden to platforms to show that self-preferencing has "no long-run exclusionary effects" and "either the absence of adverse effects on competition or an overriding efficiency rationale."[21] We would discourage such a proposal in the United States because it would chill market activity that is likely to benefit consumers.[22] Although it would appear to help some of our member companies in the short run to target self-preferencing, the long-term effects of making procompetitive activity more difficult or illegal would tend to harm the economy and ultimately our member companies as well.

Some competitors are asking for an increase in the scope of antitrust law, but they tend to overstate the problems they identify. For example, advocates for legislative intervention point to the cost of the services software platforms provide to developers as evidence that Congress should expand antitrust law.[23] To show that paying for developer services is unfair, they compare the cost of software distribution to the cost of payment processing.[24] This is kind of like comparing the cost of a set of tires to the cost of a car. Yes, the tires are a part of the car, but nobody thinks a car is only a set of tires or that tires should always cost the same as a car. Similarly, payment processing is just one element of the array of services you get on a software platform, which include: immediate availability through hundreds of millions of people's devices; payment processing; marketing through the app store; privacy features embedded in the platform; assistance with intellectual property protection; and security features built into the platform. The stated problem, therefore, seems to be that software platform developer services are too expensive. But again, the problem is overstated because this cost is being compared to the cost of a much less substantial service. Therefore, it does not appear to be a compelling reason to expand antitrust law or create a regulatory regime with a purpose of reducing the price of developer services.

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[21] HEIKE SCHWEITZER, JACQUES CRÉMER AND YVES-ALEXANDRE DE MONTJOYE, COMPETITION POLICY FOR THE DIGITAL ERA: FINAL REPORT 7 (2019) (the "EU Report"), *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[22] It is unclear how the EU would apply this concept and researchers point to a lack of direct caselaw on the theory of harm as it was raised in a case against Google. *See* Beata Mäihäniemi (LL.D.), "Lessons from the Recent Commission's Decision on Google. To Favour Oneself or Not, That is the Question," Working Paper, The Legal Tech Lab, Univ. of Helsinki 13 ("This new theory of harm . . . is however, difficult to apply . . . in practice, as one cannot find any direct case law on the issue in question.").

[23] *Online Platforms and Market Power, Part 5: Competitors in the Digital Economy: Hearing Before the H. Judiciary Comm., Subcomm. on Antitrust, Commercial, and Admin. L.*, 116th Cong. 7 (2020) (statement of David Heinemeier Hansson, CTO & Cofounder, Basecamp) ("Most mobsters would not be so brazen as to ask for such an exorbitant cut . . .") (Basecamp Testimony).

[24] *Id.* at 7.

The other evidence advocates offer to show harm to competition is that making software available on the open internet is free (it is not),[25] whereas software distribution on a platform generally costs money.[26] As alluded to above, selling software on the open internet requires the seller to take on several tasks the software platform bundles together (including marketing, intellectual property policing, privacy controls, security features, and payment processing). And even taking it at face value, the premise has the inconvenient characteristic of proving the opposite point—that is, selling software on the open internet can be a substitute for selling software on a platform. Not only that, detractors of software platforms say they have no choice but to submit to software platform demands and then in the next paragraph, admit that they need not submit to software platform demands because they sell their software on the open internet instead.[27] It is hard to imagine that this internal inconsistency goes unnoticed, and observers likely cannot help but discern from this that software sellers have options. Indeed, other developers have made the transition off platforms without claims of anticompetitive conduct.[28] Substitutes, even when they are not identical, are common in market economies and tend to signal healthy competition.

The other conclusion we can draw from these arguments is that policymakers should be wary of opportunistic behavior by well-resourced competitors disguised as antitrust concern. Those who are most vocal often imply they are speaking for the app economy as a whole,[29] but in reality, they tend to be larger companies seeking to use antitrust law or other policy levers to undermine competitors. Right now, the largest software platforms charge the same (as a percentage of revenue) for developer services regardless of the company's size or political clout. Smaller developers have the advantage in this arrangement because they do not have the leverage to negotiate better terms on their own, as larger companies do. Overtures to have Congress involve itself in developer-platform relations, therefore, may benefit the largest software companies on the platforms but may actually make small developers like App Association members worse off. If large software companies are able to convince Congress to require software platforms to give them a better deal, App Association members and their clients and customers are forced to subsidize the resulting discount for these larger companies. Adding insult to injury, many of our member companies

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[25] If a software company opts to reach its customers through the open internet instead of a software platform, the company still needs to invest in overhead costs the platform would otherwise handle, including marketing, intellectual property management, privacy and security features, and payment processing.

[26] *Id.*

[27] *See, e.g.,* Basecamp Testimony at 7.

[28] *See*, *e.g.*, Nick Statt, "Fortnite for Android will ditch Google Play Store for Epic's website," THE VERGE (Aug. 3, 2018), *available at* https://www.theverge.com/2018/8/3/17645982/epic-games-fortnite-android-version-bypass-google-play-store ("CEO Tim Sweeney says the primary motivation here is twofold. Epic wants to maintain its direct relationship with consumers."); Chris Welch, "Netflix stops offering in-app subscriptions for new and returning customers on iOS," THE VERGE (Dec. 28, 2018), *available at* https://www.theverge.com/2018/12/28/18159373/netflix-in-app-subscriptions-iphone-ipad-ios-apple.

[29] Daniel Ek, Founder and CEO, Spotify, "Consumers and Innovators Win on a Level Playing Field," Spotify (Mar. 13, 2019), *available at* https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/ ("So, let me be clear that this is not a Spotify-versus-Apple issue. We want the same fair rules for companies young and old, large and small.").

compete with these larger firms, so the advantage handed to the larger companies could directly disadvantage App Association members.

Even as the antitrust concerns expressed in this area are often overstated, a competition analysis of these dynamics is not always the final say, and antitrust concerns may conflict with countervailing policy priorities. For example, policymakers raised alarms over measures software platforms use to protect consumer privacy. In one instance, a software platform faced antitrust concerns after a decision to curtail apps' ability to track a consumer's location even when the app is not running unless the consumer clearly consents. Advocates exert a steady stream of pressure on software companies and platforms to improve their privacy practices, especially with respect to location data.[30] They often point to the opaque or even misleading manner in which companies collect such sensitive personal information. As one advocate argues, "[p]rivacy is often framed as a matter of personal responsibility, but a huge portion of the data in circulation isn't shared willingly—it's collected surreptitiously and with impunity."[31] Privacy controls at the platform level help ameliorate this perceived problem by making it easier to set collection rules for all or specific apps.

Policymakers at all levels have made it clear that companies should embed privacy into the design of their products and services.[32] Accordingly, the purpose of a privacy prompt from the platform's operating system should not be to confuse a consumer into selecting an option that gives away more data than they intended. It follows that requiring platforms to make it easier to provide location data (even when an app is not running) than it is to protect that data runs headlong into the policy imperative of privacy by design. Looking at the issue solely from a competition lens is, therefore, an incomplete view. Moreover, the more privacy protective approach of one software platform differentiates it competitively from other platforms that arguably make it easier for developers to collect sensitive data. In resolving these policy tangles, the focus should be on what works best for consumers. Antitrust law by itself rightfully addresses consumer welfare—it does not seek to benefit competitors. So, if a platform has an offering that a consumer prefers over the offering of an independent developer, policymakers should ask whether the complaints of powerful competitors necessitate legislating away that choice.

App Association members are selective about the markets they enter, but they compete aggressively. And the presence of a powerful and well-resourced competitor is not always enough to totally discourage entry. For example, our Minneapolis-based member company Vemos provides a dashboard for nightlife and event venues to manage the growth of their businesses.[33] The presence of incumbents like Eventbrite

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[30] *See, e.g.*, EPIC.ORG, LOCATIONAL PRIVACY, *available at* https://epic.org/privacy/location/.
[31] "EFF Report Exposes, Explains Big Tech's Personal Data Trackers Lurking on Social Media, Websites, and Apps," Press Release (Dec. 2, 2019), *available at* https://www.eff.org/press/releases/eff-report-exposes-explains-big-techs-personal-data-trackers-lurk-social-media (quoting Bennett Cyphers, EFF staff technologist and report author).
[32] *See, e.g.,* "FTC Issues Final Commission Report on Protecting Consumer Privacy," Press Release, FED. TRADE COMM'N (Mar. 26, 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/03/ftc-issues-final-commission-report-protecting-consumer-privacy.
[33] VEMOS, https://www.vemos.io/ (last visited Mar. 9, 2020).

was not a deterrent because Vemos differentiates itself from incumbents by compiling data from and interoperating with a variety of event management tools and analyzing the data to provide insights into how clients can improve their events and businesses. Having a lot of resources is an undeniable advantage as a competitor (whether it is a platform or not), but our member companies exist because they fill a niche with a differentiated product, they can compete on price, or they can simply outmaneuver the larger competitors. The continued existence and success of camera apps on the two largest app stores are an example of companies competing directly with a platform. Camera+ was an early app that exceeded the software capabilities of Apple's early camera app, pressing Apple to produce better camera software. Now, Camera+, ProCamera, Halide, and several other camera apps are all popular downloads and offer iPhone users a variety of options aside from the native app.[34] But that is not to say a company with a competing offering should never be purchased by a larger company. There are three main definitions of success for a small company: passing the company along to the next generation; being purchased by a larger company; or (much less often) an initial public offering (IPO). Being purchased is often the best of these three options for the business owner and consumers—after all, IPOs are expensive and fraught with risk.[35] A purchase that helps produce better products or services for consumers is both a natural and beneficial end for some companies and healthy from a competition perspective.

V. Platforms Aren't Perfect

Although developers can choose from multiple platforms, there is no such thing as a perfect platform. Our member companies pay a fee to platforms for developer services, and they expect those services to meet their needs. Just as online companies must clearly communicate their data practices to consumers, so must platforms clearly define the requirements and details of their terms of service to developers. For example, when platforms change their developer guidelines, they must communicate clearly and ensure developers understand what the changes mean for them and their customer relationships. Occasionally, we hear from a member company that an ill-defined change significantly impacted their business. For example, a software platform recently put a member company that provides a call blocking app on notice for temporary removal unless it made changes to how it obtained permission for gathering incoming call data.[36] The platform did not clearly explain how its policies changed or why they would necessitate action on the app's part, but it was the first removal notice of its kind in the

[34] *See* Tara Schatz, "10 best camera apps for iPhone that beat the iOS camera," MACPAW (Dec. 24, 2018, *updated* Feb. 13, 2019), *available at* https://macpaw.com/how-to/best-iphone-camera-apps.
[35] *See* Will Rinehart, "Welcome to the Kill Zone? A closer look at merger and start-up data suggests it's a cultivation zone," THE BENCHMARK (Feb. 27, 2020), *available at* https://medium.com/cgo-benchmark/welcome-to-the-kill-zone-852339601fbb ("For startups, going public isn't a sure path to success. Companies typically sign away 4 to 7 percent of their gross proceeds to an investment bank to sell shares of the stock. They also tend to incur an additional $4.2 million in costs to go through the process of getting listed. On top of this, a company will have to fork over another $1 to $2 million for federal compliance every year. Most IPOs perform worse than the overall market.").
[36] Graham Dufault and Madeline Zick, "What's More Control with Fewer Options?" ACT | THE APP ASSOCIATION (May 21, 2019), *available at* https://actonline.org/2019/05/21/whats-more-control-with-fewer-options/.

app's nine years on the platform. Ultimately, the platform did not remove the app, but the process for remaining on the store was opaque and difficult enough to navigate that the company looked to us, their trade association, for help. Relevantly, this occurred amid a major update to California's privacy laws, so it may be an example of the unintended consequences of government intervention.

Especially for enterprise app developers, a software platform's safety and security are essential elements of developer services. Software platforms' security features improved markedly over the course of their existence. Whereas unlocking a device used to require a four-digit passcode, devices are now capable of biometric-based authentication, and software platforms make these authentication measures available to developers as well so that they can also benefit from these heightened security measures. But the game of cat-and-mouse between cybersecurity professionals and hackers will never end, and security must continue to evolve to meet and beat the threats. Although some platforms do not control device security, developers want the platform's security features to work seamlessly with any relevant hardware and that they account for all attack vectors. Software platforms should continue to improve their threat sharing and gathering capabilities to ensure they protect developers across the platform, regardless of where threats originate. Moreover, they should approve and deploy software updates with important security updates rapidly to protect consumers as well as developers and their clients and users. The same is true when it comes to privacy controls. App developers strongly desire platform-level privacy controls they can adapt for their products and services. The types and nature of these controls vary among platforms and this variation should result in continuously improving options that iterate with end user expectations and privacy risks.

Similarly, software platforms play a significant role in helping small developers enforce their intellectual property (IP) rights. Our member companies' IP helps eliminate the inherent disadvantages of being a small, innovative company by enabling them to protect the fruits of their ingenuity from larger firms that might want to take it. Unfortunately, some of our member companies fall victim to IP thieves that succeed in selling the pirated content or using it to steal ad revenue on platforms. Ad networks can and do help mitigate the pirated ad revenue problem,[37] but platforms must also vigorously police their app stores for stolen content. With vast online stores, it is difficult for a platform to verify legitimate requests to remove allegedly pirated content. But a single app developer should not need the help of a legal team or trade association to resolve the issue. In one instance, an App Association member company, Busy Bee Studios, approached us when it was unable to convince the platform to investigate an app that appeared to have been stolen from Busy Bee. With our assistance, the platform investigated the issue and found that the infringing app was in fact stolen content.[38] But the time and resources it took our member company—which only has a few employees—to resolve the issue were significant and could have gone toward the development of their next app. Since this issue arose, IP resolution processes improved

[37] *See, e.g.,* Trustworthy Accountability Group, *available at* https://www.tagtoday.net/.
[38] *See* Alex Cooke, "Member Monday: How One Small Developer Fought a Rogue App," (Nov. 26, 2018), *available at* https://actonline.org/2018/11/26/member-monday-how-one-small-developer-fought-a-rogue-app/.

across the board, but the story is a reminder that they are important and in-demand developer services that platforms should improve in order to compete for developers.

VI. Congress Can Help Maintain a Level Playing Field

Our members' ability to create jobs and develop innovative software depends on strong IP protections, a stable standards-setting system, and access to talent. In order to ensure the growth of the app economy, small, innovative companies must be able to pursue IP claims affordably and challenge claims that should not have been granted in the first place. For instance, we applaud the House of Representatives' recent passage of the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (S. 1273), which would establish a voluntary small claims board at the Copyright Office, a less-expensive alternative for companies with important infringement claims but fewer resources. Similarly, when it comes to patents our members support the current process for *inter partes* review (IPR) because IPR proceedings cost on average in the low six-figure range versus up to $5 million for a typical patent in federal court. While the low six-figures is still out of reach financially for many small businesses, an IPR provides much-needed leverage to companies faced with the possibility of litigation in federal court.

Another IP-related issue important to our members is their ability to rely on technical standards like WiFi, 4G, and 5G. In the United States, the private sector leads standards setting, with the participation of government actors. For example, IEEE recently finalized the WiFi 6 (or IEEE 802.11ax) standard.[39] Like many technical standards, WiFi 6 consists of technologies, many of which are patented, volunteered by companies who seek to make their IP "essential" to the standard. In other words, in order to manufacture a device that interconnects to WiFi 6, the manufacturer must obtain a patent license from each of the companies with patents essential to WiFi 6. As a corollary, the companies that own these standard-essential patents (SEPs) must agree to license their SEPs to any willing licensee on terms that are fair, reasonable, and non-discriminatory (FRAND).[40] When SEP owners go back on these promises and instead refuse to license to manufacturers, and then seek exorbitant license fees from downstream companies, antitrust concerns are raised. This is an area where antitrust law certainly plays a role and should be appropriately enforced by regulators. The Federal Trade Commission (FTC) recently brought such an antitrust complaint against Qualcomm, and the App Association filed an amicus brief supporting the FTC's claims.[41] The case is on appeal with the 9th Circuit. If Qualcomm successfully overturns

[39] Robert Saracco, "WiFi 6 is Rolling," IEEE BLOG (Nov. 8, 2019), *available at* https://cmte.ieee.org/futuredirections/2019/11/08/wifi-6-is-rolling/.
[40] DEPT. OF JUSTICE, NAT'L INSTITUTE FOR STANDARDS AND TECH., AND UNITED STATES PATENT AND TRADEMARK OFFC., POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download.
[41] Brief of Amicus Curiae ACT | The App Association in opposition to Qualcomm's Motion for Partial Stay Pending Appeal, *Fed. Trade Comm'n v. Qualcomm Inc.*, 9th Cir. No. 19-16122 (filed Jul. 19, 2019).

the ruling against it at the district court level, it could have dire consequences—not just for the smartphone ecosystem but for automakers and the IoT ecosystem generally[42]—as SEP owners adopt the licensing practices at issue in that case. We urge this Subcommittee to ensure antitrust law is enforced vigorously where SEP abuse harms competition and consumers.

VII. Conclusion

We appreciate this opportunity to provide testimony in this important hearing. Our member companies have a strong interest in maintaining a competitive app economy that enables them to compete with larger firms worldwide through innovative products and services for their customers and clients. The entry of platforms created novel opportunities for consumers and developers. But while platforms provide some of the infrastructure, developers bring smart devices to life. Without apps, a smartphone is just a phone. The symbiotic relationship between apps and platforms is not perfect, but it has created a powerful ecosystem that continues to benefit consumers. We look forward to discussing the pro-competitive effects and public policy concerns platforms have generated and welcome the discussion around how large, tech-driven firms affect smaller counterparts.

[42] "FTC v. Qualcomm – The Big Tech Case Nobody's Talking about," ACT | THE APP ASSOCIATION (Feb. 7, 2020), *available at* https://actonline.org/2020/02/07/ftc-v-qualcomm-the-big-tech-antitrust-case-nobodys-talking-about/.

Appendix: App Economy Innovators in Your Districts

Majority

Chairman Michael Lee (UT)
Company: 1564B
Located in Salt Lake City, 1564B is a one-man management consulting group that provides advice on marketing and content development as it relates to technical markets, like the internet of things (IoT). Founded in 2014, 1564B's clients range from startups and growing companies to global corporations.

Senator Chuck Grassley (IA)
Company: Higher Learning Technologies
Higher Learning Technologies (HLT) works to empower learners through easy-to-use textbook and test prep platforms spanning a variety of disciplines such as medical, dental, and business, as well as preparatory tests for college and military entrance exams. Located in Coralville, Iowa, and founded in 2012, HLT offers services on the App Store, Google Play store, and through web browsers.

Senator Mike Crapo (ID)
Company: TaxAct
Founded in 1998, TaxAct is a leading provider of affordable digital and downloadable tax preparation solutions for individuals, business owners, and tax professionals. Their flagship product promises users the highest degree of accuracy and was designed by their own in-house programmers and tax accountants. All available forms are IRS and state approved, and they introduced a mobile application in 2018.

Senator Joshua Hawley (MO)
Company: Topik
In 2015, two friends co-founded Topik, a mobile blogging application that makes it easy for anybody to create and share blog posts on an easy to use mobile platform. Based in St. Louis, Missouri, Topik is completely self-funded and, with only two employees, is set to launch their first mobile app later this year.

Senator Marsha Blackburn (TN)
Company: Quiet Spark
Established in 2011 in LaVergne, Tennessee, a wife and husband team founded Quiet Spark after noticing their son's issues with spelling. Their first app was SuperSpeller, an iOS app that makes learning spelling fun for children through learning games and reward features. They have also created other apps that help users keep track of their lives through categories like exercise, reading time, scheduling, homework, and more.

Minority

Ranking Member Amy Klobuchar (MN)
Company: VEMOS.io
Located in the Twin Cities and founded in 2013, Vemos is a platform solution for bars, restaurants, and other venues as a one-stop-shop for the digital tools needed to manage and grow their businesses. Operating with only eight full-time employees, Vemos found a way to harness and present a venue's data in a humanized way, which helps venues understand who their customers are and how to market to them effectively.

Senator Patrick Leahy (VT)
Company: Aprexis Health Solutions
Aprexis Health Solutions is a cloud-based software that helps patients with personalized services for Medication Therapy Management and includes more than 1,000 participating pharmacies and more than 1 million patients. Founded in 2009, Aprexis works with health plans, pharmacy networks, corporate employers, and providers to deliver improved, patient-centric health outcomes.

Senator Cory Booker (NJ)
Company: Micro Integration Services, Inc.
Founded in 1985, Micro Integration Services is a father and son team who transitioned from selling and maintaining hardware to an entirely software-based consulting business. MIS is focused on solving problems and helping their clients develop software for mobile and web turnkey business solutions. Although they have maintained their two-man team, Micro Integration Services works with major corporations like Kraft and the Philadelphia Eagles.

Senator Richard Blumenthal (CT)
Company: Pixellet
Located in Stamford, Connecticut, Pixellet is a full-service web and mobile development and design firm with dozens of offered services, including digital marketing and e-commerce. Founded in 2014, Pixellet only has one employee and has served a variety of industries including real estate, health care, financial services, and education, among others.

August 20, 2020

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, District of Columbia 20580

RE: *Federal Trade Commission Review of Health Breach Notification Rule*

ACT | The App Association's Connected Health Initiative (CHI)[1] appreciates the opportunity to provide input to the Federal Trade Commission (FTC) on whether changes should be made to a the Health Breach Notification Rule, which requires vendors of personal health records and related entities that are not covered by the Health Insurance Portability and Accountability Act (HIPAA) to notify individuals, the FTC, and, in some cases, the media of a breach of unsecured personally identifiable health data.[2]

CHI is the leading advocate for digital health policy and law advancements, representing a broad consensus of stakeholders across the healthcare and technology sectors. Our mission is to support the responsible and secure use of connected health innovations throughout the continuum of care to improve patients' and consumers' experiences and health outcomes. CHI is a long-time active advocate for the increased use of innovative technology in the delivery of healthcare and engages with a broad and diverse cross-section of industry stakeholders focused on advancing clinically validated digital medicine solutions.

CHI shares your commitment to advancing responsible health data stewardship and privacy throughout the continuum of care and recognizes that no data is more personal to Americans than their health data. CHI members acknowledge that significant threats to Americans' most sensitive data continue to evolve and put extensive resources into ensuring the security and privacy of health data to earn the trust of consumers, hospital systems, and providers. Breach notification requirements generally serve important functions. They not only notify the individual when their information has been

[1] http://www.connectedhi.com/.

[2] https://www.ftc.gov/news-events/press-releases/2020/05/ftc-seeks-comment-part-review-health-breach-notification-rule.

compromised, but they also provide insight into security issues that organizations may be facing.

However, digital health innovators do struggle to navigate the complex environment with respect to cybersecurity and privacy as they contend with HIPAA requirements at times and relevant FTC requirements at others, on top of state-specific requirements that can vary significantly.

As the FTC notes, it only lists two breaches of 500 or more individuals since this rule was put into place 10 years ago.[3] The FTC also notes that it never enforced its health data breach rules because "as the PHR [personal health record] market has developed over the past decade, most PHR vendors, related entities, and service providers have been HIPAA-covered entities or 'business associates' subject to HHS's rule."[4] This data indicates that most PHRs are subject to HIPAA with FTC health data breach rules governing the relatively few that are not.

Ultimately, CHI supports (and is currently leading efforts related to) the development of a new cross-sectoral privacy framework by Congress in the form of a general privacy bill that is intended to result in general privacy legislation. As part of such a solution, we support the proposition that any such general privacy bill treat health data as a subclass of "sensitive" personal information subject to heightened regulatory requirements, including with respect to breach notification requirements.

Until that time, innovators in the digital healthcare ecosystem will have to carefully navigate the different scopes and contexts of federal sector-specific laws and regulations. They will further have to continue to dedicate resources to tracking and complying with the range of state data breach laws and regulations, some of which conflict or overlap with FTC health data breach notification rules.

Building on the above, CHI offers the following views in response to various questions posed by FTC:

- We support Section 318.1 of the rule's providing that FTC health breach notification rules do not apply to HIPAA-covered entities or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity. We believe this bright line is critical and should be maintained to provide legal certainty to digital healthcare innovators.

[3] Health Breach Notification, 85 FR 31085 (May 22, 2020) (HBR RFI).

[4] *Id*. CHI also notes that thousands of breaches of HIPAA-covered impacting 500 or more patients have been reported over the years. *See* https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf.

- CHI does agree that, “as consumers turn towards direct-to-consumer technologies for health information and services (such as mobile health applications, virtual assistants, and platforms’ health tools), more companies may be covered by the FTC’s Rule.”[5] Developers of technology already subject to the FTC’s general consumer protection authority are, and will continue, inventing third-party apps that utilize consumer health information and will likely meet the definition of a PHR provider.
- CHI supports FTC evolving the requirements of notification in Section 318.5 of the rule. As the FTC notes, in-app messaging, text messages, and platform messaging are tools available today that are used widely and should be allowed to be utilized to more effectively communicate with consumers that consent to it. It is common sense that consumers should be able to consent to receiving communications under the rule via these modalities as well as email.
- FTC can reduce costs and burdens on small businesses by developing explanatory resources clearly explaining the purpose and requirements of the health data breach notification rule and offering guidance on compliance with it. We note that CHI has collaborated closely with the Department of Health and Human Services’ Office of Civil Rights on the development of its HIPAA portal for developers.[6] CHI offers to partner with FTC in the creation of such a resource, which would ease compliance burdens and reduce costs.

[5] HBR RFI at 31086.

[6] https://hipaaqsportal.hhs.gov/.

CHI thanks you in advance for your time and consideration of the input above.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel

Connected Health Initiative
1401 K St NW (Ste 501)
Washington, DC 20005
[redacted]

The Connected Health Initiative (CHI), an initiative of ACT | The App Association, is the leading multistakeholder spanning the connected health ecosystem seeking to effect policy changes that encourage the responsible use of digital health innovations throughout the continuum of care, supporting an environment in which patients and consumers can see improvements in their health. CHI is driven by the its Steering Committee, which consists of the American Medical Association, Apple, Bose Corporation, Boston Children's Hospital, Cambia Health Solutions, Dogtown Media, George Washington University Hospital, HIMSS, Intel Corporation, Kaia Health, Microsoft, Novo Nordisk, The Omega Concern, Otsuka Pharmaceutical, Podimetrics, Rimidi, Roche, United Health Group, the University of California-Davis, the University of Mississippi Medical Center (UMMC) Center for Telehealth, the University of New Orleans, and the University of Virginia Center for Telehealth.

For more information, see www.connectedhi.com.

December 11, 2019

Federal Trade Commission, Office of the Secretary
Constitution Center, 400 7th Ave, SW, 5th Floor, Suite 5610 (Annex B)
Washington, District of Columbia 20024

Re: Comments of ACT | The App Association regarding the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Act (COPPA) Rule Review, 16 CFR part 312, ***Project No. P195404****.*

Dear Acting Secretary Tabor,

ACT | The App Association (App Association) respectfully submits its views to the Federal Trade Commission (FTC) on its request for public comment in the above-captioned proceeding.[1] The App Association appreciates the Commission's evaluation of its existing regulations pertaining to the Children's Online Privacy Protection Act (COPPA) Rule and its consideration to modify, retain, or eliminate parts of the Rule deemed ineffective for the constantly changing technology marketplace.

I. Introduction and Statement of Interest

The App Association represents approximately 5,000 small business software application development companies and technology firms globally that create the technologies driving internet of things (IoT) use cases across consumer and enterprise contexts. Today, the App Association represents an ecosystem valued at approximately $1.7 trillion and is responsible for 5.9 million American jobs. Our members create innovative solutions that drive the world's rapid embrace of mobile technology. Their products power consumer and enterprise markets across modalities and segments of the economy. Since COPPA's inception, the App Association has taken an active role in making sure that the small business community is aware of their responsibilities under the COPPA Rule. For example, the App Association created a checklist for apps that are made for children to ensure that there is a free accessible resource for small businesses to use as a guide to comply with the COPPA Rule.[2] Furthermore, our organization frequently participates in public forums on the issue of protecting children with respect to technology and mobile apps. We testified before the House Energy and Commerce Committee on "Protecting Children's Privacy in an Electronic World"[3];

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[1] Federal Trade Commission, *Request for Public Comment on the Implementation of Children's Online Privacy Protection Rule* (COPPA), 84 Fed. Reg. 35842 (July 25, 2019).

[2] *Checklist for apps that are made for children*, ACT | THE APP ASSOCATION, https://actonline.org/family-app-privacy/, (last visited December 11, 2019).

[3] U.S. House Energy & Commerce Committee, Hearing, Protecting Children's Privacy in an Electronic World (Oct. 5, 2011).

participated in the FTC's "The Future of the COPPA Rule" workshop[4]; and most recently spoke at the Family Online Safety Institute's (FOSI) 2019 Annual Conference.[5] While the App Association supports protecting children's privacy, over time, the current COPPA Rule disproportionally eliminates small developers out of the market for apps and software programs specifically designed with children in mind. We encourage the FTC to implement changes to the current rule that set reasonable and effective requirements for small software and app developers to become compliant with the COPPA Rule, while still providing new and novel technology for the next generation.

II. The Current State of Children's Online Usage and Parent Engagement Impacting Businesses' Compliance with COPPA

According to the App Association's research, 85 percent of parents have concerns about their children's digital privacy.[6] PricewaterhouseCoopers (PwC) says that children 12 to 15 years old consume 20 hours of screen time each week,[7] with other data suggesting that kids 8 to 18 years old consume seven hours of screen time per day.[8] Given these statistics and parents' growing concern about their children's privacy, it is important that parents take steps to actively monitor their children's time online. These steps include enabling parental control settings on their children's devices to make sure they do not have access to inappropriate information and reading privacy policies that the child likely does not understand due to their age. However, research shows that fewer than one in three parents use parental settings on their children's devices[9] and the Pew Research Center also says that 81 percent of parents knowingly let their children use General Audience (GA) YouTube without parental restrictions.[10]

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[4] The Federal Trade Commission, *The Future of COPPA Rule Workshop*: Morgan Reed, President, ACT | The App Association, *Developers and COPPA: Their Real-World Experience*, (Oct. 7, 2019), https://www.ftc.gov/news-events/events-calendar/future-coppa-rule-ftc-workshop.

[5] Family Online Safety institute (FOSI), *2020 Vision: The Future of Online Safety*, (November 21, 2019) https://www.fosi.org/events/2019-annual-conference/.

[6] Morgan Reed, *Developers and COPPA: Their Real-World Experience*, F.T.C. COPPA WORKSHOP, https://www.ftc.gov/system/files/documents/public_events/1535372/slides-coppa-workshop-10-7-19.pdf (October 7, 2019) (F.T.C. COPPA Workshop Slides).

[7] *Kids Digital Media Report 2019*, PRICEWATERHOUSECOOPERS, 4, https://cdn2.hubspot.net/hubfs/5009836/PwC%202019/Kids%20Digital%20Media%20Report%202019%20.pdf? (May 2019).

[8] *New tools, old rules: limit screen-based recreational media at home*, AMERICAN HEART ASSOCIATION SCIENTIFIC ADVISORY, https://newsroom.heart.org/news/new-tools-old-rules-limit-screen-based-recreational-media-at-home (Aug. 6, 2018).

[9] F.T.C. COPPA Workshop Slides.

[10] Aaron Smith, et. al, *Many Turn to YouTube for Children's Content, News, How-To Lessons*, PEW RESEARCH CENTER, https://www.pewresearch.org/internet/2018/11/07/many-turn-to-youtube-for-childrens-content-news-how-to-lessons/ (Nov. 7, 2018).

These research results from a variety of sources demonstrate that while parents often say they care deeply about their children's privacy, their actions display a lesser degree of concern. They may also feel that they should not be the ones responsible for implementing parental controls to protect their child's online privacy. Instead some parents expect that app developers should provide free educational or child friendly applications that automatically include the necessary parental settings to protect their children's privacy. This expectation places an enormous financial burden on child app and software developers because they have to provide their products for a small or no fee; pay COPPA Rule compliance costs; and still continue to compete in a market that includes General Audience (GA) developers that have children using their products, but do not bear the financial implications of COPPA Rule compliance.

The COPPA Rule's burdensome compliance costs have resulted in many children-directed app and software developers closing down their businesses or deciding to target a general audience. Furthermore, others children-directed app and software developers will now only sell their products to schools that operate under Family Education Rights and Privacy Act (FERPA) because they are unable to keep up with the substantial costs of COPPA compliance. These examples demonstrate that the current COPPA Rule it is not being used in an effective manner to protect children's online privacy. Therefore, it is imperative that the FTC find a new and balanced approach between the importance of children's privacy and a reasonable cost of compliance with its current Rule.

III. The COPPA Definition of Personal Information Should Not Include a Child's Unidentifiable Biomarkers (Voice, Face, Fingerprints)

Under the current COPPA Rule, personal information is "individually identifiable information about an individual collected online, including: ... (8) a photograph, video, or audio file where such fie contains a child's image or voice."[11] In today's world across a variety of modalities, children are accessing (and contributing) online content at younger and younger ages for a variety of reasons. Many children have a video game console in their home, such as Microsoft's Xbox or Sony's PlayStation 4®, which allows the device to detect the child's voice to enable them to talk with other online users online. Additionally, many households use Apple's Siri ®, Amazon's Alexa ®, and Google's Google Home™, and it is inevitable that the device or an application on the device may pick up a child's voice, often times without knowing due to its inability to detect the difference. These devices while likely being intended for a general audience (GA) may now be subject to COPPA due to potentially having "actual knowledge" of children (under the age of 13) using their products. Furthermore, there are other applications that may be subject to COPPA that are made for individuals with learning or physical disabilities. For instance, autistic children may use an app to help them with their speech, which would require the collection of the child's voice in order to make their statement clearer; or a child who is blind may also speak to the virtual assistant software in their phone in order to use the phone's basic functions.

[11] 16 C.F.R. § 312.2 Definitions (2013).

Many new apps may collect biomarkers such as voice, facial features, and fingerprints in some form, and the App Association urges the FTC to consider how these latest technologies can fit into a law created nearly 20 years ago. We urge the FTC to recognize the extraordinary burdens associated with COPPA compliance, particularly for small business developers of such technology. For example, developing additional technology to identify the difference between an adult and child voice remains a need, and its implementation may be prohibitively expensive while providing no additional protections for the child if the biomarker is deidentified. While the App Association fully supports privacy protections for children, such protections will stifle inovation if we continue to disincentivize the development of child focused tech through potentially unfeasibly regulatory requirements. Therefore, the App Association strongly urges the FTC to consider modifying the definition of personal information to either exclude "biomarkers" or to only require that a business comply with COPPA when identifying, or reasonably identifying, the "biomarker" and specifically associating it with the child as opposed to the child's voice only being generally wrapped up in a data collection by an app.

IV. Incentivize Platforms to Provide Procedural Mechanisms for App Developers to Obtain Verifiable Parental Consent

A number of practical COPPA compliance challenges arise from the fact that many apps integrate into and operate through mobile communications platforms maintained by a different operator. As a result, certain information—such as the user's IP address, device ID, username, or screen name—sometimes shares automatically between the app developer and the platform provider when a user runs the application. This limited information sharing supports (and is often necessary for) the technical and operational functioning of the app.

The App Association urges the FTC to permit more efficient and practical solutions for COPPA Rule compliance that takes advantage of the latest pro-consumer developments in technology. As we mentioned in our testimony earlier this year, there has been a significant decline in the numer of app and software developers that create products spefically designed for children under the age of thirteen.[12] This is due to the often times insurmountable hurdle of COPPA Rule compliance for small businesses in the child app and software space. While the enactment of the COPPA Rule had the well intentioned goal of promoting children's online privacy, in its current state the Rule has instead eliminated an important set of child app developers from the marketplace due to the costs of compliance.

In order to change this result, we strongly encourage the FTC to consider providing incentives for platforms that supply procedural verifiable parental consent (VPC)

[12] Morgan Reed, *Developers and COPPA: Their Real-World Experience*, F.T.C. COPPA WORKSHOP, https://www.ftc.gov/system/files/documents/public_events/1535372/slides-coppa-workshop-10-7-19.pdf (October 7, 2019).

mechanisms to app developers that fall under the COPPA Rule. By providing these incentives the FTC would allow some of the costly expenses of designing a child app to be reduced for those small developers whose primary goal is to impact children with age appropriate content and resources.

The App Association envisions VPC in three separate but distinct categories with platforms supplying innovative procedural solutions for verifying and notifying consenting adults.

1. *Verifying that the person who will be providing consent is an adult.*

The App Association encourages the FTC to allow platforms to provide procedural mechanisms for child app developers to utilize when verifying a person's age and ability to consent to an app's privacy policy before the child's use. For example, the platform could require a platform user to provide their age as an initial step of creating an account when becoming a part of the platform's community. In turn, the child app developers that fall under COPPA's authority could then use this verification as a part of their VPC process to ensure a person is of the correct age to consent to the app's privacy policy. Furthermore, we encourage the FTC to allow the specific platform to determine the best procedural mechanisms for verification on their individual platform.

2. *Notifying the consenting adult of the intended collection, use, and disclosure of the child's personal information by the app developer, consistent with the disclosures made in the privacy notice*.

Additionally, we would support the FTC allowing platforms to provide notifications to the platform verified consenting adult/parent/guardian about the intended collection, use, or disclosure of the child's personal information. This could potentially be accomplished through the child-app developer using the platform's procedural mechanisms to explain their collection, use, or disclosure of the child's personal information. After providing this information to the platform, the platform could provide a notification to the consenting adult/parent/guardian when the app is opened to ensure that the consenting adult is aware of the privacy policy for the specific app.

3. *Obtaining consent from the adult before the app is permitted to collect, use, or disclose a child's (under the age of 13) personal information provided in the notice*.

Upon the platform's collaboration with the child app developer in categories one and two, we believe that in the final step of VPC, the child app developer must ensure that it properly obtained VPC before collecting, using, or disclosing any child's personal information. A platform may choose to assist a child app developer by providing an implementation VPC framework to the child app developer for ways in which the app developer may obtain VPC from the parent. However, the child app developer must ensure that their VPC method is compliant with the COPPA Rule.

Depending on the size of the company, the FTC could also encourage platforms to share their "age gate/screen" data with small child app developers—if requested—so that they can more easily identify children attempting to use their apps and ensure that each developer has obtained the proper VPC, in compliance with the COPPA Rule. While the App Association would not require that the FTC mandate platforms to take this additional step, it could provide platforms with additional incentives to provide this information to encourage start ups and small businesses to participate in the child-app development market.

By allowing platforms and child-app developers to conduct collaborative efforts to obtain VPC, parents can make informed decisions about the apps their children use in an exponentially streamlined and transparent fashion.

The App Association notes that some platforms already implement similar procedures to those proposed above. Some platforms offer family sign up plans that allow children to use a platform, but also provide parents optional settings for their children such as "asking to buy," rejecting or approving a purchase, monitoring content, or placing limits on screen time from the parent's device.[13] This allows a parent a simplified process to see what their kids are doing on their devices and decide what limits they want to set for their children.

This approach ensures that parents have meaningful notice of, and control over, how an app collects, uses, and discloses their children's personal information without imposing unnecessary burdens and costs on app developers.

V. Conclusion

The App Association's members work hard to positively change children's lives through smart device applications that help them learn, explore, and communicate. Our members include countless parents who are developers and they understand the need to protect children in the mobile and internet environment. There is no stronger group of people with the knowledge and the frontline experience to understand that privacy and innovation can coexist. What can create conflict is well-meaning regulation that errs on the side of proscribing innovation in the name of protecting privacy.

Currently, the COPPA Rule disincentivizes small businesses from educational or child-directed entertainment app development by requiring exorbitant amounts of time and energy interpreting unclear regulations. The Rule also eliminates the ability to collect non-personal information to assist in furthering the educational goals of apps and exposes many new parties to unexpected COPPA liability. The FTC should focus on creating flexible, simple to implement regulations that protect children, allow parents to

[13] *Keep Your Child's Screen Time Healthy and Happy*, QUSTODIO, qustodio.com/en/family/how-it-works/ (last visited December 11, 2019) (explaining how Qustodio's program helps parents manage and supervise their children's devices); *Family Privacy Disclosure for Children*, APPLE, https://www.apple.com/legal/privacy/en-ww/parent-disclosure/ (last visited December 11, 2019).

monitor and give parental consent, and allow operators to understand clearly their obligations under COPPA.

We thank the Commission for the opportunity to comment and hope the information we provided helps to further improve and simplify the regulations surrounding COPPA.

Sincerely,

Brian Scarpelli
Senior Policy Counsel

Alexandra McLeod
Associate Policy Counsel

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005

February 17, 2021

The Honorable Frank Pallone
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

The Honorable Cathy McMorris Rodgers
Republican Leader
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

Dear Chairman Pallone and Leader McMorris Rodgers,

We deeply appreciate your leadership as the House Committee on Energy and Commerce plots a course for the 117th Congress to address the COVID-19 pandemic and to get our economy back on track. As part of these efforts, we ask that you continue the bipartisan work of crafting a single set of rules governing the privacy practices of entities that generally fall under the Federal Trade Commission's (FTC's) jurisdiction. Recent events and the forced shift of daily and essential activities—especially core healthcare services—to the digital space underscore the need to act decisively on this issue.

ACT | The App Association (the App Association) is a trade group representing about 5,000 mobile software and connected device makers in the app economy. Our industry is a $1.7 trillion ecosystem led by U.S. companies and supporting about 5.9 million American jobs, including in New Jersey and Washington. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Strong privacy protections that meet evolving consumer expectations are a key component of developing consumer trust in tech-driven products and services. The App Association helps shape and promote adherence to privacy laws and best practices in a variety of contexts, including for apps directed to children and digital health tools.

The productive use of healthcare data no longer only occurs with healthcare providers and other entities under the jurisdiction of the Health Insurance Portability and Accountability Act (HIPAA). The creation and flow of healthcare data outside the HIPAA umbrella has accelerated, and although the FTC takes an active role in enforcing the prohibition on unfair or deceptive acts or practices (UDAP), it should have tools that adapt better to the risks healthcare data presents. From our perspective, the answer is not to extend HIPAA to cover healthcare tools and services not currently subject to HIPAA. HIPAA's overarching purpose is to ensure the portability of health data between covered entities and business associates, and it was not primarily designed to give consumers better control over their own healthcare. Instead of expanding this approach, we urge you to establish a set of federal requirements that puts in place baseline consumer rights and curbs data processing activities that exposes consumers to undue privacy risks. The Committee's bipartisan staff draft legislation circulated last Congress was a positive start representing substantial agreement on aspects of privacy that previously struggled for consensus. We urge you to continue the work on this effort, and we stand ready to support negotiations and oversight activities around it.

The recent settlement between the FTC and fertility and period tracking app Flo is emblematic of the FTC's limitations, as well as the health-related privacy risks future legislation should address. The FTC's complaint alleges that Flo shared the "health information of users with outside data

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analytics providers after promising that such information would be kept private."[1] The mischief here is reminiscent of previous activities the FTC punished. Not only did Flo mislead consumers about its data sharing practices, but it also allowed third parties to use the data it shared for their own purposes.[2] In some cases, this occurred in violation of the terms of service of those third parties, the data having been shared via software development kits (SDKs) they provided to Flo.[3] These privacy missteps are especially concerning given the sensitive nature of the health information at issue. A federal law more intentionally focused on curbing privacy harms should empower consumers to exert more control over their sensitive personal information, including the rights to access, correction, and deletion of such information. Sensitive personal information should also be subject to some flexible limits on processing activities that pose too great a risk to consumers.

Although Flo's core deceptive statements in this case enabled the FTC to enjoin further harmful conduct, the recurrence of these privacy harms involving health information highlight the need for risk-based privacy regulation at the federal level. Each and every headline detailing the deceptive conduct of firms using healthcare data outside the HIPAA umbrella threatens to further erode consumer trust, which is a key necessity for our member companies. The healthcare innovations our member companies produce—from heart health and chronic condition monitoring to simply managing digital health information across health systems—are far too important for us to let them fall victim to foundering consumer trust in digital health earned by bad actors. In this case, unlocking the innovative potential for life-saving technologies involves the establishment of a single set of strong, national privacy requirements. We look forward to working with you toward this goal in the 117th Congress.

Sincerely,

Morgan Reed
President
ACT | The App Association

[1] Press release, "Developer of Popular Women's Fertility-Tracking App Settles FTC Allegations that It Misled Consumers About the Disclosure of their Health Data," Fed. Trade Comm'n (Jan. 13, 2021), *available at* https://www.ftc.gov/news-events/press-releases/2021/01/developer-popular-womens-fertility-tracking-app-settles-ftc.
[2] Fed. Trade Comm'n, *Flo Health, Inc.*, complaint (published Jan. 13, 2021), *available at* https://www.ftc.gov/system/files/documents/cases/flo_health_complaint.pdf.
[3] *Id.*

[redacted]

From: Sagar Golla <[redacted]>
Sent: Thursday, July 8, 2021 10:05 AM
To: ANTITRUST; JulyPublicComments; Kryzak, Lindsay
Subject: Abuses in Google Assistant App Store
Attachments: Assistant App Store Abuse.pdf

Dear FTC,

My name is Sagar Golla, founder and CEO of Host Buddy. Host Buddy was in the top 5 in the Google Assistant App Store, until Google released their own Food Ordering App. PFA for details, here is the summary:

- As a platform provider, Google bestowed superior powers to Google's own app, routes every invocation of Order Food from consumers to connect their Ad partners.
- Google Squatting Appstore with hundreds of apps to connect EVERY major food brand.
- As an end to end platform, Host Buddy, not only provides skills to connect consumers, but also help restaurateurs to orchestrate all the incoming orders (including delivery orders) to a single dashboard to improve operations. More details here: https://invited.hostbuddy.io
https://invited.hostbuddy.io/allorders/

- I have been struggling with these issues for the last 1.5 years. I will provide every detail you need to investigate further.

I request your immediate attention & swift action.

Thank you,

--
Sagar Golla

Founder, CEO

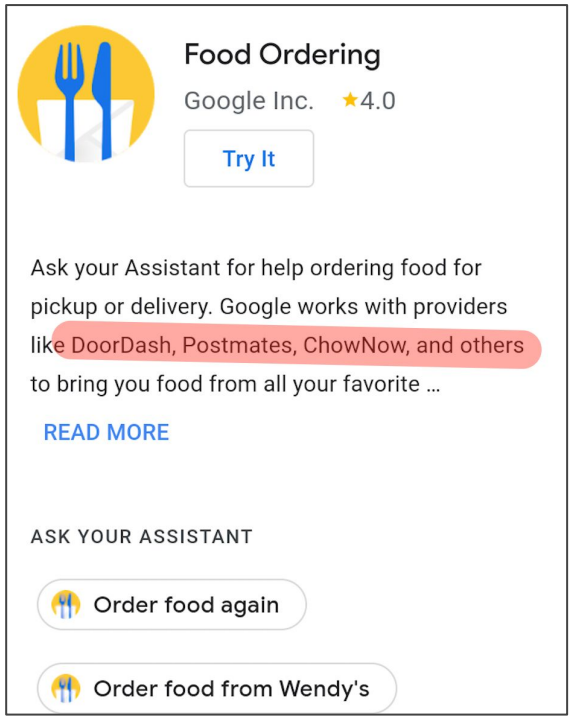
Hostbuddy, Inc.
[redacted]
hostbuddy.io

Google Abuses in Assistant App Store & GMB

From: Sagar Golla, Hostbuddy, Inc
[redacted]

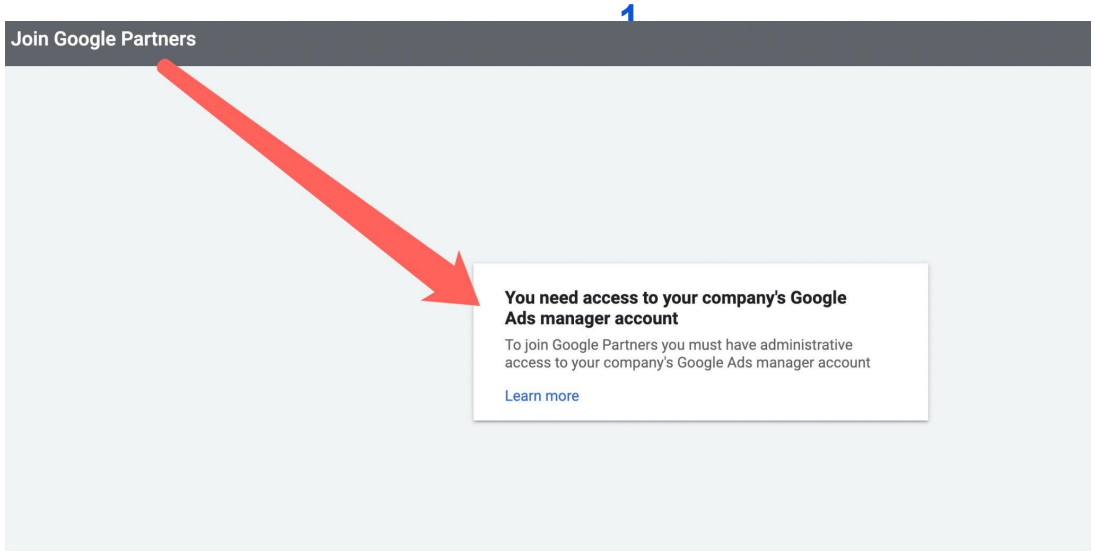
https://invited.hostbuddy.io/

Google's OWN Food Ordering APP in Assistant

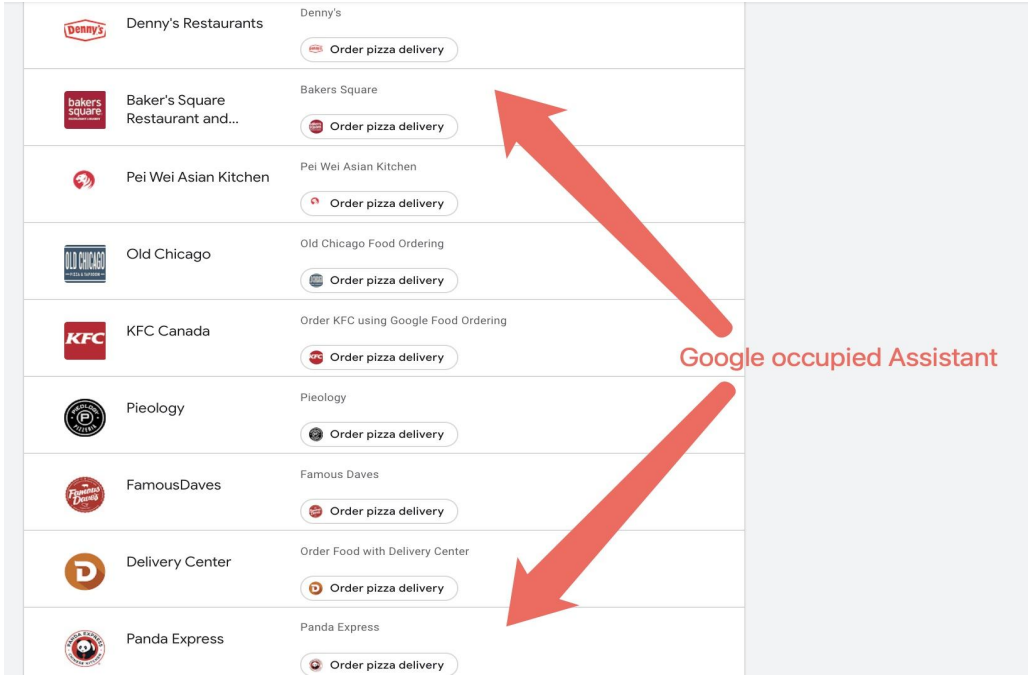


1. Every invocation of "Order Food" is controlled by Google and routed to select partners.

Need Ad Manager Account to be Google Partner



SQUATTING App Store with Hundreds of OWN Apps!



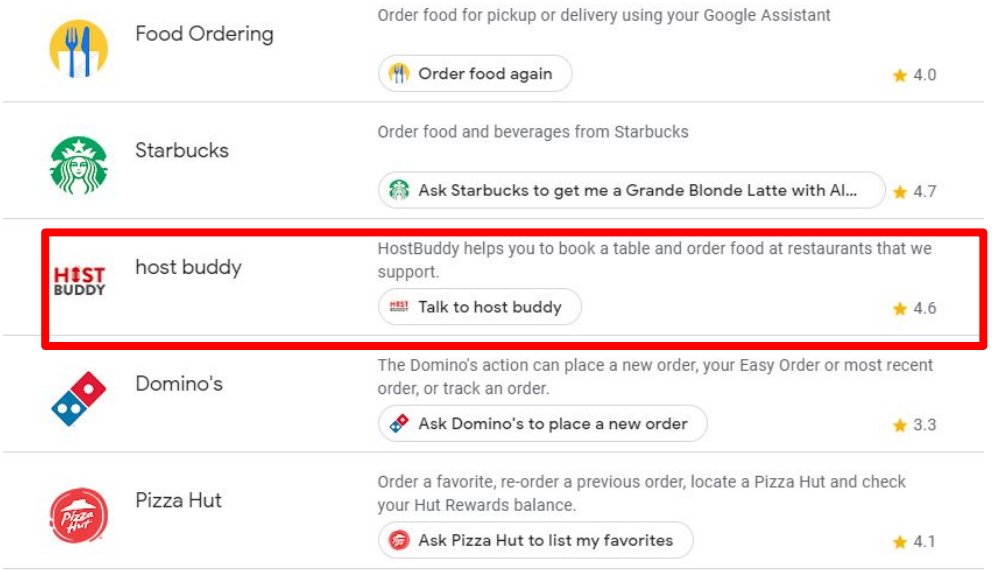
- Hundreds of apps made by Google, have occupied Assistant App Market.

- Google made apps to connect every major food brands from Assistant.

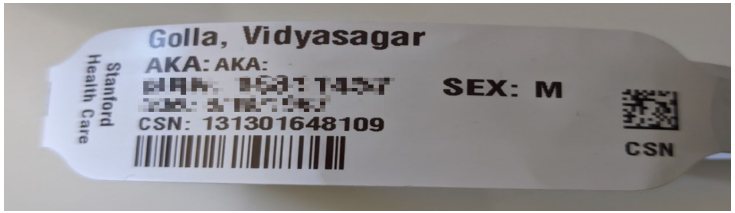
- These are web apps - https://www.youtube.com/watch?v=hR93DYLaJww

Google is misleading & obstructing startups with Self-preferencing

Developer Harassment

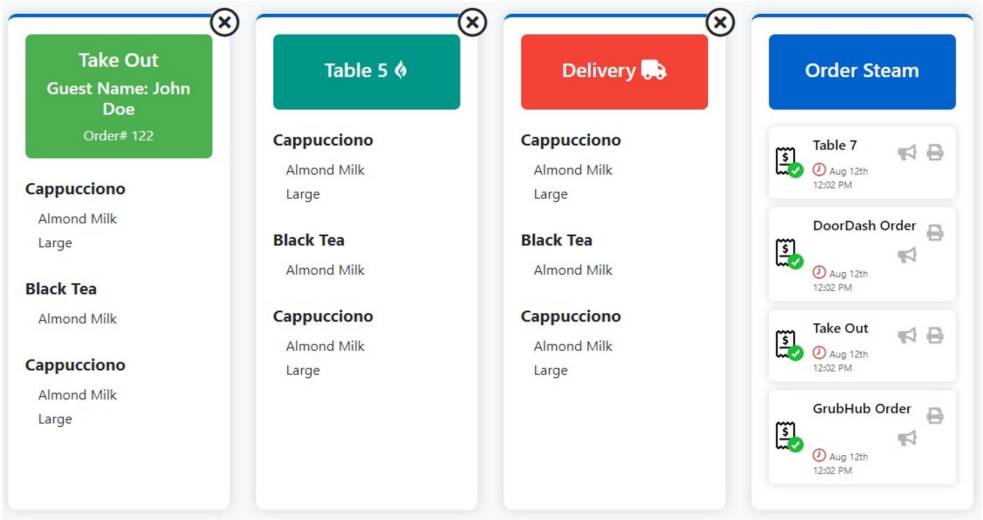


- HostBuddy was in the Top 5 in Food Ordering category, until Google's own.
- Google took my action down 6 times, so that I go away!
- Google has limitless resources, exec used contractors to harass me, hospitalized once.



HOST Buddy Superior experience than Google:
https://vimeo.com/487951068

HOST BUDDY is an end to end - Optimized for Restaurant Operations



- **All Orders is HostBuddy skill, to view all the incoming orders, including from delivery partners to single display!!**
- **Enhance Restaurant operations.**
- **All Orders Details: https://invited.hostbuddy.io/allorders/**

Google only cares about consumer side, since they can pocket referral fee. We built skill for staff too!!

Downfall of Surveillance Economy

- Star Trek like voice communicators are NOT coming because of Google.
- Imagine when we don't have to worry about our data and interacted with voice or touch to enhance our lives.

Productivity Loss for consumers !!

Google My Business is a Backdoor for Ad Revenue

- Google makes GMB page for EVERY restaurants & displays during search.
- Even when restaurant has their own online ordering, order will be routed through delivery partner like DoorDash.
- Restaurants has to pay 20 -30% commission, Google takes a cut through their ad partners.

Restaurant CAN'T CHANGE "PICKUP" button!!

Restaurant Losses in NUMBERS

Even if Restaurant pays ONLY 1K /month in commissions for pickup orders.

Which is only 30$/day. (I know restaurants, which spend > 200$/day in commissions).

For 20M restaurants in North America it will be > 20M*1k = $2B in a month

$24B in just year! (could be more during pandemic)

- **This doesn't include developers like me who are not able to deliver our services because of Google's anti-competitive policies, 2.5 years of Hostbuddy.**

Save Restaurants & Innovation

Thank you!!
Sagar Golla
HostBuddy Inc.

https://invited.hostbuddy.io/

[redacted]

From: Todd Achilles <[redacted]>
Sent: Wednesday, June 30, 2021 11:41 AM
To: JulyPublicComments
Cc: Todd Achilles
Subject: Open meeting statement
Attachments: Achilles_Evoca_Consumer Harm Memo 6-30-21_final.pdf

Dear FTC Staff,

I have submitted a video statement (link here) for tomorrow's meeting.

Attached is the economic analysis we conducted of the consumer harm caused by anticompetitive practices in the media sector.

I appreciate your help to make sure our analysis is attached to my video statement and written comments.

Best,
Todd

Todd Achilles

CEO
e: t[redacted] | w: evoca.tv
m: [redacted]

CONSUMER HARM FROM ANTICOMPETITIVE TYING AND REFUSALS TO DEAL IN THE MEDIA INDUSTRY

Todd Achilles, CEO, Evoca

Dual content suppliers – media networks that supply both broadcast channels and non-broadcast content – are engaged in tying and refusals to deal. Both of these anticompetitive activities harm consumers. The dual content suppliers are pursuing these anticompetitive actions to protect a revenue stream to which they have recently become accustomed.

Historically, dual content suppliers have enjoyed two primary revenue streams: (1) revenue from fees paid by advertisers on broadcast and non-broadcast channels;[1] and (2) revenue from fees paid by MVPDs to license non-broadcast content. In recent years, dual content suppliers have also enjoyed a third revenue stream: (3) revenue from fees MVPDs pay to retransmit broadcast channels.[2] Figure 1 illustrates these revenue streams. Figure 2 identifies the recent growth in this third revenue stream for dual content suppliers.

Today, Evoca's innovative use of the FCC's new ATSC 3.0 television broadcast technology has the potential to reduce the dual content suppliers' third revenue stream. With ATSC 3.0, TV broadcasters like Evoca are now able to deliver bundles of non-broadcast channels to consumers over-the-air using traditional TV licensed spectrum. Evoca seeks to employ its innovation to deliver desirable non-broadcast content at relatively low prices, thereby providing consumers with a lower priced, high quality alternative to cable and satellite service. The Evoca service complements the scores of TV broadcast channels that are freely available over-the-air. Consumers in Evoca's footprint that can receive broadcast channels over-the-air can do so at no charge to supplement the bundle of channels they purchase from Evoca.[3]

While consumers welcome Evoca's new service,[4] dual content suppliers view this service as a threat to their third revenue stream. If consumers choose Evoca's service over the services they have traditionally purchased from cable and satellite operators, revenue from the retransmission fees paid by cable and satellite operators will decline. To limit this potential erosion of revenue from retransmission fees, dual content suppliers are preventing Evoca from securing access to key non-broadcast content on reasonable terms and conditions. Some dual content suppliers are doing so by refusing to engage in any meaningful negotiations with Evoca about

---

1 Revenue from advertisers initially served as the sole source of financing for over-the-air broadcasts.

2 Payments for retransmission of broadcast channels are made to the owner of the affiliate broadcast station. In cases where the station is not owned by the relevant dual content supplier, the station delivers a portion of the retransmission payments to the dual content supplier (in the form of reverse retransmission payments). See the Appendix for additional detail.

3 Consumers cannot be charged for broadcast channels received over the air.

4 Market research conducted by Evoca predicts that 22% of US homes – more than 30 million US households – will sign up for the Evoca service. Doing so will save the typical household that presently subscribes to cable or satellite service more than $50 per month. The corresponding aggregate annual US household savings could exceed *$18 billion* (= 30 million × $50/month × 12 months).

licensing non-broadcast content. Other dual content suppliers are requiring Evoca to pay retransmission fees as a precondition for licensing non-broadcast content. This tying is being imposed even though Evoca will not retransmit broadcast channels and dual content suppliers are required to use their TV spectrum licenses in the public interest and provide free, over-the-air signals.

These anticompetitive actions limit Evoca's ability to deliver highly valued, reasonably priced video service to consumers. When dual content suppliers refuse to license key non-broadcast content to Evoca, Evoca is unable to deliver content that consumers are known to value highly. When dual content suppliers tie Evoca's licensing of non-broadcast content to Evoca's payment of retransmission fees, the suppliers raise Evoca's costs artificially. In doing so, the dual content suppliers harm current cable and satellite subscribers by limiting Evoca's ability to deliver a high quality, reasonably priced alternative to the products of incumbent MVPDs.[5]

These anticompetitive actions by dual content suppliers also harm consumers who do not have ready access to cable and satellite services. Evoca has the potential to be an important new video "pipe" to the home in many geographic regions, particularly chronically underserved mid and small markets. If Evoca is not driven from the market by the anticompetitive actions of dual content suppliers, Evoca will be able to serve many households that lack access to cable or satellite services in addition to competing head-to-head against cable and satellite operators.[6] Thus, the anticompetitive actions of dual content suppliers harm a broad range of consumers with varying levels of access to alternative suppliers of video services.

Evoca is not requesting any unfair competitive advantage or special treatment. Evoca simply requests the right to license non-broadcast content on fair and reasonable terms, without this right being tied to the payment of retransmission fees.

If these requests are granted, Evoca will be able to bring the benefits of enhanced competition to current cable and satellite subscribers. Evoca will also be able to deliver highly valued, reasonably priced video services to consumers that presently are not served by cable or satellite operators. As history makes abundantly clear, consumers benefit greatly when the operation of new industry suppliers is not impeded by anticompetitive actions.

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[5] If Evoca is forced to pay for the right to retransmit broadcast channels even though it will not retransmit the channels, Evoca will be compelled to pass some of its increased costs on to its customers in the form of higher prices. Consequently, the anticompetitive tying will effectively force consumers who receive broadcast channels over the air to pay for viewing these channels, which is inconsistent with the prohibition on charging consumers for broadcasts received over the air.

[6] If Evoca is not impeded by the anticompetitive actions of dual content suppliers, it will be able to deliver innovative new services like *Evoca Learn* in addition to delivering at relatively low prices the non-broadcast content that consumers are known to value.

Figure 1. Payments to Dual Content Suppliers

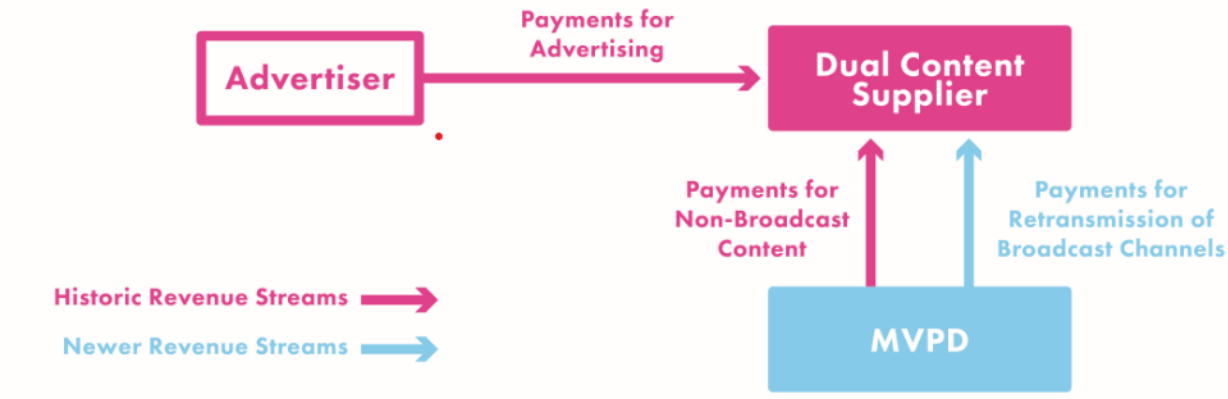
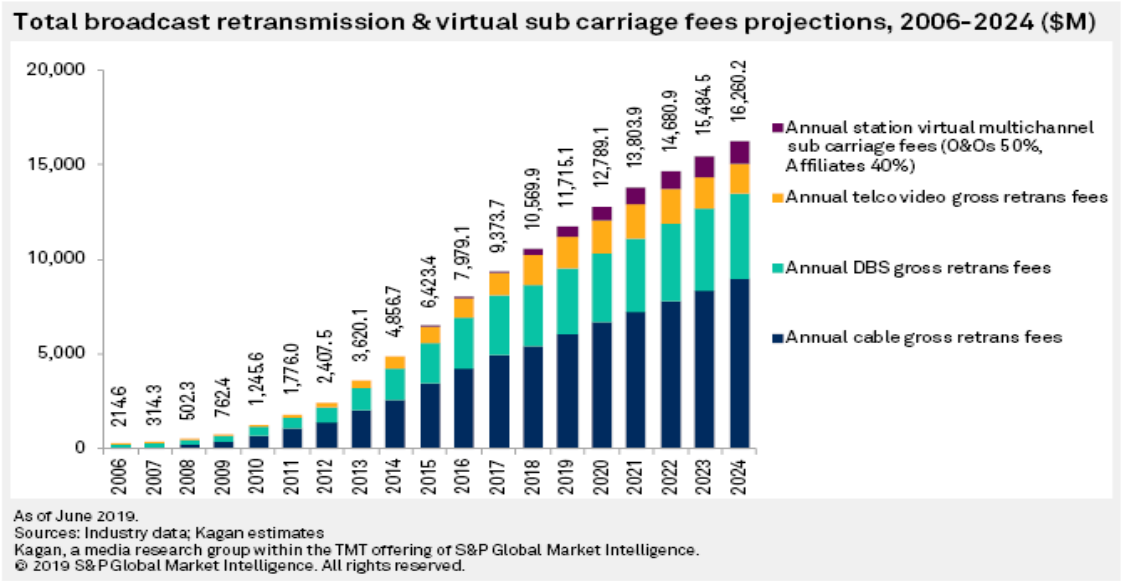


Figure 2. Growth of Retransmission Broadcast Fees.



https://www.rbr.com/retransmission-consent-revenue-an-11-growth-engine/

APPENDIX. THE DETAILS OF MEDIA INDUSTRY PAYMENTS

Historic Payments

Advertisers pay broadcast stations and dual content suppliers for carrying advertisements.

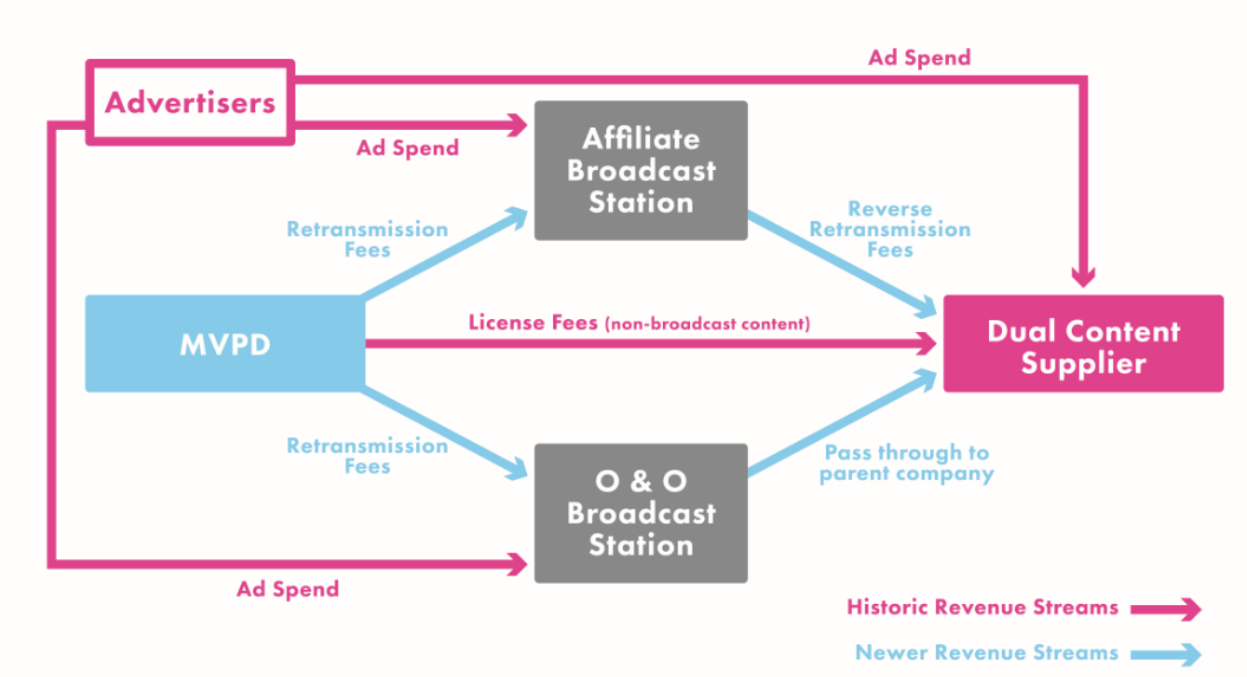
MVPDs pay dual content suppliers to license non-broadcast content.

Newer Payments

MVPDs pay retransmission fees to the owner of the relevant affiliate broadcast station. When this station is owned and operated (O&O) by the dual content supplier, the retransmission payments are effectively made directly to the dual content supplier, as illustrated in the bottom portion of Figure A1.

When the relevant affiliate broadcast station is not owned and operated by the dual content supplier, a portion of the retransmission fees that an MVPD pays to the owner of the broadcast station is delivered to the dual content supplier in the form of reverse retransmission fees, as illustrated in the top portion of Figure A1.

Figure A1. Media Industry Payments to Dual Content Suppliers.

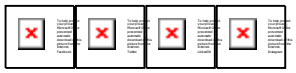


[redacted]

From: Najah Farley <[redacted]>
Sent: Wednesday, June 30, 2021 11:56 AM
To: JulyPublicComments
Subject: July 1, Public Meeting Comments
Attachments: NELP FTC comments_6-30-21.pdf

To whom it may concern:
Please find attached NELP's public comments re: **Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015)**
Thank you,
Najah Farley

Najah Farley
Senior Staff Attorney (pronouns: she/her)
National Employment Law Project
[redacted]
www.nelp.org | raisetheminimumwage.com



NATIONAL EMPLOYMENT LAW PROJECT

Rebecca Dixon
Executive Director

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Seattle, WA 98121
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June 30, 2021

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Re: **Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015)**

Dear Chairwoman Khan,

On behalf of the National Employment Law Project (NELP), I write in support of the Federal Trade Commission (FTC) rescinding its interpretation of unfair competitive practices and pursuing rulemaking in the area of non-compete clauses and agreements. NELP is a non-profit, non-partisan research and advocacy organization specializing in employment policy. Founded over 50 years ago, NELP aims to ensure that all workers in the US, and all who aspire to work, can attain economic opportunity, security, and prosperity through their labor. We regularly partner with federal, state and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement. NELP has provided testimony and technical assistance on the issue of non-competes to various organizations and state legislatures and continues to advocate for limiting the usage of these clauses.

The area of non-compete law is an important intersection between traditional competition concerns and workers rights and thus ripe for FTC intervention. Non-competition agreements are imposed by employers on employees, often as a condition of getting a job, or receiving a promotion and bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. Research suggests that nearly 1 in 5 workers in the United States are currently bound by a non-compete.[1] Employers' stated reasons for using non-competes are typically to protect trade secrets, screen for employees that intend to stay with the company, and protect investment in employee trainings.[2] However, although non-compete agreements are more common in high-paying jobs with access to trade secrets, 12% of workers without a college degree and earning less than $40,000 a year reported signing a non-compete.[3] This indicates that companies are not only using non-competes to protect trade secrets. Also,

[1] Evan Starr, J.J Prescott,. and Norman Bishara, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[2] U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf

[3] Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

there are other methods to protect trade secrets or protect investments that do not impede workers' mobility and reduce their bargaining power, such as non-disclosure agreements narrowly tailored to address those issues and using the civil actions available under the Defend Trade Secrets Act.

Non-compete provisions are usually presented by employers in a 'take it or leave it' fashion. Most employees and independent contractors do not have the power to change them or negotiate their implementation. Workers are forced to sign or forego the job opportunity contract or promotion. Studies have shown that workers rarely negotiate on the issue of non-competes, largely because many receive the non-compete as a condition of a job offer or after accepting the job offer and lack the power to do so.[4] Of those who received the non-compete before the job offer, only 10 percent bargained over the non-compete.[5]

The proliferation of these agreements has had the practical effect of stopping workers from moving to new jobs in their chosen industry. For workers in low wage industries, this can have dire consequences, as moving from company to company is often how workers receive raises. Non-competes have been shown to depress wages by reducing competition.[6] Thus, many employers, by requiring workers to sit out of the labor market for a year to 18 months are depriving them of receiving the higher wages and benefits that they would receive through taking a job with a new company, often without any additional compensation for the time away from the workforce.[7] Recent research on a partial non-compete ban in Oregon found that banning non-competes for hourly workers contributed to higher hourly wages.[8] Also, research has shown that in addition to lowering wages overall, the enforcement of non-competes may exacerbate the wage gap that workers of color face.[9]

While some states have been moving toward partially banning or restricting non-competes, state laws governing non-competes are a patchwork of provisions and approaches that do not go far enough in regulating the use of these coercive practices.[10] In the wake of the Covid-19 pandemic, the FTC can contribute to a more just recovery. The FTC should not hesitate to weigh in on the legality of non-compete agreements. Such a step would change the national landscape for job mobility and provide relief and opportunity for millions of workers.[11]

Respectfully submitted,

Najah A. Farley
Najah A. Farley
Senior Staff Attorney

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[4] Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

[5] Evan Starr, J.J Prescott,. and Norman Bishara, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[6] Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

[7] The requirement to pay the employee for the time of the restriction required by the non-compete has been included in the 2018 Massachusetts non-compete law, MGL c.149, § 24L (2018) Massachusetts Noncompetition Agreement Act.

[8] Michael Lipsitz and Evan Starr, *Low-wage workers and the enforceability of non-compete agreements*, Academy of Management, July 29, 2020, https://journals.aom.org/doi/epdf/10.5465/AMBPP.2020.50.

[9] Matthew S. Johnson, Kurt Lavetti, Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, February 17, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

[10] Beck Reed Riden, "New Map of Recent Changes to State Non-compete Laws," Fair Competition Law, June 8, 2021, https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/.

[11] Economic Policy Institute estimates that 36-60 million private sector workers are covered by non-competes. Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements*, December 10, 2019, https://www.epi.org/publication/noncompete-agreements/.

[redacted]

From: Ashley Baker <[redacted]>
Sent: Wednesday, June 30, 2021 11:49 AM
To: JulyPublicComments
Subject: Public Comment Submission Form for July 1, 2021 Open Commission Meeting
Attachments: FTC July Meeting_Joint Comments.pdf

To whom it may concern,

I would like to submit the attached written comments to be placed on the public record of the Commission for the July open meeting.

Please let me know if you have any questions.

Thank you,

Ashley Baker

Ashley Baker
Director of Public Policy
The Committee for Justice

[redacted]

Website | www.committeeforjustice.org
Twitter | @andashleysays | @CmteForJustice

Submitted: June 30, 2021

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 1, 2021 OPEN MEETING AGENDA

In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

We, the undersigned, appreciate this opportunity to provide comments regarding the possible rescission of the Commission's 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition (UMC) Under Federal Trade Commission Act § 5 (2015 statement).

While we applaud the Commission's broader goal of bringing transparency through a series of monthly open meetings, allowing only six days for public comment on significant agenda items that will drastically affect enforcement policy decisions is a deterrent to substantive public input.[1] As Commissioner Noah Phillips stated, "a mere week's notice on matters requiring serious deliberation, and a number of the policies themselves, undermine that very goal" of transparency.[2] To allow for both transparency and substantive public participating in these proceedings, the Commission should allow for a standard of 30 days of public input.

More troubling still is the fact that the Commission will be considering a significant shift in enforcement policy as the open meeting agenda will include this sudden push to revoke the 2015 statement. This policy statement provides a bipartisan framework that lays out widely agreed upon core principles regarding antitrust law and the Commission's Section 5 enforcement. Among these principles is "the promotion of consumer welfare" and focusing enforcement on acts or practices that "must cause, or be likely to cause, harm to competition or the competitive process."

[1] See "FTC Announces Agenda for July 1 Open Commission Meeting." The Federal Trade Commission. (June 24, 2021), available at: https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting.

[2] Commissioner Noah J. Phillips. @FTC Phillips, Twitter. (June 25, 2021), available at: https://twitter.com/FTCPhillips/status/1408459407134973955.

As the Commission explained when issuing its 2015 statement: "In describing the principles and overarching analytical framework that guide the Commission's application of Section 5, our statement affirms that Section 5 is aligned with the other antitrust laws, which have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis."[3]

The rescission of the 2015 statement would untether the Commission's enforcement decisions from concerns over harms to consumers and to the competitive process. Consumer welfare is appropriately prioritized in the 2015 statement and remains the goal of antitrust as recognized and reaffirmed in existing case law.

Additionally, the Commission's recent Notice of the open meeting did not even state an objective justification for the quick removal of the 2015 policy, nor did it indicate whether it would be replaced by new guidance.

Abandoning the 2015 statement's framework would remove important guardrails that established predictability and guidance in enforcement actions. The lack of predictability resulting from the FTC's re-expanded discretion in invoking broad Section 5 authority on a case-by-case basis would create uncertainty for businesses of all sizes and across all industries. The Commission's misandventure into UMC expansionism would generate unwarranted confusion, and eventually courts would have to grapple with questions of interpreting the outer boundaries of Section 5 authority that were previously cabined by the 2015 statement.

Above all, we are concerned that the Commission's sudden rush to revoke the 2015 statement foreshadows a broader agenda to radically change antitrust law by greatly expanding the Commission's enforcement discretion.

These concerns have been echoed by others such as Senator Mike Lee (R-UT), who stated that "[s]hould the FTC rescind the statement, it will replace clarity with ambiguity in the midst of a fragile economic recovery. Rescinding the statement would also signal that the Commission rejects the idea that there are any limits to its power or regulatory reach, and that it intends to use Section 5 to address non-economic harms outside the agency's purview or expertise."[4]

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and

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[3] "Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." The Federal Trade Commission. (August 13, 2015), available at: https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

[4] See "Sen. Lee Expresses Concerns about Possible Revocation of FTC 2015 Statement of Section 5 Enforcement Principles."(June 24, 2021), available at: https://www.lee.senate.gov/public/index.cfm/press-releases?ID=88C0AA07-BB92-427C-8EEC-63B92E8E6A26.

consideration of proposals. We welcome the opportunity to further discuss these views and stand ready to provide additional input.

Sincerely,

Ashley Baker
Director of Public Policy
The Committee for Justice

Daren Bakst
Senior Research Fellow in Regulatory Policy Studies
The Heritage Foundation

Asheesh Agarwal
Former Assistant Director
FTC Office of Policy Planning

Robert H. Bork, Jr.
President
Antitrust Education Project

Dan Caprio
Senior Fellow
The Lares Institute

James Edwards
Executive Director
Conservatives for Property Rights

Richard A. Epstein
The Laurence A. Tisch Professor of Law,
New York University School of Law
The Peter and Kirsten Bedford Senior Fellow,
The Hoover Institution
The James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer,
The University of Chicago

Theodore A. Gebhard
Former Senior Attorney
FTC Office of Policy and Coordination

Douglas Holtz-Eakin
President

American Action Forum

Jennifer Huddleston
Director of Technology and Innovation Policy
American Action Forum

Thomas A. Lambert
Wall Family Chair and Professor of Law
University of Missouri Law School

Doug McCullough
Director
Lone Star Policy Institute

Timothy Sandefur
Vice President for Litigation
The Goldwater Institute

Thomas A. Schatz
President
Citizens Against Government Waste

NOTE: Organizations and affiliations are listed for identification purposes only.

[redacted]

From: Scott Strumello <[redacted]>
Sent: Wednesday, June 30, 2021 8:06 PM
To: JulyPublicComments
Subject: Public Comment Submission for July 1, 2021 Open Commission Meeting
Attachments: FTC Letter Insulin.pdf

I am choosing to participate in this open meeting in the following way: Submitting a written comment. Because my written comment exceeds the character, I am emailing my statement to julypubliccomments@ftc.gov. Written statements will be placed on the public record of the Commission.

Sincerely,
Scott Strumello

Scott Strumello
[redacted]

The Honorable Lina Khan
Chair
U.S. Federal Trade Commission (FTC)
Washington, DC 20580
julypubliccomments@ftc.gov

July 1, 2021

Dear Ms. Kahn and FTC staff,

I sincerely appreciate the opportunity to submit a written statement for the Federal Trade Commission review.

As an individual who has lived with autoimmune Type 1 diabetes for nearly a half century, my concerns are primarily with the U.S. pharmaceutical and biotech industry practices related to prescription drug (Rx) "rebates", exactly WHO benefits from those price concessions, how Rx rebates affect spending by both insurers and consumers, and the role pharmacy benefit managers ("PBM's") and other entities play in the process. Although the topic is complex, I believe a great deal was explained in the bipartisan U.S. Senate report "Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug" (see https://www.finance.senate.gov/download/grassley-wyden-insulin-report for the report) which is a through document containing details on the underlying business practices which is useful background information.

Rx Rebates Have Become the Primary Way in which Pharma Competes on Price, But Not All Benefit

Let me begin by acknowledging that back in the 1990's — when the National Association of Insurance Commissioners (NAIC) decided its Statutory Accounting Principles would *not* follow the Generally Accepted Accounting Principles (GAAP) that treated prescription drug rebates as price offsets — there were relatively small Rx rebates on most prescription drugs, most healthcare plans at the time still had small fixed co-pays, and a health plan's members were all more or less equally affected by the prescription drug rebating practice. Since then, changes in benefit designs means at least half of all individuals who receive employer-sponsored commercial healthcare insurance now has a high-deductible insurance plan. However, failure to adhere to generally accepted accounting standards means that billions of dollars is generally not even apparent to most auditors, which has grown into a massive problem.

Rx Rebates Have Ballooned Into a $187 Billion/Year Problem

As of 2020, prescription drug rebates had ballooned into $187 billion in size, and the figure has grown steadily in recent years. Rx rebates have grown far too big to simply be ignored by the U.S. FTC anymore. According to estimates from Adam J. Fein, who is the CEO of the Drug Channels Institute, a subsidiary of Pembroke Consulting, Inc. whose primary clients are pharma companies and entities involved in U.S. prescription drug distribution (including drug wholesalers and pharmacy benefits managers and their parent companies which are U.S commercial healthcare insurance companies), as of 2020, **77% of all U.S. prescription drug claims are now paid for by the three largest PBM's** (CVS Health/Caremark/Aetna at 32%, Cigna's Express Scripts + Ascent Health Services at 24%, and United Healthcare Group's OptumRx unit at 21%). For the source data, visit https://www.drugchannels.net/2021/04/the-top-pharmacy-benefit-managers-pbms.html for details). Dr. Fein was also the source of the estimated the total value of gross-to-net reductions ("Rx rebates") for patent-protected brand-name drugs (Rx rebates) which he reveals totaled $187 billion in 2020, and that includes insulin as a therapeutic category. Insulin is unique in that there are no "generic" versions of this medicine sold in the U.S. today, and FDA-approved biosimilars not made and sold by one of the three primary suppliers are relatively few in number (so far), and are primarily in the basal insulin category, not the rapid-acting mealtime insulin category.

Insulin Is One of the Most Heavily-Rebated Prescription Drugs in Existence

As it turns out, insulin is a therapeutic category of prescription drugs which happens to be among the most heavily-rebated categories in existence. The leading companies (Eli Lilly & Co., Novo Nordisk and Sanofi supply over 95% of all insulin sold in the U.S., the notable exception seems to be insulin sold in IV bags used by emergency and operating rooms, and that appears to be mainly from Pfizer. Of note is that a vast majority of insulin is self-administered by patients, except for those who happen to be hospitalized) are willing to pay big rebates in order to get their insulins listed on preferred drug formularies. In fact, we know with absolute certainty that one of the largest insulin manufacturers operating in the U.S., Denmark-based Novo Nordisk A/S (whose U.S.-based subsidiary Novo Nordisk, Inc. is based in Princeton, NJ), has started to openly disclose in the company's quarterly earnings presentations to investors exactly how much it spends on Rx rebates. In Novo Nordisk A/S Q4 2020 earnings presentation, the company now discloses rebates as a percentage of gross U.S. sales for insulin. An archived version for the company's Q4 2020 earnings presentation can be accessed free of charge at https://seekingalpha.com/article/4403040-novo-nordisk-s-2020-q4-results-earnings-call-presentation, and the data revealing 74% rebate percentage of gross sales are is revealed on slide #103.

Rx Rebates Are Nearly Impossible to Track Due to FASB Non-Compliance

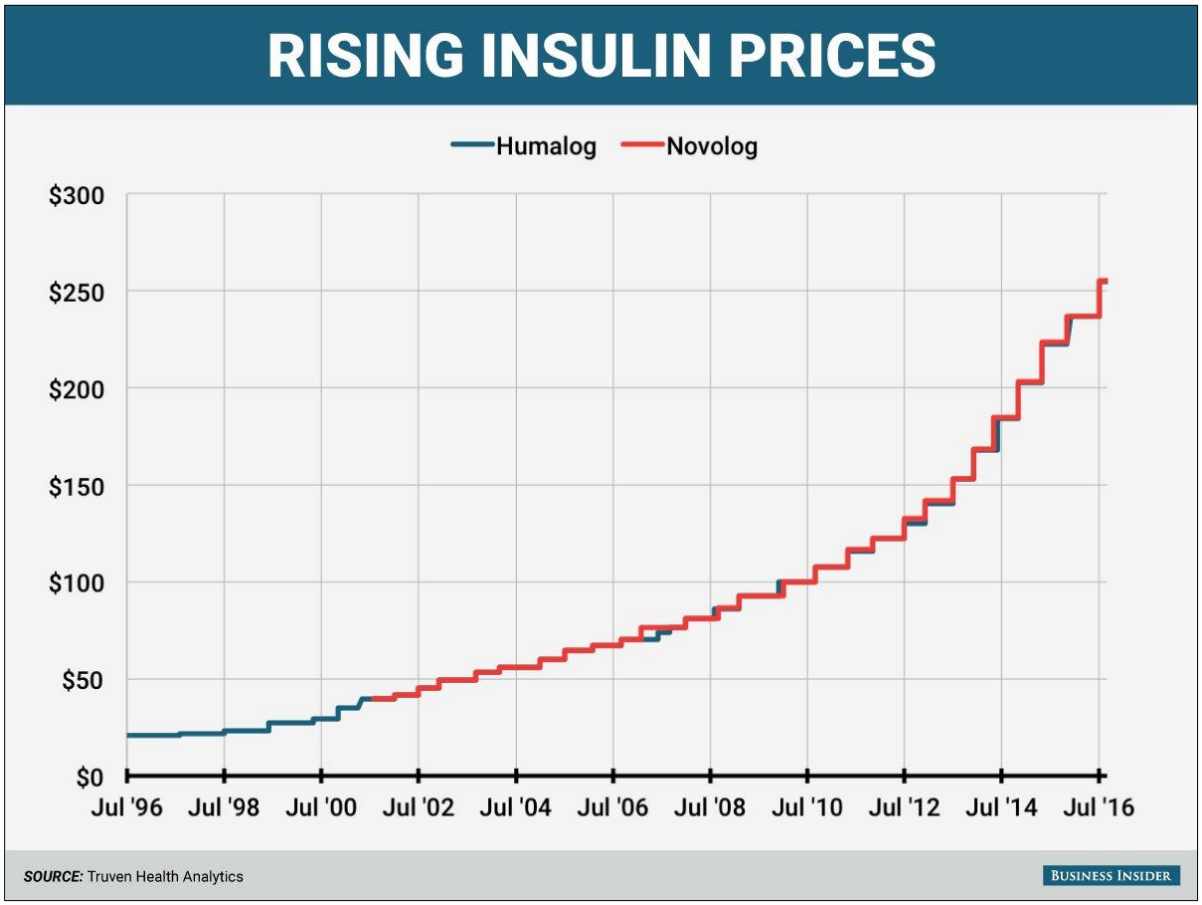
As noted, the primary means by which the pharmaceutical and biotechnology industries secure commercial healthcare insurance formulary placement is with volume-based price concessions which are given in the form of prescription drug rebates. We know that rebates are given in aggregate from a given pharmaceutical company and paid to a pharmacy benefits manager. This also makes it challenging to discern the dollar amount of rebates paid for each pharmaceutical product, although Novo Nordisk is close because most of its revenues are derived from insulin, although the company has shifted focus away from insulin to GLP-1 drugs sold to treat Type 2 diabetes.

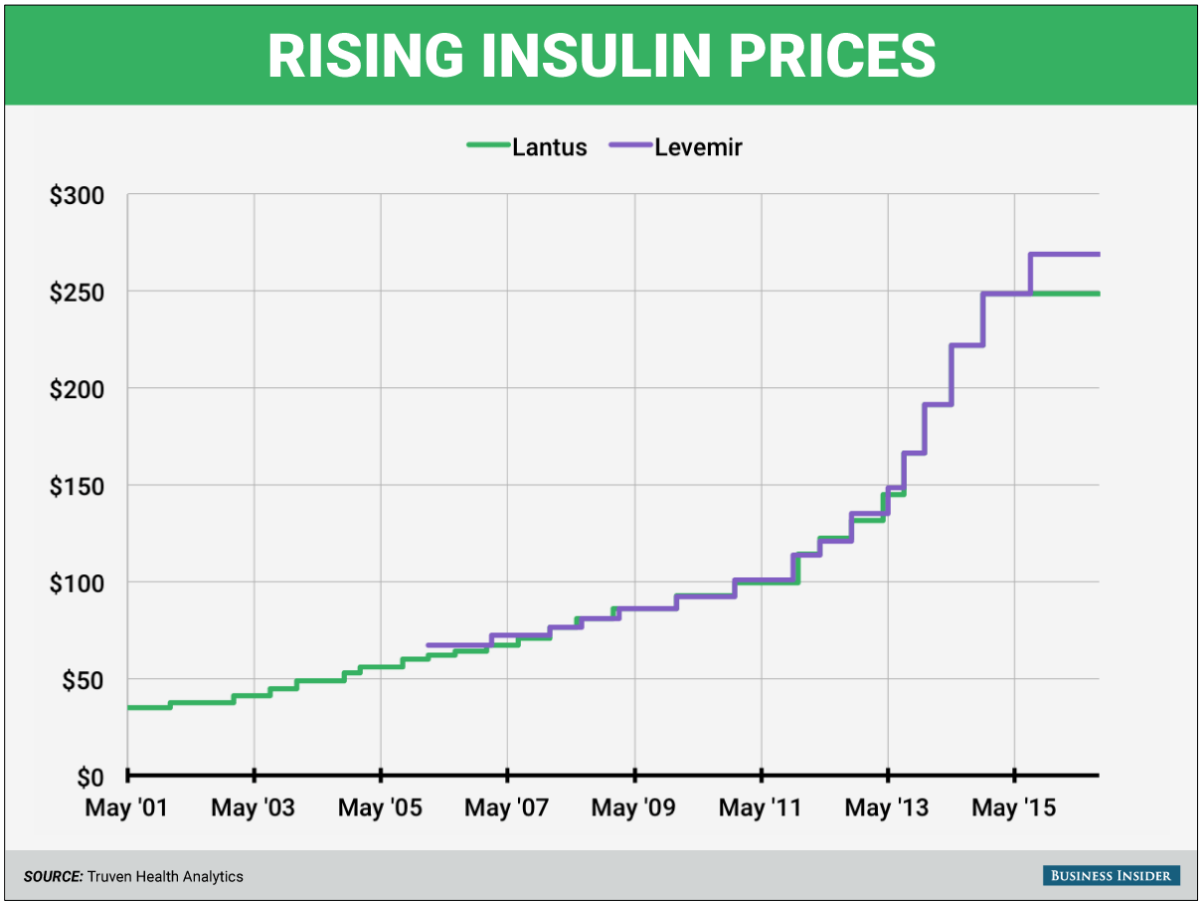
Insulin is the ONLY FDA-approved drug for the treatment of autoimmune Type 1 diabetes, therein lies the problem. We also know with certainty that the top three PBM's now pay for more than 3/4 of all prescription drugs sold in the U.S.

Pharmaceutical Industry Raises Prices in Tandem, Down to the Last Cent

One troubling discovery is one which is remarkably similar to the one which Connecticut Attorney General William Tong who filed a compelling lawsuit in June 2020. His complaint saw 51 states and U.S. territories joining him in a price-fixing lawsuit in a conspiracy by generic drug manufacturers to artificially inflate and manipulate prices, reduce competition, and unreasonably restrain trade for generic drugs sold across the United States. Although the case must still be heard in court, for a case to have such overwhelming cooperation among all states and other territorial government attorneys suggests strongly that the case will likely be successful.

The following charts are courtesy of the news outlet *Business Insider*, but the graphic images explain more than 1000 words can the lockstep insulin price increases for both rapid-acting and long-acting insulin varieties routinely used by patients from supposedly rival insulin manufacturers, so I wish to include them on the next page:


RISING INSULIN PRICES
Humalog
Novolog
$300
$250
$200
$150
$100
$50
$0
Jul '96
Jul '98
Jul '00
Jul '02
Jul '04
Jul '06
Jul '08
Jul '10
Jul '12
Jul '14
Jul '16
SOURCE: Truven Health Analytics
BUSINESS INSIDER


RISING INSULIN PRICES
Lantus
Levemir
$300
$250
$200
$150
$100
$50
$0
May '01
May '03
May '05
May '07
May '09
May '11
May '13
May '15
SOURCE: Truven Health Analytics
BUSINESS INSIDER

The suits argue that through telephone calls, text messages, emails, corporate conventions, and dinner parties, generic pharmaceutical executives were in constant communication, colluding to fix prices and restrain competition as though it were a standard course of business. Even though they knew what they were doing was wrong and likely illegal, and they took steps to try and evade accountability, using code words and warning each other in order to avoid email and detection.

Between 2007 and 2014, a number of different generic drug manufacturers sold most of the generic drugs dispensed in the United States. The multistate investigation uncovered comprehensive, direct evidence of unlawful agreements to minimize competition and raise prices on more than 114 generic drugs. The first of three complaints alleged longstanding agreements among various manufacturers to ensure a "fair share" of the market for each competitor, and to prevent "price erosion" due to competition. If generic drug manufacturers are behaving in this manner, there is no reason to believe brand-name drug makers are not doing the same thing (see the original complaint at https://portal.ct.gov/-/media/AG/Press_Releases/2019/FINAL-Redacted-Public-Derm-Complaint.pdf for detail). All one needs to do is to simply look at historical price increases which have moved in tandem with one another for years for insulin price increases.

That said, the U.S. Federal Trade Commission (FTC) has unique power to investigate the covert secret money-transfer of more than $180 billion/year in Rx rebates, as well as the brand-name drug industry's lockstep price-increases by the pharmaceutical companies on their insulin products, all of which suggests the same type of behavior is going on in the brand-name drug industry because they believe they can realistically get away with that anticompetitive behavior. Importantly, I urge the FTC to use this letter as a basis to begin immediate investigation into what genuinely look like anticompetitive (and criminal) behaviors by various entities involved in the manufacture, merchandising and sale of insulin products in the United States.

Vertical Integration of Commercial Healthcare Insurance Co's with PBM's Should Not Have Been FTC-Approved, But Were

Commercial healthcare insurance company payers are the colossal elephants in the room of U.S. insulin pricing. There has been a steady stream of mergers and acquisitions among healthcare insurance companies over the past 25 years, and the largest among them now cover more individuals than the European Union countries combined in terms of prescription drug sales. Adding to that complexity is the very recent vertical integration of pharmacy benefits managers ("PBM's") and commercial healthcare insurance companies. Previously, PBM's operated primarily as independent entities, today, the top 3 PBM's are all owned by big healthcare insurance companies, and the FTC said almost nothing about that vertical integration and raised no questions about the impact of those business combinations. Most notably, in the past 3 years, the FTC had allowed Cigna to acquire Express Scripts, and CVS Health to acquire Aetna. Perhaps with the benefit of hindsight, FTC can now see those mergers should have specified certain divestitures.

The healthcare insurance company payers have used their weight to push for massive rebates, and then to create benefit designs where Americans pay for prescriptions as a percentage of "gross pharmacy claims expense." That's the front-end price at the pharmacy. It doesn't account for rebates and other offsets that travel around the back from manufacturers to insurers. In the 1990's — when the National Association of Insurance Commissioners (NAIC) decided its Statutory Accounting Principles would *not* follow the Generally Accepted Accounting Principles (GAAP) that treat rebates as price offsets — there were small rebates on most drugs, most health plans had small fixed co-pays, and a health plan's members were all more or less equally affected by the practice. Two decades later, about 90% of prescription fills are for generics that have no back-end rebating — but for the remaining 10% of prescriptions, for brand-name drugs, rebates have exploded to more than $150 billion annually. Those include people who need insulin.

Meanwhile, half of Americans are now on healthcare plans with high deductibles or percentage cost-"sharing" that insurers base upon gross claims expense. This is why the calls for FTC investigation on insulin prices have grown so much in recent years. Patients are being routinely exposed to bogus drug list prices and they are pissed-off about it.

Drug Channels: "High Rx Prices Are the Other Guy's Fault, Not Ours!"

The pharma lines were well-rehearsed, but ring hollow. First, pharma claimed that no one actually pays list price for drugs. That's a categorical falsehood today.

Although no drug channel entity pays the bogus list price, more than half of all patients are regularly forced to pay the bogus list price at the pharmacy now because they have high-deductible insurance plans. Although the urgency could decline since the Internal Revenue Service (IRS) FINALLY added insulin and other diabetes medicines to the small list of "preventative treatments" eligible for pre-deductible coverage, the reality is that differing "plan year" dates have enabled commercial healthcare insurance companies to collect billions of dollars in Rx rebates and not share them with patients and justify not sharing the money due to different plan year dates for each policy sold. We also know that the destination for those billions isn't insurance companies' bottom lines, but are instead flowing to employers, being given to employers as "premium offsets". It is the reason former FDA chief Scott Gottlieb made headlines in 2018 (see https://www.cnbc.com/2018/03/07/fda-commissioner-to-health-insurers-youre-doing-it-wrong.html for detail) when he told a conference of insurance company executives they were "doing it [healthcare insurance] wrong" and that the sick are not supposed to be subsidizing the healthy in a functional healthcare system.

Dysfunctional Government Gives Drug Channel Entities Exactly What They Want Most: To Preserve the Costly Status Quo at the Expense of Patients

In reality, there is plenty of fault to go around amongst all entities which are primarily concerned with collecting money they have not earned from a dysfunctional drug distribution system, yet what the pharmaceutical industry, the commercial healthcare insurance industry, as well as a variety of drug channel entities including PBM's all want most is to preserve the expensive status quo of leaving everything as it is right now. Thanks to a divided and largely dysfunctional federal government, that is precisely what they've received. That said, states across the country have been taking actions on their own.

Colorado began with a price cap on insulin prices. Other states followed-suit. Ordinarily, price caps are not really an effective solution to a structural problem, but in this case, they are very effective solutions. The reason is because state-mandated price caps on insulin FORCE commercial healthcare insurance companies to share the benefit of the 74% insulin rebates they are already receiving from PBM's which they own outright with the covered patients whose prescription drug purchases generate those rebates in the first place. For insurance, it means they must reduce premiums using some other revenue source, not insulin Rx rebates.

Supreme Court Ruled in Rutledge v. Pharmaceutical Care Management Association That States CAN Regulate PBM Activities

Separately, in 2020, the U.S. Supreme Court handed the states a unanimous victory in governing pharmacy benefits managers ("PBM's") in the Rutledge v. Pharmaceutical Care Management Association ruling (see the ruling at https://www.supremecourt.gov/opinions/20pdf/18-540_m64o.pdf for details) which the drug industry trade group known as the Pharmaceutical Research and Manufacturers of America (better known by its acronym PhRMA). The 19-page decision ruled that Arkansas Act 900 was legal because payments made for voluntarily-created employee benefit plans in private industry under the Employee Retirement Income Security Act of 1974, otherwise known as ERISA. ERISA plans are not regulated by state insurance departments and are typically self-funded. Yet when the Arkansas law went into effect in September 2015, the Pharmaceutical Care Management Association, which represents PBM's, immediately sued. The industry argued that state laws can't preempt PBM behaviors. The high court disagreed, thereby opening the door to various state laws to do what the Federal government has basically chosen to ignore.

To be sure, price-caps are not the best way to fix the problem, but they deliver an immediate fix to a complex problem which defies easy fixes. But the U.S. Federal Trade Commission (FTC) should immediately investigate the covert secret money-transfer of $187 billion/year in Rx rebates, and lockstep price-increases by the pharmaceutical companies on their insulin products. Ordinary "free" markets do not typically behave in such a manner, unless the industry has concluded that it is in their best interests to simply not compete on price anymore.

GoodRx Co-Founder/Co-CEO: "A Company Like Ours Should Not Need to Exist"

Aside from positive Supreme Court rulings and other litigation still working their way through the judicial process, we have witnessed an important development occur in the U.S. marketplace for prescription drugs. A Santa Monica, California-based startup known as GoodRx Holdings, Inc. is starting to deliver meaningful benefits to consumers in terms of runaway prescription drug prices. Without a long diatribe about how GoodRx actually works, some important things to know are that the company had a successful IPO on September 22, 2020. It is already very profitable.

Although one might presume that the company mainly serves uninsured customers with prescription drug coupons, in fact, more than 75% of GoodRx customers are individuals who already have insurance coverage, many with high deductible insurance plans which force them to pay bloated prices for prescription drugs until they have satisfied an annual deductible.

Unlike many rivals, GoodRx offers instant discounts of more than 75% off of many (not all) insulin products. The company has offered a way for many consumers to slash their out-of-pocket costs and find it is cheaper to buy prescription drugs like insulin with a GoodRx coupon than it is to buy it with their insurance, even though insurance purchases contribute towards deductibles they must satisfy.

Around the time of the GoodRx IPO, company co-founder and co-CEO Doug Hirsch revealed:

> *"It's [GoodRx] totally free, because it should be free. I say this, and people think it's a PR statement or something, but I would love someday to have our company not need to exist. I lived in England for a while, so I have some understanding of the NHS: It's such an advancement over what we have. A company like ours should not have to exist: People should be able to get the health care that they need, without having to do research and jump through hoops and get approvals. I spent an hour on the phone yesterday with a hospital because my son had a seizure six months ago, and I've got a stack of bills, trying to just get it straight. The amount of time and effort and energy being wasted in this country, it's mind blowing."*

The critical take-away is that the Federal Trade Commission (FTC) has a critical role to play here. Currently, the secret cash-flow for prescription drugs enables the commercial healthcare insurance companies to collect billions in Rx rebate money, use that money to sell more insurance policies, and play massive financial games with insulin prices, because no one really has a very reliable accounting for where all those billions of dollars are going right now. The Federal Trade Commission (FTC) can play a meaningful and unique role with a thorough investigation of what the healthcare insurance industry is doing with all of the prescription drug rebates, and should really break-up the insurance companies so they're no longer vertically-integrated with the PBM's because that has proven to be very anticompetitive behavior and damaging to the retail pharmacy business, but that typically takes a lot of time and does not always yield immediate benefit.

FTC Role: Not Simply Rubber-Stamping Corporate Mergers & Acquisitions

Consider what happened when the FTC broke-up the old Bell System back in 1984. My father worked for his entire career for the old AT&T and it provided very nicely for my family. But breaking-up the old Bell System ultimately yielded massive societal benefits, only it took several decades for those benefits to be realized. For example, today, I can pick up the telephone and call your office in Washington DC and pay next to nothing for the call. Back in 1984, that phone call would have cost me several dollars (depending upon the length of the call). Whenever monopolistic behavior occurs, un-doing that takes time, and in the meantime, there is not much societal benefit. But mandating Rx rebate pass-thru to patients at the cash register would provide immediate patient benefit while longer-term fixes are done in a prudent and more thoughtful manner.

I sincerely hope the FTC can investigate the underlying issues related to insulin prices, which have risen for many patients by more than 1,100% over the past decade. I look forward to seeing the U.S. FTC looking into this matter,

Sincerely,
Scott Strumello

NATIONAL EMPLOYMENT LAW PROJECT

Rebecca Dixon
Executive Director

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June 30, 2021

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C. 20580

Re: **Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015)**

Dear Chairwoman Khan,

On behalf of the National Employment Law Project (NELP), I write in support of the Federal Trade Commission (FTC) rescinding its interpretation of unfair competitive practices and pursuing rulemaking in the area of non-compete clauses and agreements. NELP is a non-profit, non-partisan research and advocacy organization specializing in employment policy. Founded over 50 years ago, NELP aims to ensure that all workers in the US, and all who aspire to work, can attain economic opportunity, security, and prosperity through their labor. We regularly partner with federal, state and local lawmakers on a wide range of issues to promote workers' rights and labor standards enforcement. NELP has provided testimony and technical assistance on the issue of non-competes to various organizations and state legislatures and continues to advocate for limiting the usage of these clauses.

The area of non-compete law is an important intersection between traditional competition concerns and workers rights and thus ripe for FTC intervention. Non-competition agreements are imposed by employers on employees, often as a condition of getting a job, or receiving a promotion and bar an employee or independent contractor from going to a competing employer or related business for a period following the end of an employment relationship or contract. Sometimes they are bound by either industry or geography, but some are very broad, implicating entire regions of the United States. Some may even list rival specific competitor companies that employees may not join after leaving their previous employer. Research suggests that nearly 1 in 5 workers in the United States are currently bound by a non-compete.[1] Employers' stated reasons for using non-competes are typically to protect trade secrets, screen for employees that intend to stay with the company, and protect investment in employee trainings.[2] However, although non-compete agreements are more common in high-paying jobs with access to trade secrets, 12% of workers without a college degree and earning less than $40,000 a year reported signing a non-compete.[3] This indicates that companies are not only using non-competes to protect trade secrets. Also,

[1] Evan Starr, J.J Prescott,. and Norman Bishara, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[2] U.S. Department of Treasury Office of Economic Policy, *Non-compete Contracts: Economic Effects and Policy Implications* (2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf

[3] Two studies have shown that 30-40% of workers received the non-compete after they have accepted the job offer. Starr, Evan, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, University of Michigan Law & Econ Research Paper No. 18-013, 2019 and Marx, Matt, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, American Sociological Review, vol. 76, no. 5, 2011, pp. 695-712.

there are other methods to protect trade secrets or protect investments that do not impede workers' mobility and reduce their bargaining power, such as non-disclosure agreements narrowly tailored to address those issues and using the civil actions available under the Defend Trade Secrets Act.

Non-compete provisions are usually presented by employers in a 'take it or leave it' fashion. Most employees and independent contractors do not have the power to change them or negotiate their implementation. Workers are forced to sign or forego the job opportunity contract or promotion. Studies have shown that workers rarely negotiate on the issue of non-competes, largely because many receive the non-compete as a condition of a job offer or after accepting the job offer and lack the power to do so.[4] Of those who received the non-compete before the job offer, only 10 percent bargained over the non-compete.[5]

The proliferation of these agreements has had the practical effect of stopping workers from moving to new jobs in their chosen industry. For workers in low wage industries, this can have dire consequences, as moving from company to company is often how workers receive raises. Non-competes have been shown to depress wages by reducing competition.[6] Thus, many employers, by requiring workers to sit out of the labor market for a year to 18 months are depriving them of receiving the higher wages and benefits that they would receive through taking a job with a new company, often without any additional compensation for the time away from the workforce.[7] Recent research on a partial non-compete ban in Oregon found that banning non-competes for hourly workers contributed to higher hourly wages.[8] Also, research has shown that in addition to lowering wages overall, the enforcement of non-competes may exacerbate the wage gap that workers of color face.[9]

While some states have been moving toward partially banning or restricting non-competes, state laws governing non-competes are a patchwork of provisions and approaches that do not go far enough in regulating the use of these coercive practices.[10] In the wake of the Covid-19 pandemic, the FTC can contribute to a more just recovery. The FTC should not hesitate to weigh in on the legality of non-compete agreements. Such a step would change the national landscape for job mobility and provide relief and opportunity for millions of workers.[11]

Respectfully submitted,

Najah A. Farley
Najah A. Farley
Senior Staff Attorney

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[5] Evan Starr, J.J Prescott,. and Norman Bishara, *Noncompetes in the U.S. Labor Force* (December 24, 2017), https://ssrn.com/abstract=2625714.

[6] Marshall Steinbaum, *How widespread is Labor Monopsony? Some New Results Suggest its Pervasive*, ROOSEVELT INSTITUTE, December 18, 2017; Greg Robb, *Wage growth is soft due to declining worker bargaining power, former Obama economist says*, MARKETWATCH, August 24, 2018.

[7] The requirement to pay the employee for the time of the restriction required by the non-compete has been included in the 2018 Massachusetts non-compete law, MGL c.149, § 24L (2018) Massachusetts Noncompetition Agreement Act.

[8] Michael Lipsitz and Evan Starr, *Low-wage workers and the enforceability of non-compete agreements*, Academy of Management, July 29, 2020, https://journals.aom.org/doi/epdf/10.5465/AMBPP.2020.50.

[9] Matthew S. Johnson, Kurt Lavetti, Michael Lipsitz, The Labor Market Effects of Legal Restrictions on Worker Mobility, February 17, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381.

[10] Beck Reed Riden, "New Map of Recent Changes to State Non-compete Laws," Fair Competition Law, June 8, 2021, https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/.

[11] Economic Policy Institute estimates that 36-60 million private sector workers are covered by non-competes. Alexander J.S. Colvin and Heidi Shierholz, *Noncompete Agreements*, December 10, 2019, https://www.epi.org/publication/noncompete-agreements/.

Scott Strumello
[redacted]

The Honorable Lina Khan
Chair
U.S. Federal Trade Commission (FTC)
Washington, DC 20580
julypubliccomments@ftc.gov

July 1, 2021

Dear Ms. Kahn and FTC staff,

I sincerely appreciate the opportunity to submit a written statement for the Federal Trade Commission review.

As an individual who has lived with autoimmune Type 1 diabetes for nearly a half century, my concerns are primarily with the U.S. pharmaceutical and biotech industry practices related to prescription drug (Rx) "rebates", exactly WHO benefits from those price concessions, how Rx rebates affect spending by both insurers and consumers, and the role pharmacy benefit managers ("PBM's") and other entities play in the process. Although the topic is complex, I believe a great deal was explained in the bipartisan U.S. Senate report "Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug" (see https://www.finance.senate.gov/download/grassley-wyden-insulin-report for the report) which is a through document containing details on the underlying business practices which is useful background information.

Rx Rebates Have Become the Primary Way in which Pharma Competes on Price, But Not All Benefit

Let me begin by acknowledging that back in the 1990's — when the National Association of Insurance Commissioners (NAIC) decided its Statutory Accounting Principles would *not* follow the Generally Accepted Accounting Principles (GAAP) that treated prescription drug rebates as price offsets — there were relatively small Rx rebates on most prescription drugs, most healthcare plans at the time still had small fixed co-pays, and a health plan's members were all more or less equally affected by the prescription drug rebating practice. Since then, changes in benefit designs means at least half of all individuals who receive employer-sponsored commercial healthcare insurance now has a high-deductible insurance plan. However, failure to adhere to generally accepted accounting standards means that billions of dollars is generally not even apparent to most auditors, which has grown into a massive problem.

Rx Rebates Have Ballooned Into a $187 Billion/Year Problem

As of 2020, prescription drug rebates had ballooned into $187 billion in size, and the figure has grown steadily in recent years. Rx rebates have grown far too big to simply be ignored by the U.S. FTC anymore. According to estimates from Adam J. Fein, who is the CEO of the Drug Channels Institute, a subsidiary of Pembroke Consulting, Inc. whose primary clients are pharma companies and entities involved in U.S. prescription drug distribution (including drug wholesalers and pharmacy benefits managers and their parent companies which are U.S commercial healthcare insurance companies), as of 2020, **77% of all U.S. prescription drug claims are now paid for by the three largest PBM's** (CVS Health/Caremark/Aetna at 32%, Cigna's Express Scripts + Ascent Health Services at 24%, and United Healthcare Group's OptumRx unit at 21%). For the source data, visit https://www.drugchannels.net/2021/04/the-top-pharmacy-benefit-managers-pbms.html for details). Dr. Fein was also the source of the estimated the total value of gross-to-net reductions ("Rx rebates") for patent-protected brand-name drugs (Rx rebates) which he reveals totaled $187 billion in 2020, and that includes insulin as a therapeutic category. Insulin is unique in that there are no "generic" versions of this medicine sold in the U.S. today, and FDA-approved biosimilars not made and sold by one of the three primary suppliers are relatively few in number (so far), and are primarily in the basal insulin category, not the rapid-acting mealtime insulin category.

Insulin Is One of the Most Heavily-Rebated Prescription Drugs in Existence

As it turns out, insulin is a therapeutic category of prescription drugs which happens to be among the most heavily-rebated categories in existence. The leading companies (Eli Lilly & Co., Novo Nordisk and Sanofi supply over 95% of all insulin sold in the U.S., the notable exception seems to be insulin sold in IV bags used by emergency and operating rooms, and that appears to be mainly from Pfizer. Of note is that a vast majority of insulin is self-administered by patients, except for those who happen to be hospitalized) are willing to pay big rebates in order to get their insulins listed on preferred drug formularies. In fact, we know with absolute certainty that one of the largest insulin manufacturers operating in the U.S., Denmark-based Novo Nordisk A/S (whose U.S.-based subsidiary Novo Nordisk, Inc. is based in Princeton, NJ), has started to openly disclose in the company's quarterly earnings presentations to investors exactly how much it spends on Rx rebates. In Novo Nordisk A/S Q4 2020 earnings presentation, the company now discloses rebates as a percentage of gross U.S. sales for insulin. An archived version for the company's Q4 2020 earnings presentation can be accessed free of charge at https://seekingalpha.com/article/4403040-novo-nordisk-s-2020-q4-results-earnings-call-presentation, and the data revealing 74% rebate percentage of gross sales are is revealed on slide #103.

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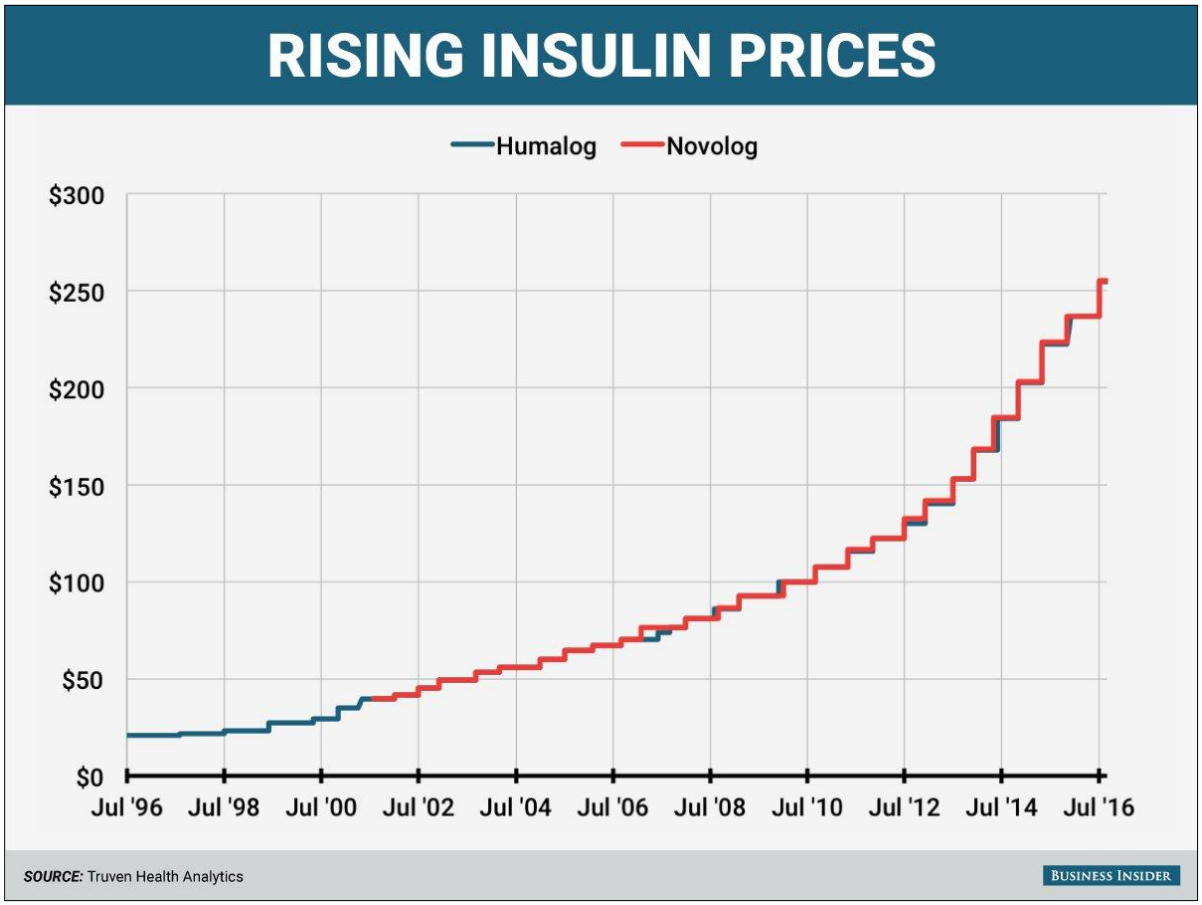
As noted, the primary means by which the pharmaceutical and biotechnology industries secure commercial healthcare insurance formulary placement is with volume-based price concessions which are given in the form of prescription drug rebates. We know that rebates are given in aggregate from a given pharmaceutical company and paid to a pharmacy benefits manager. This also makes it challenging to discern the dollar amount of rebates paid for each pharmaceutical product, although Novo Nordisk is close because most of its revenues are derived from insulin, although the company has shifted focus away from insulin to GLP-1 drugs sold to treat Type 2 diabetes.

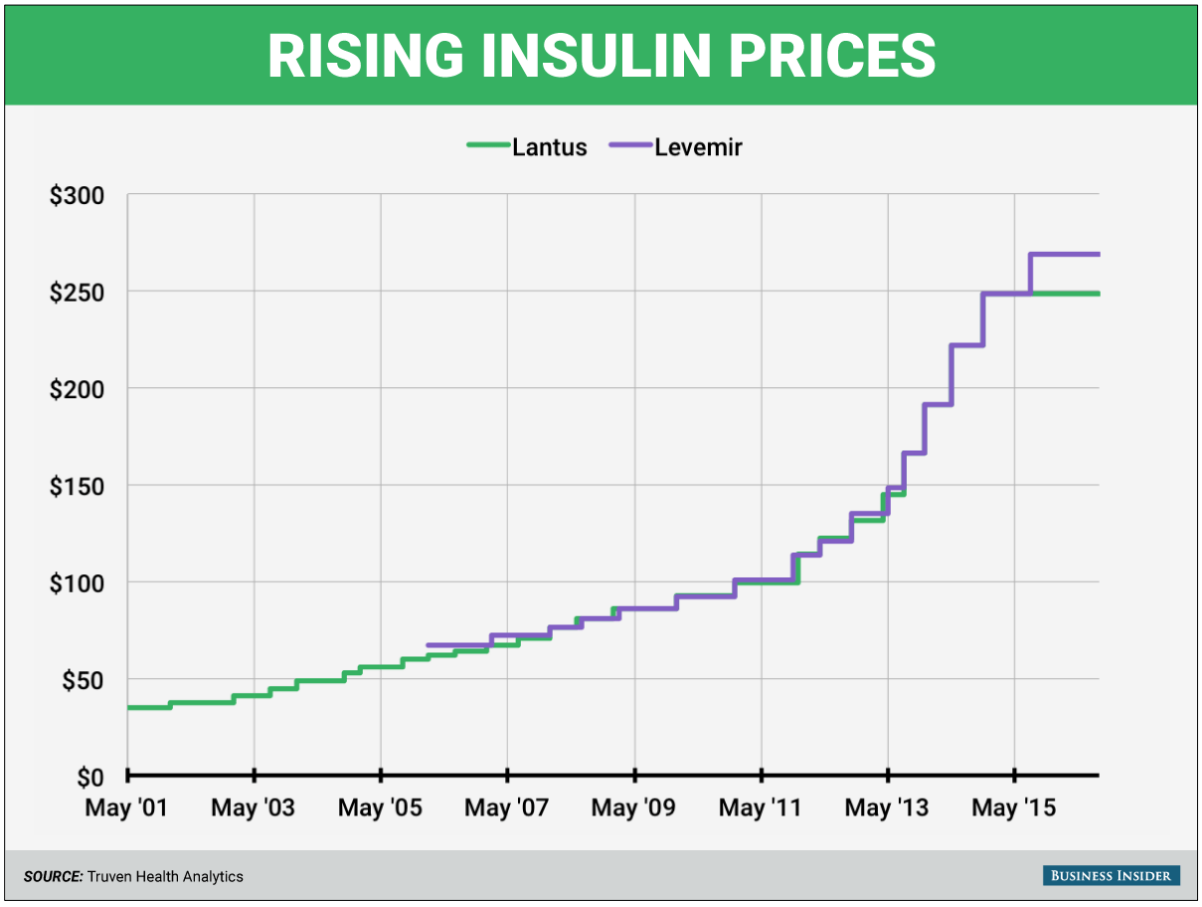
Insulin is the ONLY FDA-approved drug for the treatment of autoimmune Type 1 diabetes, therein lies the problem. We also know with certainty that the top three PBM's now pay for more than 3/4 of all prescription drugs sold in the U.S.

Pharmaceutical Industry Raises Prices in Tandem, Down to the Last Cent

One troubling discovery is one which is remarkably similar to the one which Connecticut Attorney General William Tong who filed a compelling lawsuit in June 2020. His complaint saw 51 states and U.S. territories joining him in a price-fixing lawsuit in a conspiracy by generic drug manufacturers to artificially inflate and manipulate prices, reduce competition, and unreasonably restrain trade for generic drugs sold across the United States. Although the case must still be heard in court, for a case to have such overwhelming cooperation among all states and other territorial government attorneys suggests strongly that the case will likely be successful.

The following charts are courtesy of the news outlet *Business Insider*, but the graphic images explain more than 1000 words can the lockstep insulin price increases for both rapid-acting and long-acting insulin varieties routinely used by patients from supposedly rival insulin manufacturers, so I wish to include them on the next page:


RISING INSULIN PRICES
Humalog
Novolog
$300
$250
$200
$150
$100
$50
$0
Jul '96
Jul '98
Jul '00
Jul '02
Jul '04
Jul '06
Jul '08
Jul '10
Jul '12
Jul '14
Jul '16
SOURCE: Truven Health Analytics
BUSINESS INSIDER


RISING INSULIN PRICES
Lantus
Levemir
$300
$250
$200
$150
$100
$50
$0
May '01
May '03
May '05
May '07
May '09
May '11
May '13
May '15
SOURCE: Truven Health Analytics
BUSINESS INSIDER

The suits argue that through telephone calls, text messages, emails, corporate conventions, and dinner parties, generic pharmaceutical executives were in constant communication, colluding to fix prices and restrain competition as though it were a standard course of business. Even though they knew what they were doing was wrong and likely illegal, and they took steps to try and evade accountability, using code words and warning each other in order to avoid email and detection.

Between 2007 and 2014, a number of different generic drug manufacturers sold most of the generic drugs dispensed in the United States. The multistate investigation uncovered comprehensive, direct evidence of unlawful agreements to minimize competition and raise prices on more than 114 generic drugs. The first of three complaints alleged longstanding agreements among various manufacturers to ensure a "fair share" of the market for each competitor, and to prevent "price erosion" due to competition. If generic drug manufacturers are behaving in this manner, there is no reason to believe brand-name drug makers are not doing the same thing (see the original complaint at https://portal.ct.gov/-/media/AG/Press_Releases/2019/FINAL-Redacted-Public-Derm-Complaint.pdf for detail). All one needs to do is to simply look at historical price increases which have moved in tandem with one another for years for insulin price increases.

That said, the U.S. Federal Trade Commission (FTC) has unique power to investigate the covert secret money-transfer of more than $180 billion/year in Rx rebates, as well as the brand-name drug industry's lockstep price-increases by the pharmaceutical companies on their insulin products, all of which suggests the same type of behavior is going on in the brand-name drug industry because they believe they can realistically get away with that anticompetitive behavior. Importantly, I urge the FTC to use this letter as a basis to begin immediate investigation into what genuinely look like anticompetitive (and criminal) behaviors by various entities involved in the manufacture, merchandising and sale of insulin products in the United States.

Vertical Integration of Commercial Healthcare Insurance Co's with PBM's Should Not Have Been FTC-Approved, But Were

Commercial healthcare insurance company payers are the colossal elephants in the room of U.S. insulin pricing. There has been a steady stream of mergers and acquisitions among healthcare insurance companies over the past 25 years, and the largest among them now cover more individuals than the European Union countries combined in terms of prescription drug sales. Adding to that complexity is the very recent vertical integration of pharmacy benefits managers ("PBM's") and commercial healthcare insurance companies. Previously, PBM's operated primarily as independent entities, today, the top 3 PBM's are all owned by big healthcare insurance companies, and the FTC said almost nothing about that vertical integration and raised no questions about the impact of those business combinations. Most notably, in the past 3 years, the FTC had allowed Cigna to acquire Express Scripts, and CVS Health to acquire Aetna. Perhaps with the benefit of hindsight, FTC can now see those mergers should have specified certain divestitures.

The healthcare insurance company payers have used their weight to push for massive rebates, and then to create benefit designs where Americans pay for prescriptions as a percentage of "gross pharmacy claims expense." That's the front-end price at the pharmacy. It doesn't account for rebates and other offsets that travel around the back from manufacturers to insurers. In the 1990's — when the National Association of Insurance Commissioners (NAIC) decided its Statutory Accounting Principles would *not* follow the Generally Accepted Accounting Principles (GAAP) that treat rebates as price offsets — there were small rebates on most drugs, most health plans had small fixed co-pays, and a health plan's members were all more or less equally affected by the practice. Two decades later, about 90% of prescription fills are for generics that have no back-end rebating — but for the remaining 10% of prescriptions, for brand-name drugs, rebates have exploded to more than $150 billion annually. Those include people who need insulin.

Meanwhile, half of Americans are now on healthcare plans with high deductibles or percentage cost-"sharing" that insurers base upon gross claims expense. This is why the calls for FTC investigation on insulin prices have grown so much in recent years. Patients are being routinely exposed to bogus drug list prices and they are pissed-off about it.

Drug Channels: "High Rx Prices Are the Other Guy's Fault, Not Ours!"

The pharma lines were well-rehearsed, but ring hollow. First, pharma claimed that no one actually pays list price for drugs. That's a categorical falsehood today.

Although no drug channel entity pays the bogus list price, more than half of all patients are regularly forced to pay the bogus list price at the pharmacy now because they have high-deductible insurance plans. Although the urgency could decline since the Internal Revenue Service (IRS) FINALLY added insulin and other diabetes medicines to the small list of "preventative treatments" eligible for pre-deductible coverage, the reality is that differing "plan year" dates have enabled commercial healthcare insurance companies to collect billions of dollars in Rx rebates and not share them with patients and justify not sharing the money due to different plan year dates for each policy sold. We also know that the destination for those billions isn't insurance companies' bottom lines, but are instead flowing to employers, being given to employers as "premium offsets". It is the reason former FDA chief Scott Gottlieb made headlines in 2018 (see https://www.cnbc.com/2018/03/07/fda-commissioner-to-health-insurers-youre-doing-it-wrong.html for detail) when he told a conference of insurance company executives they were "doing it [healthcare insurance] wrong" and that the sick are not supposed to be subsidizing the healthy in a functional healthcare system.

Dysfunctional Government Gives Drug Channel Entities Exactly What They Want Most: To Preserve the Costly Status Quo at the Expense of Patients

In reality, there is plenty of fault to go around amongst all entities which are primarily concerned with collecting money they have not earned from a dysfunctional drug distribution system, yet what the pharmaceutical industry, the commercial healthcare insurance industry, as well as a variety of drug channel entities including PBM's all want most is to preserve the expensive status quo of leaving everything as it is right now. Thanks to a divided and largely dysfunctional federal government, that is precisely what they've received. That said, states across the country have been taking actions on their own.

Colorado began with a price cap on insulin prices. Other states followed-suit. Ordinarily, price caps are not really an effective solution to a structural problem, but in this case, they are very effective solutions. The reason is because state-mandated price caps on insulin FORCE commercial healthcare insurance companies to share the benefit of the 74% insulin rebates they are already receiving from PBM's which they own outright with the covered patients whose prescription drug purchases generate those rebates in the first place. For insurance, it means they must reduce premiums using some other revenue source, not insulin Rx rebates.

Supreme Court Ruled in Rutledge v. Pharmaceutical Care Management Association That States CAN Regulate PBM Activities

Separately, in 2020, the U.S. Supreme Court handed the states a unanimous victory in governing pharmacy benefits managers ("PBM's") in the Rutledge v. Pharmaceutical Care Management Association ruling (see the ruling at https://www.supremecourt.gov/opinions/20pdf/18-540_m64o.pdf for details) which the drug industry trade group known as the Pharmaceutical Research and Manufacturers of America (better known by its acronym PhRMA). The 19-page decision ruled that Arkansas Act 900 was legal because payments made for voluntarily-created employee benefit plans in private industry under the Employee Retirement Income Security Act of 1974, otherwise known as ERISA. ERISA plans are not regulated by state insurance departments and are typically self-funded. Yet when the Arkansas law went into effect in September 2015, the Pharmaceutical Care Management Association, which represents PBM's, immediately sued. The industry argued that state laws can't preempt PBM behaviors. The high court disagreed, thereby opening the door to various state laws to do what the Federal government has basically chosen to ignore.

To be sure, price-caps are not the best way to fix the problem, but they deliver an immediate fix to a complex problem which defies easy fixes. But the U.S. Federal Trade Commission (FTC) should immediately investigate the covert secret money-transfer of $187 billion/year in Rx rebates, and lockstep price-increases by the pharmaceutical companies on their insulin products. Ordinary "free" markets do not typically behave in such a manner, unless the industry has concluded that it is in their best interests to simply not compete on price anymore.

GoodRx Co-Founder/Co-CEO: "A Company Like Ours Should Not Need to Exist"

Aside from positive Supreme Court rulings and other litigation still working their way through the judicial process, we have witnessed an important development occur in the U.S. marketplace for prescription drugs. A Santa Monica, California-based startup known as GoodRx Holdings, Inc. is starting to deliver meaningful benefits to consumers in terms of runaway prescription drug prices. Without a long diatribe about how GoodRx actually works, some important things to know are that the company had a successful IPO on September 22, 2020. It is already very profitable.

Although one might presume that the company mainly serves uninsured customers with prescription drug coupons, in fact, more than 75% of GoodRx customers are individuals who already have insurance coverage, many with high deductible insurance plans which force them to pay bloated prices for prescription drugs until they have satisfied an annual deductible.

Unlike many rivals, GoodRx offers instant discounts of more than 75% off of many (not all) insulin products. The company has offered a way for many consumers to slash their out-of-pocket costs and find it is cheaper to buy prescription drugs like insulin with a GoodRx coupon than it is to buy it with their insurance, even though insurance purchases contribute towards deductibles they must satisfy.

Around the time of the GoodRx IPO, company co-founder and co-CEO Doug Hirsch revealed:

> *"It's [GoodRx] totally free, because it should be free. I say this, and people think it's a PR statement or something, but I would love someday to have our company not need to exist. I lived in England for a while, so I have some understanding of the NHS: It's such an advancement over what we have. A company like ours should not have to exist: People should be able to get the health care that they need, without having to do research and jump through hoops and get approvals. I spent an hour on the phone yesterday with a hospital because my son had a seizure six months ago, and I've got a stack of bills, trying to just get it straight. The amount of time and effort and energy being wasted in this country, it's mind blowing."*

The critical take-away is that the Federal Trade Commission (FTC) has a critical role to play here. Currently, the secret cash-flow for prescription drugs enables the commercial healthcare insurance companies to collect billions in Rx rebate money, use that money to sell more insurance policies, and play massive financial games with insulin prices, because no one really has a very reliable accounting for where all those billions of dollars are going right now. The Federal Trade Commission (FTC) can play a meaningful and unique role with a thorough investigation of what the healthcare insurance industry is doing with all of the prescription drug rebates, and should really break-up the insurance companies so they're no longer vertically-integrated with the PBM's because that has proven to be very anticompetitive behavior and damaging to the retail pharmacy business, but that typically takes a lot of time and does not always yield immediate benefit.

FTC Role: Not Simply Rubber-Stamping Corporate Mergers & Acquisitions

Consider what happened when the FTC broke-up the old Bell System back in 1984. My father worked for his entire career for the old AT&T and it provided very nicely for my family. But breaking-up the old Bell System ultimately yielded massive societal benefits, only it took several decades for those benefits to be realized. For example, today, I can pick up the telephone and call your office in Washington DC and pay next to nothing for the call. Back in 1984, that phone call would have cost me several dollars (depending upon the length of the call). Whenever monopolistic behavior occurs, un-doing that takes time, and in the meantime, there is not much societal benefit. But mandating Rx rebate pass-thru to patients at the cash register would provide immediate patient benefit while longer-term fixes are done in a prudent and more thoughtful manner.

I sincerely hope the FTC can investigate the underlying issues related to insulin prices, which have risen for many patients by more than 1,100% over the past decade. I look forward to seeing the U.S. FTC looking into this matter,

Sincerely,
Scott Strumello

[redacted]

From: Corey Duteau <[redacted]>
Sent: Thursday, July 1, 2021 3:49 PM
To: JulyPublicComments
Subject: Pharmacy Benefit Managers (PBMs) & DIR fees!!!

Dear FTC,
I am reaching out to you to make comments on the DIR fees that the Pharmacy Benefit Managers (PBMs) have taken back from our small little Vermont pharmacy so far this year, not to mention from all the pharmacies in this country. As you can see depicted by the first chart, to date, they have taken back **$61,613.95!!** so far this year. In 2020, the PBMs took back **$145,092.94.** **$115,000** of this was from CVS Caremark alone!!!! This is downright illegal and is like dealing with organized crime. What other industry takes money back from a sale six to nine months after the transaction was completed??!!

What is also interesting is that if you look at the third chart labeled CVS CAREMARK DIR FEES that focuses on CVS solely, you will see how quickly they are increasing what they are taking back from our pharmacy alone. From 2019 to 2020, CVS DIR fees increased by 60%!!!!! How are they allowed to do this?! They are allowed to do this because our Senators, Congressmen/women, FTC and other government agencies have allowed the PBMs to fleece America's independent pharmacies for decades. Enough is enough!

What is frustrating to pharmacy owners is that it seems everyone in Washington just doesn't understand why the healthcare system in the United States is so expensive. Let me be blunt and point directly to the PBMs for medication costs! It really doesn't get any simpler than this. Our government has allowed mega companies like CVS to not only reimburse pharmacies for medications, but they are allowed to own their own pharmacies where they reimburse themselves more than they would an independent like us, and the government has even allowed companies like CVS to own insurance companies. They now own the majority of the companies that are all part of the medication system in the United States. Nothing like having so much money, you can buy your way in to monopolies and literally put your competition out of business because your competition relies on receiving payments from the competition.

I hope that you saw the Supreme Court actually brought some justice and understanding to what the PBMs are doing. SCOTUS sided with the AG from Arkansas who said what the PBMs are doing is nothing short of organized crime. Why has no one else in the Senate, Congress, FTC, etc. been able to see what these companies are doing? It's shameful to say that our representatives and government agencies either don't care or have been lobbied heavily by these tyrants who say they are only helping save money.

What I would love to hear is that the FTC will investigate and break up these illegal monopolies!! Now that the Supreme Court sided with Rutledge (Rutledge vs PCMA), there should be sufficient proof that the PBMs need to be regulated, and you are in a position to start doing something to save all the independent pharmacies across this nation. In addition, State after State are conducting their own review of just their Medicaid programs which are funded in part by Federal money and just this week Delaware concluded an analysis of 2018-2020 and determined that the PBMs have overcharged them 24.5 million dollars!!!! State by State, the proof is being shown that the PBMs are illegally profiting from our government's ignorance to how they operate. They are making BILLIONS of dollars all funded by the taxpayers of this nation.

Now is the time to do something that will make a difference across the nation! Time to regulate PBMs at the Federal level!!

2021 YTD

MONTH	TOTAL CLEARED	ADJUSTMENTS	TOTAL CHECK
JANUARY	$547,809.84	-$12,214.05	$535,595.79
FEBRUARY	$541,248.96	-$5,315.52	$535,933.44
MARCH	$605,257.90	-$25,547.71	$579,710.19
APRIL	$638,582.32	-$15,018.26	$623,564.06
MAY	$583,188.43	-$5,939.84	$577,248.59
JUNE	$643,199.95	$2,421.43	$645,621.38
JULY	$0.00	$0.00	$0.00
AUGUST	$0.00	$0.00	$0.00
SEPTEMBER	$0.00	$0.00	$0.00
OCTOBER	$0.00	$0.00	$0.00
NOVEMBER	$0.00	$0.00	$0.00
DECEMBER	$0.00	$0.00	$0.00
	$3,559,287.40	**-$61,613.95**	**$3,497,673.45**

2020

MONTH	TOTAL CLEARED	ADJUSTMENTS	TOTAL CHECK
JANUARY	$599,631.18	-$11,448.35	$588,182.83
FEBRUARY	$504,693.32	-$5,902.76	$498,790.56
MARCH	$524,959.84	-$10,408.75	$514,551.09
APRIL	$618,179.09	-$8,112.84	$610,066.25
MAY	$538,612.13	-$5,201.68	$533,410.45
JUNE	$540,219.51	-$2,353.10	$537,866.41
JULY	$666,767.10	-$12,532.93	$654,234.17
AUGUST	$587,770.41	-$24,128.23	$563,642.18
SEPTEMBER	$622,806.44	-$15,495.84	$607,310.60
OCTOBER	$642,224.57	-$5,732.14	$636,492.43
NOVEMBER	$588,972.12	-$14,797.79	$574,174.33
DECEMBER	$663,725.42	-$28,978.53	$634,746.89
	$7,098,561.13	**-$145,092.94**	**$6,953,468.19**

CVS CAREMARK DIR FEES

YEAR		TRIMESTER 1	%	TRIMESTER 2	%	TRIMESTER 3	%	TOTAL DIR
2016	CVS	$9,452.00		$9,871.00		$10,538.00		$29,861.00
2017	CVS	$14,874.00	57%	$13,813.00	40%	$13,091.00	24%	$41,778.00
2018	CVS	$16,624.00	12%	$19,052.00	38%	$21,203.00	62%	$56,879.00
2019	CVS	$23,166.00	39%	$24,336.00	28%	$22,011.00	4%	$72,502.00
2020	CVS	$38,596.00	67%	$39,004.00	60%	$36,818.00	67%	$114,419.27
2021	CVS	$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$0.00		$0.00		$0.00		$0.00
		$102,712.00		**$106,076.00**		**$103,661.00**		**$315,439.27**

Corey Duteau, R.Ph.
Pharmacy Manager

Freedom Pharmacy

[redacted]

www.freedompharmacyvt.com
www.facebook.com/freedompharmacyvt

[redacted]

From: Gary Boehler <[redacted]>
Sent: Wednesday, June 30, 2021 2:13 PM
To: JulyPublicComments
Cc: Weinsten, Randall M.
Subject: FTC July 1st Comments

Importance: High

Good Afternoon,

Per Randall Weinsten I am submitting comments for your open hearing tomorrow. Using the original website, I was consistently messaged with “Access Denied.” Mr. Weinsten suggested I use the email address above.

Below are my comments in my original writing.

Thank you.

Good Morning,

I am submitting comments as a consultant pharmacist with 51 years of experience, the past 35 focused primarily on third party (pharmacy benefit manager) contracting, and the negative impacts on patients, plan sponsors, state and federal taxpayers, and pharmacies across the nation. In my estimation this has largely developed because of a lack of FTC scrutiny on the vertical integration of large insurance companies with pharmacy benefit managers, their self-owned mail order and specialty pharmacies, behind the scenes rebate aggregators, patient clawbacks, and a myriad of other egregious actions that are directly responsible for the rising costs of prescription drugs; all this in spite of the fact that 90% of all prescriptions filled are generic, generic deflation averages 10%-12% per year, yet patient costs and copays/coinsurance continues to rise. At the same time, PBM profits continue to climb, CEOs are paid $36 million per year (Larry Merlo, CVS Caremark) and everyone else is footing the bill.

1. The FTC has not done its job in stopping vertical integration. The top five PBMs now control 85% of the prescription drug market. All of them either own or are owned by the largest health insurance carriers in this county (United Healthcare, Cigna, Aetna). The huge savings espoused during these integrations are NOWHERE to be found.
2. Patients are being steered by these behemoths to PBMs' preferred or restricted networks (or their own mail order/specialty facilities). Who is the PBM to tell a patient where he/she must obtain their prescriptions? Apparently it is OK to force a patient to drive 25 or more miles one way to get their prescription needs. That's not freedom of choice - it's steering pure and simple.
3. Manufacturers continue to be blamed for the high cost of drugs; I will grant you there is some blame to be laid at manufacturers' doorsteps, but I am also firmly convinced 80% of the issue lies at the doorsteps of these vertically integrated corporations, who have no fiduciary responsibility to anyone but themselves and their shareholders .Manufacturers, by and large, are being held hostage by PBMs who engage in nothing less than "bidding wars" to see what manufacturer(s) is/are willing to pony up the biggest rebates to a PBM for the "privilege" of being placed on a formulary in a top tier position.
4. State and federal taxpayers are being swindled by PBMs. The amount of state and federal dollars being spent for state Medicaid programs, Medicare Part D, veterans' prescription drug benefits, and all other taxpayer funded programs has to run into billions of wasted dollars annually. One only look back to the past three to five years to see state findings of spread pricing in state Medicaid programs; the same is true of Medicare Part D programs showing huge patient clawbacks at the point of sale, DIR fees being extracted from pharmacies post-adjudication, and other performance management fees being pulled back retrospectively. Does the federal government have any accountability in place to

really track how many of those fees that rightfully belong to U.S. taxpayers ever make it back to the government coffers? If so, I would love to be informed how my taxpayer dollars are being recouped from these "guardians" of my taxpayer dollars.

5. PBMs have no fiduciary responsibility of any kind except to themselves and their shareholders. Why is that allowed, and why does the federal government/FTC/DOJ continue to allow this to happen. As a taxpayer I demand a reckoning of my tax funded donations to the federal government. At age 74 and 51 years of non-stop work, as well as an in-depth understanding of how PBMs operate in the shadows, it is time for those of us with that understanding to be allowed to speak our piece and be heard.

6. Anything and everything a PBM does is FOIA protected; it is written all over their contracts and is another alarm bell that there is something very amiss when this "sensitive information" may not be shared. It is nothing more than an overt attempt to remain in the shadows and keep everyone else in the dark; that has become and is the PBMs' modus operandi. I believe the FTC and government knows this but has not chosen to do anything about it.

7. The FTC is supposedly focused on anti-trust and anticompetitive practice in these United States. With respect to the profession of pharmacy let me share with you some egregious actions of PBMs that point directly to those types of actions:

a. Contracts of adhesion for independent pharmacies - take it or leave it; no negotiations. As a pharmacy you are in or you're not. Additionally, during the term of a contact, a PBM can unilaterally move your store to another network, adjust reimbursement rates, force your patients to their preferred/restricted networks of which you may not be a part (multiple Medicare Part D networks do not even OFFER parts of their networks to an independent owner).

b. Patients being forced to big box stores or PBM owned mail order and/or specialty pharmacies, meaning direct competition with a locally owned pharmacy over which the patient has no choice. This, even though practically ALL patients want their prescriptions filled by their local pharmacist who they know and trust as opposed to a pharmacy hundreds of miles away with no face and virtually NO interaction for patients on life saving drugs.

c. Unbridled restrictions on PBMs with DIR fees taken from pharmacies at will months after a prescription has been filled! The PBMs set their own rules and guidelines, do not measure a pharmacy's performance based on that store's own merits, but rather "lumps" all pharmacies in a network or grouping and rates them all on a "combined" average score. That is anticompetitive when a top performing store is "fined" for being a top performer but is not treated as such in the end with the financial reward deserved.

d. Prime Therapeutics, within the past 18 months, has "assigned" its adjudication and contracting to Express Scripts in two steps .On April 1, 2020, Express Scripts began doing the claims adjudication for Prime Therapeutics. In so doing, the contracted rates that Express Scripts had in its system were used instead of what pharmacies had contracted with Prime Therapeutics - all because of the "assignment" clause Prime Therapeutics had in place with all of its contracted pharmacies. Then.....on January 1, 2021, Express Scripts also began doing all pharmacy contracting on behalf of Prime Therapeutics, meaning all negotiations for Prime Therapeutics are done through Express Scripts. The most recent announcement came from Prime Therapeutics & Express Scripts stating that Express Scripts will now start doing manufacturer rebate negotiations on behalf of Prime Therapeutics as well. It appears to me that this is another thinly veiled vertical integration between Express Scripts and Prime Therapeutics without having signed the marriage document or exchanged wedding rings. This is so blatantly obvious to all of us in the retail world of pharmacy! How can that not be obvious to the FTC? Many of us feel the FTC is aware, but chooses to do nothing. My colleagues and I are asking for a deep dive into these usurious actions by PBMs across the country and rein them in. The end result will be billions of dollars in this country's annual drug spend. The rich are becoming richer at the expense of everyone else in their path.

I am asking that you submit these comments to my U.S. Senator Amy Klobuchar. She has indicated a deep desire to address anticompetitive issues in this country. Among them are those actions of PBMs and something that directly or indirectly impacts every American in this country, both in monetary impacts as well as availability to receive the appropriate prescription care that all are entitled to receive. We have a group of behemoths standing in the way that needs to be addressed now, and not later. These companies are NOT too big to fail, nor will they. They need to be reined in and have controls put in place in both state and federal venues. All of us "here on the outside" need your help.

I have also contacted Senator Klobuchar's office and told her staff to expect my comments in this email to be sent to her office; I will be in touch with the Senator to set up meetings with her staff and the Senator if available to provide much

more in-depth proof of what is really happening behind the smoke and mirrors games of pharmacy benefit managers in this country. It is interesting to note that the United States has the highest drug costs in the world by about 40%, while at the same time we are the ONLY country in the world that utilizes PBMs (middlemen). This model needs to change before it is too late.

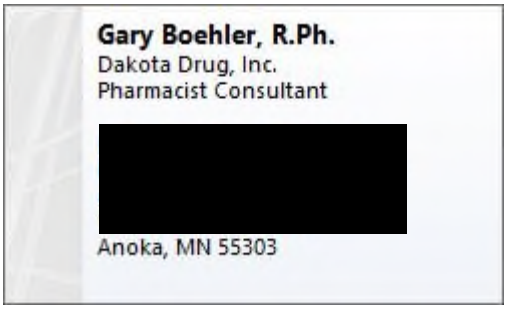
Thank you for allowing me to share these comments.

Sincerely,

Gary W. Boehler, R.Ph.
Consultant Pharmacist

FTCComments_June302021

Gary Boehler, R.Ph.



[redacted]

From: Ashley Baker <[redacted]>
Sent: Wednesday, June 30, 2021 11:49 AM
To: JulyPublicComments
Subject: Public Comment Submission Form for July 1, 2021 Open Commission Meeting
Attachments: FTC July Meeting_Joint Comments.pdf

To whom it may concern,

I would like to submit the attached written comments to be placed on the public record of the Commission for the July open meeting.

Please let me know if you have any questions.

Thank you,

Ashley Baker

Ashley Baker
Director of Public Policy
The Committee for Justice

[redacted]

Website | www.committeeforjustice.org
Twitter | @andashleysays | @CmteForJustice

Submitted: June 30, 2021

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 1, 2021 OPEN MEETING AGENDA

In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

We, the undersigned, appreciate this opportunity to provide comments regarding the possible rescission of the Commission's 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition (UMC) Under Federal Trade Commission Act § 5 (2015 statement).

While we applaud the Commission's broader goal of bringing transparency through a series of monthly open meetings, allowing only six days for public comment on significant agenda items that will drastically affect enforcement policy decisions is a deterrent to substantive public input.[1] As Commissioner Noah Phillips stated, "a mere week's notice on matters requiring serious deliberation, and a number of the policies themselves, undermine that very goal" of transparency.[2] To allow for both transparency and substantive public participating in these proceedings, the Commission should allow for a standard of 30 days of public input.

More troubling still is the fact that the Commission will be considering a significant shift in enforcement policy as the open meeting agenda will include this sudden push to revoke the 2015 statement. This policy statement provides a bipartisan framework that lays out widely agreed upon core principles regarding antitrust law and the Commission's Section 5 enforcement. Among these principles is "the promotion of consumer welfare" and focusing enforcement on acts or practices that "must cause, or be likely to cause, harm to competition or the competitive process."

[1] See "FTC Announces Agenda for July 1 Open Commission Meeting." The Federal Trade Commission. (June 24, 2021), available at: https://www.ftc.gov/news-events/press-releases/2021/06/ftc-announces-agenda-july-1-open-commission-meeting.

[2] Commissioner Noah J. Phillips. @FTC Phillips, Twitter. (June 25, 2021), available at: https://twitter.com/FTCPhillips/status/1408459407134973955.

As the Commission explained when issuing its 2015 statement: "In describing the principles and overarching analytical framework that guide the Commission's application of Section 5, our statement affirms that Section 5 is aligned with the other antitrust laws, which have evolved over time and are guided by the goal of promoting consumer welfare and informed by economic analysis."[3]

The rescission of the 2015 statement would untether the Commission's enforcement decisions from concerns over harms to consumers and to the competitive process. Consumer welfare is appropriately prioritized in the 2015 statement and remains the goal of antitrust as recognized and reaffirmed in existing case law.

Additionally, the Commission's recent Notice of the open meeting did not even state an objective justification for the quick removal of the 2015 policy, nor did it indicate whether it would be replaced by new guidance.

Abandoning the 2015 statement's framework would remove important guardrails that established predictability and guidance in enforcement actions. The lack of predictability resulting from the FTC's re-expanded discretion in invoking broad Section 5 authority on a case-by-case basis would create uncertainty for businesses of all sizes and across all industries. The Commission's misandventure into UMC expansionism would generate unwarranted confusion, and eventually courts would have to grapple with questions of interpreting the outer boundaries of Section 5 authority that were previously cabined by the 2015 statement.

Above all, we are concerned that the Commission's sudden rush to revoke the 2015 statement foreshadows a broader agenda to radically change antitrust law by greatly expanding the Commission's enforcement discretion.

These concerns have been echoed by others such as Senator Mike Lee (R-UT), who stated that "[s]hould the FTC rescind the statement, it will replace clarity with ambiguity in the midst of a fragile economic recovery. Rescinding the statement would also signal that the Commission rejects the idea that there are any limits to its power or regulatory reach, and that it intends to use Section 5 to address non-economic harms outside the agency's purview or expertise."[4]

Proposals to change well-functioning policies deserve serious deliberation and an opportunity for meaningful input from the public and from all stakeholders. We encourage the Commission to adopt a more open process and transparent approach that allows for proper notice and

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[3] "Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act." The Federal Trade Commission. (August 13, 2015), available at: https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

[4] See "Sen. Lee Expresses Concerns about Possible Revocation of FTC 2015 Statement of Section 5 Enforcement Principles."(June 24, 2021), available at: https://www.lee.senate.gov/public/index.cfm/press-releases?ID=88C0AA07-BB92-427C-8EEC-63B92E8E6A26.

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Sincerely,

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Director of Public Policy
The Committee for Justice

Daren Bakst
Senior Research Fellow in Regulatory Policy Studies
The Heritage Foundation

Asheesh Agarwal
Former Assistant Director
FTC Office of Policy Planning

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Timothy Sandefur
Vice President for Litigation
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Thomas A. Schatz
President
Citizens Against Government Waste

NOTE: Organizations and affiliations are listed for identification purposes only.

Submitted: June 30, 2021

Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

COMMENTS TO THE FEDERAL TRADE COMMISSION CONCERNING THE JULY 1, 2021 OPEN MEETING AGENDA

In Re: Rescission of 2015 Statement of Enforcement Principles On Unfair Methods of Competition Under FTC Act § 5

Dear Chair Khan and Commissioners Phillips, Chopra, Slaughter, and Wilson:

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[4] See "Sen. Lee Expresses Concerns about Possible Revocation of FTC 2015 Statement of Section 5 Enforcement Principles."(June 24, 2021), available at: https://www.lee.senate.gov/public/index.cfm/press-releases?ID=88C0AA07-BB92-427C-8EEC-63B92E8E6A26.

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Submitted: June 30, 2021

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Washington, DC 20580

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NOTE: Organizations and affiliations are listed for identification purposes only.

[redacted]

From: Pam Dixon <[redacted]>
Sent: Thursday, July 1, 2021 2:36 PM
To: JulyPublicComments
Subject: Comments of WPF pursuant to meeting
Attachments: WPF_Comments_FTC_OpenMeeting_01July2021_fs.pdf

Hi,

Attached please find our written comments with some details I was not able to add in my oral statement this morning (July 1, 2021). Thank you for your work to make the commenting process smooth.

Please let me know if there are any questions,

Best regards, and thank you again for allowing the public to provide comments.

Pam

Pam Dixon
Executive Director
World Privacy Forum
[redacted]p
Lake Oswego OR 97035
www.worldprivacyforum.org / @privacyforum

WORLD **PRIVACY** FORUM

Comments of the World Privacy Forum to FTC Chair and Commissioners, Open FTC Commission Meeting

July 1, 2021

Chair Khan and Commissioners,

Thank you for the opportunity to make a public comment at this Open FTC Commission meeting.

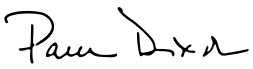
The FTC Health Breach Notification Rule implements the American Recovery and Reinvestment Act of 2009. Congress asked the FTC to craft a rule applicable to a vendor of PHRs or to a PHR-related entity in connection with a product or service offered by that entity. The FTC crafted an excellent rule, consistent with the limits provided by Congress.

Fifteen years ago, PHR technology was clunky, and data transfers could be challenging. Today, there is significant expansion in health data ecosystems outside of HIPAA and include apps, smartwatches, mobile devices, and personal health records among other devices and mechanisms.

The health ecosystem data flows outside of HIPAA protections have escaped the boundaries of the original rule. The World Privacy Forum requests that the Commission re-examine the Health Breach Notification rule to update it. The impacts of the global pandemic have put an exclamation point on the importance of this issue.

Thank you for your work.

Respectfully,



Pam Dixon
Founder & Executive Director
World Privacy Forum

Related documents:

- Comments of the World Privacy Forum to the FTC regarding Proposed Consent Order, In the Matter of Flo Health, File No. 1923133. March 1, 2021. (PDF, 4 pages) https://www.worldprivacyforum.org/wp-content/uploads/2021/03/WPF_Comments_FloHealth_1March2021_fs.pdf

- Comments of the World Privacy Forum to the Federal Trade Commission regarding Health Breach Notification Rulemaking, Project No. R91102. June 1, 2009. (PDF, 12 Pages) http://www.worldprivacyforum.org/wp-content/uploads/2009/08/WPF_FTCBreachcomments_06012009_fs.pdf

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 2:57 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 14:57 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Corbin
Last Name: Barthold
Affiliation: TechFreedom
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Thank you for the opportunity to comment on the Commission's plan, at its July 1 open meeting, to "vote on whether to rescind the policy statement issued by the Commission in 2015[.]" Federal Trade Commission, FTC Announces Agenda for July 1 Open Commission Meeting, https://bit.ly/2SBcxPT (June 24, 2021). The Policy Statement gives substance to the open-ended term "unfair methods of competition," in Section 5. 15 U.S.C. § 45(a)(1).
Abruptly revoking the Policy Statement would create non-delegation, removal-power, and notice problems. As such, the Commission should, at the very least, proceed through notice and comment before rescinding the Statement.

Start with non-delegation. Gundy v. United States, 139 S. Ct. 2116 (2019), is the Supreme Court's most recent statement on how much authority Congress may delegate to executive agencies, consistent with the constitutional imperative that Congress hold "all legislative Powers." Art. I § 1.
Gundy upholds the broad "intelligible principle" test, under which Congress's power to delegate authority is broad indeed. Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his "support"
for "reconsider[ing] th[at] approach," if and when a majority of the Court wishes to do so. 139 S. Ct. at 2131. Justice Kavanaugh, who did not participate in Gundy, has expressed just such a willingness. See Paul v.
United States, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari). And Justice Ginsburg, one of the four justices to stand by the "intelligible principle" standard in Gundy, has been replaced by Justice Barrett.

Justice Gorsuch's dissent in Gundy—a dissent joined by Chief Justice Roberts and Justice Thomas; and a dissent Justices Alito, Kavanaugh, and Barrett are likely to find attractive in a future case—thus warrants more attention than an average dissent. If the executive branch may make "laws," Justice Gorsuch notes, they will "not be few in number," nor "the product of widespread social consensus," nor "likely to protect minority interests," not "apt to provide stability and fair notice."
Gundy, 139 S. Ct. at 2135. Executive "lawmaking" would also enable both the legislature and the executive to evade accountability, each branch blaming the other for the consequences of open-ended legislation implemented through detailed agency rules. Id. For these and other reasons, Justice Gorsuch urges the Court to end its "intelligible principle misadventure"
and insist that "Congress, and not the Executive Branch, make the policy judgments" that are implemented through agency action. Id. at 2141.

As the Policy Statement itself recognizes, "Congress chose not to define the specific acts and practices that constitute unfair methods of competition in violation of Section 5." Federal Trade Commission, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, https://bit.ly/3qAhW67 (Aug. 13, 2015). Wisely, therefore, the Policy Statement attempts to cabin the Commission's discretion, ensuring that the Commission will "be guided," in its enforcement of the "statute on a flexible case-by-case basis, subject to judicial review, "by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare." Id. The Policy Statement also endorses the rule-of-reason standard, and observes that the Commission will be "less likely to challenge an act or practice" if "the Sherman or Clayton Act is sufficient to address" it. Id.

The Policy Statement was issued before the Supreme Court decided Gundy. We now know, because of Gundy, that the Policy Statement may well be a necessary narrowing of the Commission's authority—a narrowing that ensures that the Commission is not exercising greater authority than the legislature may permissibly delegate. In other words, the Court, going forward, may well consider a phrase like "unfair methods of competition" to flout the constitutional ban on non-delegation. ("The term 'unfair' is an elusive concept, often dependent upon the eye of the beholder." E.I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128, 137-38 (2d Cir. 1984).) Should the Commission begin to test the

outer boundary of the phrase "unfair methods of competition," it could in fact wind up presenting the Court the very case in which it narrows the ambit of permissible legislative delegation.
Indeed, as Commissioner Phillips observed last year, Noah Phillips, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), https://bit.ly/2U7jGrv, the term "unfair methods of competition" in Section 5 is "almost the exact wording" as "codes of fair competition," the term struck down under the non-delegation doctrine in A.L.A. Schechter Poultry Corp. v. United States,
295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

The wielding of legislative power by the Commission is particularly problematic because the Commission is not just any agency. Rather, it is an independent agency, with principal officers not subject to removal by the President. The Commission is thus unaccountable to either the legislative or the executive branch. The Court recently made clear that Humphrey's Executor v. United States, 295 U.S. 602 (1935), the decision that blessed the FTC's independent structure, should be "take[n] … on its own terms," Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2200 n.4 (2020). Humphrey's Executor stands on the assumption that the FTC is merely a "legislative … aid" that "mak[es] reports and recommendations to Congress." 140 S. Ct.
at 2200. When, therefore, the Commission seeks to implement sweeping policy changes on its own—when, that is, it goes far beyond making "reports and recommendations to Congress"—it undermines the legitimacy of its independence. This is especially so in the context of antitrust. Congress is at this very moment actively considering whether to amend or update those laws. Aggressive action by the FTC to implement a broad new conception of "unfair methods of competition" would circumvent those democratic deliberations. To some, no doubt, that is the whole point. But deliberately evading both the political branches is not, in our system of government, a legitimate tactic for ramming through sweeping new policies.

Given these serious constitutional concerns, the Commission should, at the very least, engage in notice and comment before rescinding the Policy Statement. The only reason not to go that route would be if the Commission intends immediately to bring enforcement actions under an innovative new understanding of the term "unfair methods of competition"—a move that would simply inflame, rather than dampen, the constitutional problems at hand. See E.I. Du Pont, 729 F.2d at 139 ("the Commission owes a duty to define [what conduct] would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."). Engaging in notice and comment, by contrast, would promote the values of process, accountability, and public buy-in that the Commission needs if it is to act legitimately as an independent agency in a system of representative government. What's more, engaging in greater deliberation, before taking action, would bolster the value of such policy statements more generally. After all, any statements the Commission might issue in the future will only be as strong, stable, and reliable as are the precedents, set by the Commission today, for what it takes for each such statement to be revoked. If the standard is low, no future statement will be worth the paper it's written on.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/110

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 11:44 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 11:43 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Scott
Last Name: Shewcraft
Affiliation: Economic Innovation Group
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Chair Khan, Federal Trade Commissioners, thank you for the opportunity to comment on the question of whether to rescind the "Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act" (2015). I write on behalf of the Economic Innovation Group ("EIG") to express our support for proposals to significantly limit the enforceability of covenants not to compete ("non-compete agreements" or "non-competes") and to argue that further Congressional action is needed.

Non-compete agreements limit worker mobility and dampen the dynamism of the U.S. economy. Once reserved for senior executives and those possessing valuable trade secrets, these provisions are now used extensively throughout the labor market and affect millions of low-wage and highly-skilled workers alike—with profoundly detrimental results for individual career advancement and the broader economy.

Greater enforceability of non-competes significantly reduces rates of company spinoffs and new firm entry in knowledge-intensive sectors of the economy, and the companies that do start under strict non-competes enforcement regimes are less likely to grow and survive. (Jessica Jeffers, "The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship,"
Working Paper. Evan Starr, et al., "Screening Spinouts? Non-Compete Enforceability and the Creation, Growth, and Survival of New Firms,"
Management Science 64 (2) (2018). Matt Marx, "Punctuated Entrepreneurship (Among Women)" U.S. Census Bureau Working Paper CES-18-26 (2018)).
Empirical evidence shows that non-compete enforcement also hurts worker wages and job satisfaction. (See Evan Starr "The Use, Abuse, and Enforceability of Non-compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts," Economic Innovation Group (2019)).

We agree that non-compete agreements are tools of unfair competition that deprive some companies of fair access to talent, deprive workers of free and fair competition for their labor, and illegitimately ward off the formation of new competitors by incumbent firms. However, we believe that durable federal reform that stands up to judicial review must include complementary Congressional action. More robust FTC enforcement should be joined up with a legislative push to dramatically curtail the use and abuse of non-compete agreements across the U.S. economy to provide a clear and powerful signal to employers where the law is headed.

In testimony to the Senate Committee on Small Business, John W. Lettieri, President and CEO of EIG, argued that reforms should be shaped around four core objectives. The same objectives are applicable to any potential actions the FTC may take in the future as well.

- Require Transparency: Many of the negative effects of non-competes can be
reduced simply by ensuring greater transparency and improving workers'
awareness of their bargaining position. As noted above, employers exploit their informational advantage by requiring non-competes in states where they are unenforceable, or by offering a noncompete on an employee's first day of work when other options have been foreclosed. Rules governing non-competes should be clear and easy to administer, and employees should be given adequate notice before being asked to sign away future job opportunities.
Examples: Employers should be required to notify job candidates of their intent to request signature as well as present non-competes when the formal job offer is made – not after the employee has accepted the job. Employers should disclose their intent to require a noncompete in any job posting or advertisement for the position. Additionally, employers requesting a noncompete agreement should be required to fully inform their prospective employee of applicable state and federal laws and allow adequate time for the candidate to discuss the terms of the agreement before making a decision.
- Create Disincentives for Overuse: There are currently few disincentives

for an employer to require non-competes of its employees – even when agreements are written so broadly as to be unenforceable, and even when they cover employees who have no specialized skills or trade secrets. Federal law should seek to discourage overuse of non-competes wherever possible by ensuring that employers carefully consider whether the benefits are worth the costs.
Examples: Employers should be required to compensate former employees while their noncompete is in effect. Non-competes drafted in an overly broad manner should be rendered completely void – not rewritten by courts to make them enforceable. Federal law should also penalize employers who request signature in states where non-competes are unenforceable.

- Limit the Pool of Eligible Workers: Most states currently have no

restrictions on the kinds of workers that can be bound by a noncompete. Many options exist to narrow the eligible pool of workers by industry, by wage level, or by education attainment so that non-competes are reserved only for senior executives and other top talent.
Example: Signature of a noncompete should be disallowed for any worker outside of the top five percent of the national income distribution.

- Limit the Scope of Agreements: Even when policymakers see a valid use for

non-competes under certain circumstances, most agree the scope of such agreements should be limited in various ways.
Examples: The duration of non-competes should be limited to no more than one year, and any noncompete should be voided if an employee is terminated without cause or laid off.
(available at
https://eig.org/news/testimony-before-the-senate-committee-on-small-business-noncompete-agreements-and-american-workers).

EIG urges Congress to act on the Workforce Mobility Act, bipartisan legislation introduced in both chambers to limit the use of non-competes except for in the sale of a business and the dissolution of a partnership. As part of this meeting's stated purpose, the FTC would benefit from this clearer expression of the congressional intent to condemn "unfair methods of competition" that passage of this legislation would provide. This approach would establish a nationwide policy to the benefit of workers and entrepreneurs with clear authority for administrative action and enforcement.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/66

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 7:33 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 19:32 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Kathleen
Last Name: Anthony
Affiliation: Independent Pharmacy
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
Submit written comment: Please address the corruption and greed of the middlemen known as Pharmacy Benefit Managers in the pharmaceutical industry.
The PBMs' are responsible for the demise of our busy, well-established independent pharmacy. For many years now, PBMs' have inflicted low drug reimbursements/ monies and punitive DIR fees (anti-competitive behavior) which would directly affected our bottom line and eventually led to the closure of a family owned business, in existence for over 80 years. Not one of my 4 sons went into the profession. The PBMs' are destroying the pharmacy profession. In 2019, DIR fees went off a diff, and even during a plague (COVID), we were still being hit with abusive DIR fees from the PBMs even while we struggled to help our loyal customers through a plague. The FTC's decision in 2007 that sided with the merger of CVS with Caremark has led to these deleterious effects on independent pharmacies and is responsible for the closures of 100's of family owned businesses throughout the years. Now, more and more customers are starting to realize the negative effects of the 3 PBMs monopoly (CVS Caremark, Optum RX and Express Scripts owning almost 80 % of the market) is not only hurting independent pharmacies but is hurting everyone else in regard to higher insurance premiums, denials for services needed, longer wait times, forcing customers to take certain drugs over preferred drugs by their doctors, delays in medication, forced mail order drugs and the list goes on. The PBMs' are not saving anyone monies. In fact, any benefits in regard to their schemes are directed totally to benefit themselves and their shareholders. So, now, there is less choice, a more expensive choice - an inferior choice. We were on the front lines everyday trying to help our customers navigate the healthcare debacle, and when the PBM's/insurance companies were not there to answer their customers'
questions, we were there for their customers too. We closed in August of 2020. The punitive, ever- changing, abusive DIR fees, low reimbursements, and expense for COVID precautions in regard to keeping everyone safe was just too much. It wasn't worth my husband's life. Hold PBM's accountable. Bring them into the light. Open that big black box where information seems to go in but nothing ever seems to comes out. I will never understand why the FTC allowed CVS to merge with Caremark in 2007 and then again said -sure everything is just fine- in 2012. My trust is shaken to the very core by this governmental betrayal on behalf of the pharmacy profession and all those families who have had to endure what we recently went through. In the end, there was no one else left to sell to except CVS. Then, they made my husband work there for a month. The injustice of it all is almost too much to bear.-Kathy Anthony

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/138

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 12:47 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 12:46 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Elizabeth
Last Name: Ropp
Affiliation: The People's Organization of Community Acupuncture Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: No
Link to web video statement: NH
Submit written comment:
Dear FTC,
Thank you for reading my comments and for hosting monthly public town halls.
This opportunity means alot to me. I am a licensed acupuncturist in New Hampshire. I am asking you to investigate the National Certification Commission of Acupuncture and Oriental Medicine (NCCAOM) over their monopoly of the national certification for acupuncturists. Our profession should be allowed options for other nationally recognized certification exams that test for safety and competency. In 2006 I paid almost $2000 to be nationally certified through the NCCAOM and have "active status" with their professional trade organization/corporation. In New Hampshire, like roughly half of the other US states, I must pay the NCCAOM every four years to maintain active status as a requirement to keep my state license.
Acupuncturists who are not required to pay for active status in their states pay off the NCCAOM anyway because they would be prohibited from obtaining a license in another state. The NCCAOM uses the fees that we pay them to advance their organization, not the acupuncture profession. I just received my renewal letter from their K Street office in Washington. Some of the "benefits" to maintain my active status, besides complying with my state law, include "the ability to work with the Veterans Health Administration, who now requires NCCAOM Board-Certification(TM)" and "Be promoted by the NCCAOM Advocacy team who are advancing NCCAOM certification at the federal and state level."

Thank you for your consideration on this issue.

Sincerely, The Honorable Elizabeth Ropp, L.Ac.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/86

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 9:23 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 21:23 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Donna
Last Name: Selle
Affiliation: .
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Dear FTC,
Thank you for reading my comments and for hosting monthly public town halls.
This opportunity means a lot to me. I am a licensed acupuncturist in Idaho.
I am asking you to investigate the National Certification Commission of Acupuncture and Oriental Medicine (NCCAOM) over their monopoly of the national certification for acupuncturists. Our profession should be allowed options for other nationally recognized certification exams that test for safety and competency. In 2007 I paid almost $2000 to be nationally certified through the NCCAOM and have "active status" with their professional trade organization/corporation. In roughly half of the other US states, Licensed Acupuncturists must pay the NCCAOM every four years to maintain active status as a requirement to keep a state license.
Acupuncturists who are not required to pay for active status in their states pay off the NCCAOM anyway because they would be prohibited from obtaining a license in another state. The NCCAOM uses the fees that we pay them to advance their organization, not the acupuncture profession. I just received my renewal letter from their K Street office in Washington. Some of the "benefits" to maintain my active status, besides complying with my state law, include "the ability to work with the Veterans Health Administration, who now requires NCCAOM Board-Certification(TM)" and "Be promoted by the NCCAOM Advocacy team who are advancing NCCAOM certification at the federal and state level.

Thank you for your consideration on this issue.

Sincerely,
Donna J Selle, LAc.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/154

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 2:47 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 14:47 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Lisa
Last Name: Rohleder
Affiliation: POCA Technical Institute
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Please investigate the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM), the national credentialing organization for licensed acupuncturists, for anti-competitive practices and for having an anti-consumer monopoly.

Most states require applicants for acupuncture licensure to be certified by the NCCAOM. Not only can the NCCAOM decide what constitutes entry-level qualifications for acupuncture, but because it has no competition, the NCCAOM can set any rates it chooses and impose any requirements it wants. Because its customers have no choice, it can and does supply inferior products
(tests) and services, without consequence. One of NCCAOM's primary responsibilities to the public and the AOM profession is the creation of fair, and valid, psychometrically sound exams that serve as the standard of what a first-year practitioner should know. However, its Job Task Analysis falls short of best practices, resulting in the creation of unrealistic, irrelevant standards which effectively mandate a curriculum for acupuncture schools, cost prospective students thousands of dollars in fees, and function to restrict consumer choice by invalidating the great diversity of acupuncture styles. The NCCAOM's anticompetitive practices have a disproportionate impact on Asian-American practitioners from "minority"
traditions of acupuncture practice, thus limiting access to acupuncture in Asian communities and driving otherwise qualified practitioners underground.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/106

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 1:52 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 13:52 Submitted by anonymous user: [redacted] Submitted values are:

First Name: David
Last Name: Barclay
Affiliation: American Economic Liberties Project Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: Yes
Link to web video statement:
Submit written comment:
The purpose of this comment is to draw attention to the FTC's current practice of allowing publicly known pharmaceutical antitrust violations to continue for years without intervention. For example, the FTC recently filed an amicus brief in In re Humira Antitrust Litigation, in which it recognized the potential for liability in that pay-for-delay case, but the FTC has not otherwise intervened to remedy the conduct at issue.

The FTC should stop allowing these known pharmaceutical antitrust violations to continue unabated, especially regarding blockbuster drugs such as Humira, which has had sales of nearly $20 billion in recent years and is not expected to face biosimilar competition until 2023. The FTC has the power to seek injunctive relief and other tools that could end this type of anticompetitive conduct and save consumers billions of dollars. The FTC should use the full scope of its powers to stop ongoing Pharma antitrust violations before more patients are hurt by Pharma's ongoing illegal conduct.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/90

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 3:44 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 15:43 Submitted by anonymous user: [redacted] Submitted values are:

First Name: James
Last Name: Stuber
Affiliation: Made in America Again, Inc.
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Statement of James A. Stuber on behalf of Made in America Again, Inc.
with respect to enforcement of Made in America labeling standards

Made in America Again, Inc., is a not-for-profit organization dedicated to rebuilding American communities by having consumer buy things made in those communities. Many consumers desire to buy American-made products for that purpose, and others as well.

The Commission's stated intent in the proposed rule is to strike a balance, so consumers can confidently buy American, and companies can realize the benefits of the Made in USA label.

However, the rule cannot accomplish this intent if conflicting standards are applied at the state level. In that case, companies may eschew making a Made in USA claim that would pass FTC muster, for fear of violating a "stricter" state standard, potentially with payment of fees and costs under a "private attorney general" enforcement mechanism.

In this case, consumers are deprived of the opportunity to identify a product as being made in the USA, and the company cannot realize the benefits of the Made in USA label.

This is a clear case where a national standard is needed, and we urge Congress to amend Section 45a of the Federal Trade Commission Act to provide for federal preemption of state laws in this field.

Respectfully submitted,

James A. Stuber
Founder and President
Made in America Again, Inc.
www.madeinamericaagain.org

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/118

[redacted]

From: Corbin Barthold <[redacted]>
Sent: Wednesday, June 30, 2021 3:45 PM
To: JulyPublicComments
Subject: video addition to Corbin Barthold comment for July 1 meeting

Hello,

I just submitted a comment for the July 1 meeting. If I'm allowed to do so, I'd like please to add this video-statement link to my submission:

https://techfreedom.org/wp-content/uploads/2021/06/CKB-Statement.mp4?_=2

Thank you very much for your time.

Best,
Corbin

Corbin K. Barthold
Internet Policy Counsel
TechFreedom | @TechFreedom
[redacted]

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 7:35 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 19:35 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Douglas
Last Name: Mrdeza
Affiliation: CEO Top Shelf Brands
Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Dear Chair Khan and Respective Commissioners,

Thank you for taking my question. I have been very outspoken and public regarding the abuses and pain Amazon has inflicted on my business. What tools does the FTC have to recover monies from firms that only acquired those funds through deceptive/abusive methods in the first place, and return those funds to the victim/businesses? In my case I am referring to stolen property, overcharged fees and sales tax which was collected but never disbursed to my business by Amazon. The amount in question is millions, why should I have to pay for litigation to get what is rightfully ours? I ask that Chair Khan address this matter please. Thank you very much!

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/142

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Thursday, July 1, 2021 9:25 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Thursday, July 1, 2021 - 09:25 Submitted by anonymous user: [redacted] Submitted values are:

First Name: VINCENT
Last Name: DITATA
Affiliation: NONE
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: No
Link to web video statement:
Submit written comment:
I do not believe Amazon should be a target for investigation regarding unfair competition practices.
Where was the FTC when Wal-Mart was expanding across the country in the name of lower prices caused countless small family owned businesses to close.
Where was the FTC when Home Depot and Lowes expanded across the country in the name of lower prices and caused the closure of most independent family owned hardware stores to close. Where was the FTC when Office Depot expanded across the country in the name of lower prices and caused all independent family owned small business to close. Amazon is the wrong target. Perhaps you could look at unfair participation by wealthy individuals to influence elections instead.
FYI, I have no affiliation with Amazon and don't even use the products or services that often. I prefer to visit stores to make purchases.
Thank you.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/14

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 11:55 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 11:55 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Scott
Last Name: Paul
Affiliation: Alliance for American Manufacturing Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Consumer Protection
Register to speak during meeting: No
Link to web video statement:
https://drive.google.com/file/d/1zpkXdqzSUzNuqjfFwDxLim-7XPQlA9b-/view?usp=sharing
Submit written comment:

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/74

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 7:21 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 19:21 Submitted by anonymous user[redacted] Submitted values are:

First Name: Douglas
Last Name: Mrdeza
Affiliation: Businessman harmed by Amazon Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- FTC Operations

Register to speak during meeting: No
Link to web video statement:
Submit written comment:
Dear Chair Khan and Respective Commissioners

I have been very outspoken and public when it comes to Amazon's abusive tactics and unfair methods of competition. What tools does the FTC have when it comes to recovering money from firms who only acquired the funds through deceptive practices and methods, and returning those ill-gotten funds to the victims/businesses? I would ask that Chair Khan address this question.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/134

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 11:52 AM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 11:51 Submitted by anonymous user: [redacted]
Submitted values are:

First Name: Garth
Last Name: Reynolds
Affiliation: Illinois Pharmacists Association Full Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: Yes
Link to web video statement: https://youtu.be/QUoYLFoT-9U Submit written comment: On behalf of all of the patients we serve, the Illinois Pharmacists Association asks the FTC to use any and all authority to investigate and take action concerning the manipulation of trust and wanton fraud, waste, and abuse by pharmacy benefit managers.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/70

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 1:53 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 13:53 Submitted by anonymous user: [redacted]

First Name: David
Last Name: Sobel
Affiliation: Daka Manufacturing
Full Email Address: [redacted]
Confirm Email Address: [redacted]
Telephone: [redacted]
FTC-Related Topic: Competition
Register to speak during meeting: Yes
Link to web video statement:
Submit written comment: I am an Amazon seller. Amazon is allowing Asian sellers to copy American products and decimate small businesses. I would like to share my experience in the time allotted.

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/94

[redacted]

From: Federal Trade Commission via Federal Trade Commission <[redacted]>
Sent: Wednesday, June 30, 2021 2:42 PM
To: JulyPublicComments
Subject: Form submission from: Speaker Registration and Public Comment Submission Form for July 1, 2021 Open Commission Meeting

Submitted on Wednesday, June 30, 2021 - 14:42 Submitted by anonymous user: [redacted] Submitted values are:

First Name: Alex
Last Name: Olympidis
Affiliation: Family Express Corp.
Full Email Address: [redacted]
Telephone: (219) 462-0144
FTC-Related Topic:
- Competition
- Consumer Protection

Register to speak during meeting: No
Link to web video statement:
https://familyexpress.wistia.com/medias/wmafqx3sr5
Submit written comment:

The results of this submission may be viewed at:
https://www.ftc.gov/node/1591350/submission/102

[redacted]

From: Berin Szóka <[redacted]>
Sent: Thursday, July 1, 2021 10:46 AM
To: JulyPublicComments
Subject: Re: TechFreedom Comments

Hi. I just wanted to make sure you had received our comments.

My apologies for filing them late. We are a tiny organization and the tight-turnaround required on this was difficult for us.

On Wed, Jun 30, 2021 at 9:46 PM Berin Szóka <[redacted]> wrote:

> Please find attached three comments regarding the Commission's July 1 public meeting and two attachments (labeled accordingly).
>
> The comments regarding the UMC policy statement duplicate those submitted by my colleague Corbin Barthold earlier today, but with different formatting. Please use this version.
>
> Thank you,
>
> --
> Berin Szóka | TechFreedom | @TechFreedom
> [redacted]

--
Berin Szóka | TechFreedom | @TechFreedom
[redacted]

[redacted]

From: Douglas Mrdeza <[redacted]>
Sent: Wednesday, June 30, 2021 7:33 PM
To: JulyPublicComments
Subject: Late Submission for Event tomorrow

Hello

Please forgive my tardiness, I just learned of the event taking place tomorrow and submitted the below question. Although the submission was technically late, I humbly request your consideration.

"Dear Chair Khan and Respective Commissioners,

Thank you for taking my question. I have been very outspoken and public regarding the abuses and pain Amazon has inflicted on my business. What tools does the FTC have to recover monies from firms that only acquired those funds through deceptive/abusive methods in the first place, and return those funds to the victim/businesses? In my case I am referring to stolen property, overcharged fees and sales tax which was collected but never disbursed to my business by Amazon. The amount in question is millions, why should I have to pay for litigation to get what is rightfully ours? I ask that Chair Khan address this matter please. Thank you very much! "

--
Douglas J Mrdeza
Chief Executive Officer
[redacted]

[redacted]

From: Jane Chung <[redacted]>
Sent: Wednesday, June 30, 2021 11:45 AM
To: JulyPublicComments
Subject: Jane Chung comment on behalf of Athena Coalition
Attachments: Athena FTC Comment.docx

Attached. Thank you!

COMMENTS OF THE ATHENA COALITION
To
THE FEDERAL TRADE COMMISSION
For July 1, 2021 Open Commission Meeting
June 30, 2021

Chair Khan, Commissioners Slaughter, Chopra, Phillips, and Wilson. Thank you for the opportunity to provide a public comment at this open meeting.

My name is Jane Chung, I am an advocate at Public Citizen and here representing Athena, a broad coalition of organizations representing working people and small business people coming together to create an economy where everyone can thrive. Our current fight is to rein in the power of Amazon.

We believe the continuous digital and biometric surveillance[1] conducted by tech monopolies like Amazon[2] constitute both unfair and deceptive practices and an unfair method of competition, and we urge the FTC to ban them immediately.[3]

Continuous digital surveillance through devices like Amazon Alexa and Ring, reported to be testing facial recognition, is unfair because it surveils community members (including children) around Ring owners without consent, invades their privacy, violates their civil liberties, threatens our democracy, and inflicts privacy harms that are not at all avoidable, with no countervailing benefits.[4]

Additionally, biometric surveillance like facial and voice surveillance (or recognition technology) is unfair as it fails people of color, women, and gender non conforming people, causing substantial injury including even wrongful arrest of Black men, in ways these communities cannot avoid, without any countervailing benefits.

Even for the consumer who buy Amazon Ring, Amazon's continuous digital surveillance is deceiving because the monopoly misrepresents and omits information about how that biometric data is shared, for example with law enforcement, stored, potentially hacked, or otherwise connected to profiles of them as individuals to be targeted with marketing and advertising, which a consumer acting reasonably has no way to dispute or negotiate, let alone be meaningfully aware of, given the complicated terms and conditions in user agreements, as well as the lack of explainability of their data processes. Amazon is selling a state and marketing surveillance device as a personal safety tool. It is unfair, deceptive, and needs to be banned.

Furthermore, we believe that operating continuous surveillance dragnets constitutes an unfair method of competition, and that the FTC should undertake a rulemaking to ban this practice.[5] To take the example of Amazon again, neither competitors to Amazon nor sellers that rely on Amazon for market access have the ability to monitor and track customers the way that Amazon can. Amazon's acquisitions of other data-hungry companies, including Ring doorbell and Kiva Systems robotics, has further impeded the growth of would-be rivals. Through ongoing invasions

of customers' and third parties' privacy, Amazon's data-driven monopoly power is thus entrenched.

Prohibiting invasive, inaccurate, and discriminatory biometric surveillance is essential to defending our privacy, protecting marginalized groups from discrimination, and fulfilling the FTC's mandate of consumer protection. Again, we urge the FTC to ban continuous digital and biometric surveillance as unfair and deceptive practices, and unfair methods of competition, under its existing authority.

---

[1] We define biometric surveillance as including but not limited to facial surveillance (known as facial recognition), voice surveillance (known as voice recognition), identification based on fingerprints or palm prints, gait surveillance, and logging of an individuals' head, face, or body to infer emotion, associations, activities, or the location of an individual.

[2] We provide examples of Amazon's unfair and deceptive practices because the Athena coalition focuses on Amazon; however, any action on continuous digital and biometric surveillance requires an analysis of all Big Tech companies: Amazon, Apple, Facebook, Google, and Amazon. Products from these monopolies worth investigation to this end include Google Nest and Wink, Apple Watch, and Facebook Portal.

[3] Data security and consumer privacy are squarely within the FTC's UDAP authority, with additional authority for data security and privacy coming from the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the Children's Online Privacy Protection Act.

[4] Future applications from Amazon and other monopolies are even more disturbing; Amazon has recently announced Sidewalk (a connected surveillance infrastructure), Sidekick (a surveillance product specifically targeted toward children), and surveillance devices in Amazon delivery trucks, all of which deserve increased scrutiny for discriminatory impact, privacy harms, security risks, invasions of civil liberties, and unfair and deceptive trade practices.

[5] Amazon's market power is both a cause and consequence of their data collection practices. On one hand, the economies of scale and scope from machine learning processing of rich data sets helps companies that extract vast data sets from users to consolidate their market power. On the other hand, this very market power allows them to extract increasingly intrusive data from consumers left with few alternative options.

July 1, 2021

STATEMENT OF JONATHAN JACOBSON

REGARDING THE POSSIBLE REPEAL OF THE SECTION 5 POLICY

I write to address the Commission's consideration of whether "to rescind the policy statement [regarding section 5 of the FTC Act, 15 U.S.C. § 45] issued by the Commission in 2015." As I understand it, the suggestion is to rescind and no longer follow the "consumer welfare" standard in competition matters. Anyone with a devotion to sound competition principles should oppose such a change, as do I for the reasons given below.

Some history. Prior to 1977, there was no accepted welfare standard for antitrust cases. Conduct and transactions were evaluated under an ad hoc approach based on the decision-maker's own concepts of "competition." The resulting confusion led the Court to inject clarity by adopting a number of per se rules, such as those condemning vertical territorial restraints (*Schwinn*) and maximum vertical price fixing (*Albrecht*). These per se rules were more clear, but led to condemnation of efficient business forms and the use of second- or third-best alternatives. The decisions led to a widespread concern that the United States was losing significant ground to countries around the world less hobbled by such harmful rules.

Proponents of the Chicago School approach, most prominently Judge Bork, rebelled. They advocated a "total welfare" standard (incorrectly called *consumer* welfare). Under that highly permissive standard, transactions and conduct that did not reduce the combined surplus of consumers *and producers* would not be condemned. But the Supreme Court never went that far and never adopted that approach. Instead, in *Brunswick*, the Court made clear that antitrust laws are designed to protect competition, not individual competitors. And in *Sylvania*, the Court made clear for the first time that "[c]ompetitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks." Over time, adherence to that principle has led to abolition of many of the per se rules adopted in the 1950s though 1972.

From 1977 to 1992, what this all meant was unclear (apart from overruling many of the old per se rules). There were debates as to whether there should be any standard, whether the standard should be "total" welfare, whether it should be "consumer" welfare, or whether it should be something else. In the mid-1980s government enforcement was perceived as moribund. During this period, however, "post-Chicago" analysis emerged. This analysis accepted many of the Chicago School's basic arguments, but modified them in a way designed to recognize specific facts that might be inconsistent with Chicago's rigid assumptions. One example was to leave behind the Chicago concern that harmful foreclosure is illusory, by pointing out that

practices that raise rivals' costs by foreclosing them from access to at least some customers can harm consumer welfare by giving incumbents power over price. Post-Chicago analysis focused on *true* consumer welfare – emphasizing the harms that occur when output is restricted, or prices raised, or innovation deterred. And without saying so in so many words, this was the approach taken by the Supreme Court in the *Kodak* case in 1992 – and in every case the Court has decided since then.

The consumer welfare standard. In the years after *Kodak*, antitrust achieved a rare and remarkable consensus among participants and decisionmakers – a consensus that the goals were understood and that outcomes would generally follow. That consensus continued and prevailed until very recently. It helped the Justice Department, the FTC, the courts, and state attorneys general to focus on economic effects, what *Sylvania* called "market considerations," while avoiding detours into rulings that would protect competitors to the detriment of consumers.

That is not to say that consumer welfare is a model of clarity. It most certainly is not. I addressed the most important differing interpretations in a 2015 article in *Antitrust* magazine, "Another Take on the Welfare Standard for Antitrust" (Aug. 2015), at wsgr.com/a/web/170/jacobson-0815.pdf. But the differences are minor. All agreed – at least until now – that the touchtone of harm is restricted output, increased prices, materially reduced consumer choice, and retarded innovation. What the consumer welfare standard does not do is protect competitors over consumers. And for very good reason. Competitors fare best when competition is *reduced*. Conduct that creates a better product or greater quantities or lower costs helps consumers, but can harm competitors, often severely.

The concern that appears to have motivated this call to repeal the consumer welfare standard is the protection of inferior competitors. They are the ones complaining so loudly of late. Protecting them at the expense of consumers, respectfully, is not a proper role for antitrust. If competitors are excluded in a manner that harms consumers, the antitrust laws should protect them. But if they are harmed by lower prices and the like, even from a dominant firm, that is competition in action. Repealing the consumer welfare standard would allow the Commission to make it up as it goes along. The courts will never stand for that.

Antitrust went down a different path from the 1940s through the 1960s and a bit beyond. It was a resounding and widely-acknowledged failure. The pushback came in a form of an overcorrection that marginalized antitrust as never before. It was adoption of the consumer welfare standard that saved it. The FTC's mission is to encourage competition and prevent those practices that damage it. Repeal of the Section 5 Statement would do the opposite.

COMMENTS OF THE ATHENA COALITION
To
THE FEDERAL TRADE COMMISSION
For July 1, 2021 Open Commission Meeting
June 30, 2021

Chair Khan, Commissioners Slaughter, Chopra, Phillips, and Wilson. Thank you for the opportunity to provide a public comment at this open meeting.

My name is Jane Chung, I am an advocate at Public Citizen and here representing Athena, a broad coalition of organizations representing working people and small business people coming together to create an economy where everyone can thrive. Our current fight is to rein in the power of Amazon.

We believe the continuous digital and biometric surveillance[1] conducted by tech monopolies like Amazon[2] constitute both unfair and deceptive practices and an unfair method of competition, and we urge the FTC to ban them immediately.[3]

Continuous digital surveillance through devices like Amazon Alexa and Ring, reported to be testing facial recognition, is unfair because it surveils community members (including children) around Ring owners without consent, invades their privacy, violates their civil liberties, threatens our democracy, and inflicts privacy harms that are not at all avoidable, with no countervailing benefits.[4]

Additionally, biometric surveillance like facial and voice surveillance (or recognition technology) is unfair as it fails people of color, women, and gender non conforming people, causing substantial injury including even wrongful arrest of Black men, in ways these communities cannot avoid, without any countervailing benefits.

Even for the consumer who buy Amazon Ring, Amazon's continuous digital surveillance is deceiving because the monopoly misrepresents and omits information about how that biometric data is shared, for example with law enforcement, stored, potentially hacked, or otherwise connected to profiles of them as individuals to be targeted with marketing and advertising, which a consumer acting reasonably has no way to dispute or negotiate, let alone be meaningfully aware of, given the complicated terms and conditions in user agreements, as well as the lack of explainability of their data processes. Amazon is selling a state and marketing surveillance device as a personal safety tool. It is unfair, deceptive, and needs to be banned.

Furthermore, we believe that operating continuous surveillance dragnets constitutes an unfair method of competition, and that the FTC should undertake a rulemaking to ban this practice.[5] To take the example of Amazon again, neither competitors to Amazon nor sellers that rely on Amazon for market access have the ability to monitor and track customers the way that Amazon can. Amazon's acquisitions of other data-hungry companies, including Ring doorbell and Kiva Systems robotics, has further impeded the growth of would-be rivals. Through ongoing invasions

of customers' and third parties' privacy, Amazon's data-driven monopoly power is thus entrenched.

Prohibiting invasive, inaccurate, and discriminatory biometric surveillance is essential to defending our privacy, protecting marginalized groups from discrimination, and fulfilling the FTC's mandate of consumer protection. Again, we urge the FTC to ban continuous digital and biometric surveillance as unfair and deceptive practices, and unfair methods of competition, under its existing authority.

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[1] We define biometric surveillance as including but not limited to facial surveillance (known as facial recognition), voice surveillance (known as voice recognition), identification based on fingerprints or palm prints, gait surveillance, and logging of an individuals' head, face, or body to infer emotion, associations, activities, or the location of an individual.

[2] We provide examples of Amazon's unfair and deceptive practices because the Athena coalition focuses on Amazon; however, any action on continuous digital and biometric surveillance requires an analysis of all Big Tech companies: Amazon, Apple, Facebook, Google, and Amazon. Products from these monopolies worth investigation to this end include Google Nest and Wink, Apple Watch, and Facebook Portal.

[3] Data security and consumer privacy are squarely within the FTC's UDAP authority, with additional authority for data security and privacy coming from the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, the Children's Online Privacy Protection Act.

[4] Future applications from Amazon and other monopolies are even more disturbing; Amazon has recently announced Sidewalk (a connected surveillance infrastructure), Sidekick (a surveillance product specifically targeted toward children), and surveillance devices in Amazon delivery trucks, all of which deserve increased scrutiny for discriminatory impact, privacy harms, security risks, invasions of civil liberties, and unfair and deceptive trade practices.

[5] Amazon's market power is both a cause and consequence of their data collection practices. On one hand, the economies of scale and scope from machine learning processing of rich data sets helps companies that extract vast data sets from users to consolidate their market power. On the other hand, this very market power allows them to extract increasingly intrusive data from consumers left with few alternative options.