



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

*Regarding the Report to Congress on the
FTC's Use of Its Authorities to Protect Consumer Privacy and Security*

*Commission File No. P065404
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Abuse and misuse of personal data is an urgent concern for our economy, society, and national security. In the current public health crisis, the rapid increase in contact tracing, remote learning, telemedicine, and video conferencing are making the need for effective data protection even more pressing.

The Federal Trade Commission has voted to submit a report to Congress that describes how the agency would benefit from additional authority and resources to meet its mission. I share this view. However, Commissioners must do more to use our existing authority and resources more effectively. This will demonstrate to Congress and the public that the agency will use any new authority it is given. In my view, there are at least seven significant ways my fellow Commissioners could enhance the agency's effectiveness under current law when it comes to abuse and misuse of personal data:

1. Inventory and use the rulemaking authorities that Congress has already authorized.

Contrary to what many believe, the FTC has several relevant rulemaking authorities when it comes to data protection, but simply chooses not to use them. Rules do not need to create any new requirements for market participants. In fact, they can simply codify existing legal precedents and enforcement policy to give even more clarity on what the law requires. In addition, when rules are in place, it is much easier for the agency to obtain relief for those who are harmed and seek penalties to deter other bad actors. This can be far more efficient than chasing after the same problems year after year through no-money settlements.

Even when Congress grants the FTC new authorities, the agency has sometimes done nothing. For example, in 2005, President George W. Bush signed legislation authorizing the FTC to write energy privacy rules,¹ given the rise of a "smart grid" that can pose risks to both privacy and our national security.² However, to date, the Commission has not even solicited comment from the

¹ See 42 U.S.C. 16471 (authorizing the Commission to "issue rules protecting the privacy of electric consumers" without preempting more protective state regulations).

² In 2017, the U.S. Department of Energy even warned of "imminent danger" of attacks on our grid, and highlighted the "national security and economic vulnerabilities associated with interconnectedness and the growing proliferation of unhardened consumer devices," which threatens "to infect bulk power systems." See U.S. DEPT. OF ENERGY,

public on whether or not to pursue this rule.³ If we had done so years ago, both Congress and the FTC could have gleaned valuable insights into the implementation of broad-based privacy rules to inform all of our data protection work. The FTC should inventory and publish its existing rulemaking authorities under the Administrative Procedure Act (APA) and take steps to deploy unused authorities that would address critical data protection concerns.

In addition to APA rulemaking authority, Congress has authorized the Commission to issue rules defining practices that are unfair or deceptive, and to seek civil penalties against violators.⁴ While our rulemaking procedures under this authority are slower than those available under the APA, that did not deter the Commission from recently voting to initiate rulemaking procedures targeting negative option marketing.⁵ The Commission could rely on this same authority to get started on developing data protection rules to codify existing legal precedents and enforcement policy. Even if this process proves to be time-consuming, it is worthwhile given the pressing problems we face and allows us to make better use of our limited resources in the long run. If Congress does enact additional privacy protections, the Commission would then be well positioned to implement these protections quickly.

2. Ensure that large firms face the same level of scrutiny we apply to smaller businesses.

To meaningfully deter data protection abuses and other wrongful conduct, the FTC must enforce the law equally. While we have taken a hard line against smaller violators in the data protection sphere, charging individual decisionmakers and wiping out their earnings, I am very concerned that the FTC uses a different standard for larger firms, like in the recent Facebook and YouTube matters.⁶ This is not only unfair to small firms, but also sends the unfortunate message that the largest corporations can avoid meaningful accountability for abuse and misuse of data.

It is also important for companies of all sizes to understand that the FTC is prepared to take them to court if necessary. FTC Commissioners have rarely voted to authorize agency staff to sue national players for misconduct related to privacy and data security. Instead, most of our

TRANSFORMING THE NATION’S ELECTRICITY SYSTEM: THE SECOND INSTALMENT OF THE QUARTERLY ENERGY REPORT, CHAPTER VII A 21ST-CENTURY ELECTRICITY SYSTEM: CONCLUSIONS AND RECOMMENDATIONS at 7-7, 7-3 (Jan. 2020), https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy_2020_cbj.pdf.

³ Congress has also granted APA rulemaking authority to the FTC regarding auto sales and leases, which may be relevant to privacy concerns related to the use of GPS trackers. *See* 12 U.S.C. § 5519. This authority is also relevant to emerging concerns regarding access to connected car data when motor vehicles are being serviced.

⁴ *See* 15 U.S.C. § 57a

⁵ *See* Press Release, Fed Trade Comm’n, FTC Seeks Public Comment on Ways to Improve Current Requirements for Negative Option Marketing (Sep. 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/ftc-seeks-public-comment-ways-improve-current-requirements>.

⁶ *See* Dissenting Statement of Commissioner Rohit Chopra In the Matter of Google LLC and Youtube, LLC, Comm’n File No. 1723083 (Sep. 4, 2019), https://www.ftc.gov/system/files/documents/public_statements/1542957/chopra_google_youtube_dissent.pdf. *See also* Dissenting Statement of Commissioner Rohit Chopra In re Facebook, Inc., Comm’n File No. 1823109 (Jul. 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf.

enforcement activity involves settlements with small market players. These cases are time-consuming but may have limited impact.

Contrast some of our smaller-scale settlements with the FTC's 2012 action against Wyndham Hotels, a major hospitality chain the Commission charged with employing unfair data practices. Wyndham Hotels waged an aggressive defense, challenging the FTC's theories before the District Court and the Third Circuit Court of Appeals. The court's ruling cemented the Commission's ability to target lax data security practices under existing law. The public benefits from the work of the FTC's talented investigators and litigators across the agency, and as Commissioners, we should have confidence that they can hold accountable even the largest players in the economy.

3. Increase cooperation with state attorneys general and other regulators.

State attorneys general are the country's front-line watchdogs when it comes to consumer protection, and many states have enacted privacy and data protection laws backed by strong remedial tools, including civil penalties. Partnering more frequently with state enforcers could significantly enhance the Commission's effectiveness and make better use of taxpayer resources.

For example, two years ago, the FTC brought a data protection enforcement action against PayPal and Venmo, which resulted in modified privacy practices but no monetary relief. If the FTC had partnered with an appropriate state attorney general, that relief could have included civil penalties or stronger data protections.⁷ The FTC should look for ways to enhance its cooperation with state regulators. This can be achieved through memoranda of understanding with organizations like the National Association of Attorneys General and the Conference of State Bank Supervisors to enhance coordination and cooperation when it comes to data protection.

In addition, regulators around the world are confronting similar abuses by tech firms operating globally. To advance our shared values, we should pursue more joint investigations and deepen our enforcement cooperation with our peer agencies.

4. Hold third-party watchdogs accountable and guard against conflicts of interest.

The FTC typically orders lawbreaking companies to hire a third-party assessor to review privacy and security practices going forward. However, the Commission should not place too much faith in the efficacy of these third parties.

For example, in 2012, the FTC approved PricewaterhouseCoopers (PwC) as the third-party overseer for Facebook's compliance with the Commission's privacy order. Yet, according to the Commission's complaint, Facebook was able to violate that order immediately and repeatedly⁸ without any meaningful action by PwC. While PwC was compensated for its "oversight," it is

⁷ To combat certain privacy and security abuses by providers of financial services, the FTC can also partner with the Consumer Financial Protection Bureau to obtain civil penalties.

⁸ Facebook Compl., In the Matter of Facebook, Inc., Comm'n File No. 1823109 (2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf.

not clear what value was gained by this work. The FTC’s recent orders increase accountability for third-party assessors, but there are additional actions we could take – such as requiring publication of their security assessments – to ensure they serve the public, and not the firms they are charged with overseeing.⁹

The FTC also has approved several organizations in the Children’s Online Privacy Protection Act (COPPA) Safe Harbor program. These organizations charge fees to websites and app developers to get special treatment under the law, but the Commission should change its current approach to ensuring these organizations are effective watchdogs. According to an analysis conducted by my office, few Safe Harbors offer an easy way for parents to submit complaints, and most take no disciplinary actions against member companies. When Safe Harbors do take actions, they are not required to identify to the FTC which companies violated COPPA, even if those violations were flagrant.¹⁰

The FTC should ensure these Safe Harbors are accountable to the public, rather than to their fee-paying members. We should forbid Safe Harbors from soliciting additional business from the companies they are supposed to be assessing, require them to publicize certain assessments, and end our policy of giving the Safe Harbor organizations permanent approval.¹¹

5. Reallocate resources.

While the Commission’s report has rightly noted to Congress that the number of employees working on data protection is inadequate, the Commissioners can vote to reallocate resources from other functions to increase our focus on data protection.

According to the FTC’s Congressional Budget Justification for Fiscal Year 2020, the Commission devoted just 52 FTEs to privacy and identity protection work, a lower allocation than our resource allocation to most of our other consumer protection functions, including financial practices, advertising practices, and marketing practices.¹² All of the Commission’s work is important, but data protection work should be a higher priority.

For example, some of our work can be pursued by state law enforcement or by a federal agency with a more specialized focus and expertise. The Commission could also direct its regional offices to sharpen their emphasis on data protection. A reallocation of resources could also allow the Commission to hire staff with unique skills, such as technologists, product managers, user

⁹ Statement of Commissioner Rohit Chopra In the Matter of Uber Technologies, Inc., Comm’n File No. 1523054 (Oct. 26, 2018), <https://www.ftc.gov/public-statements/2018/10/statement-commissioner-chopra-matter-uber-technologies-inc>.

¹⁰ Statement of Commissioner Rohit Chopra Regarding Miniclip and the COPPA Safe Harbors, Comm’n File No. 1923129 (May 18, 2020), https://www.ftc.gov/system/files/documents/public_statements/1575579/192_3129_miniclip_-_statement_of_cmr_chopra.pdf.

¹¹ Rohit Chopra, Commissioner, Fed. Trade Comm’n, Remarks at the Common Sense Media Truth About Tech Conference at Georgetown University (Apr. 4, 2019), <https://www.ftc.gov/public-statements/2019/04/prepared-remarks-commissioner-rohit-chopra-common-sense-media-truth-about>.

¹² FED. TRADE COMM’N, FISCAL YEAR CONGRESSIONAL BUDGET JUSTIFICATION at 127 (2020), https://www.ftc.gov/system/files/documents/reports/fy-2020-congressional-budget-justification/fy_2020_cbj.pdf.

researchers, and privacy engineers. Of course, we would like to do everything, but abuse and misuse of data is too pressing to play catch up.

6. Investigate firms comprehensively across the FTC's mission.

The FTC should use its authority to deter unfair and deceptive conduct in conjunction with our authority to deter unfair methods of competition. However, in the digital economy, the data that companies compete to obtain and utilize is also at the center of significant privacy and data security infractions.

The agency can do more to comprehensively use its authorities across its mission.¹³ When we do not, investigations may result in ineffective resolutions that fail to fix the underlying problems and may increase the likelihood of recidivism, consuming both competition and consumer protection resources with ongoing violations.

7. Conduct more industry-wide studies under Section 6(b) of the FTC Act.

Surveillance-based advertising is a major driver of data-related abuses, but the Commission has not yet used its authority to compel information from major industry players to study these practices. The Commission should vote to issue orders to study how technology platforms engage in surveillance-based advertising.

We should comprehensively study data collection practices, the use of algorithms and predictive analytics to curate content, and other details about the business models in this industry.¹⁴ I am particularly interested in how data collection tactics can lead to infringements of civil rights protections. These studies will also be particularly useful when it comes to understanding how children are tracked and targeted. Finally, studies can lay the groundwork for future policy development and inform the agency's enforcement and rulemaking agenda.

In conclusion, the Commission's report to Congress is a helpful summary of the challenges and limitations the agency faces, given existing authority and resources. At the same time, the Commission can do much more with its existing authority by taking decisive actions to improve outcomes for markets and the public.

¹³ Statement of Commissioner Rohit Chopra, In the Matter of Reckitt Benckiser Group, plc, Comm'n File No. 1310036 (Jul. 11, 2019), https://www.ftc.gov/system/files/documents/public_statements/1534673/chopra_-_reckitt_statement_7-11-19.pdf.

¹⁴ Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf.