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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding the Report to Congress on Privacy and Security

October 1, 2021

The Federal Trade Commission (“FTC” or “Commission”) is the best and most effective privacy enforcer in the world. I am proud of the work done by the Commission and its staff to protect consumers from harms caused by unfair and deceptive data security and privacy practices. The FTC has pioneered this important work across administrations, Democratic and Republican alike.

The Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2021, P.L. 116-260 (“the Joint Explanatory Statement”), directs the Commission to assess the agency’s current efforts related to data privacy and security and to identify resources necessary to improve in these areas and to report our findings to the Committees on Appropriations of the House and Senate. The FTC Report to Congress on Privacy and Security submitted by the Commission today (“the Report”) does so; and I agree with much of its description of our efforts and our needs, resource-based and statutory. But I disagree with the strategic focus it lays out for the future, a vision that suggests misplaced priorities, a disregard for statutory boundaries, and the replacement of market preferences with regulatory fiat. I respectfully dissent.

Resources and Legislation

Whether measured by the extent of changes to business operations, early identification of concerning issues, fines levied, or losses returned to consumers, in matters from Equifax to Facebook to TikTok to Zoom,¹ the FTC is the privacy and security enforcer that has had the biggest global impact. We do our work with more circumscribed legal authority and far fewer people than other similar agencies, for example the Irish Data Protection Authority² or the U.K.

¹ *FTC v. Equifax, Inc.*, Civ. Action No. 1:19-cv-03297-TWT (N.D. Ga. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3203/equifax-inc>; *In the matter of Facebook, Inc.*, FTC File No. 0923184, Docket No. C-4365 (2020), <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>; *U.S. v. Musical.ly, Inc.*, Civ. Action No. 2:19-cv-01439 (C.D. Cal. 2019), <https://www.ftc.gov/enforcement/cases-proceedings/172-3004/musically-inc>; *In the matter of Zoom Video Communications, Inc.*, FTC File No. 1923167, Docket No. C-4731 (2020), <https://www.ftc.gov/enforcement/cases-proceedings/192-3167/zoom-video-communications-inc-matter>.

² Irish Data Protection Commissioner Press Release, *Data Protection Commission statement on funding in 2021 Budget* (Oct. 13, 2020), <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-statement-funding-2021-budget> (“Increases in the funding allocated to the DPC in recent years have facilitated the

Information Commissioner.³ I join my colleagues in requesting a substantial amount of FTEs to devote to privacy and security, because I believe we can have an even bigger impact with these additional resources.

I also agree with my colleagues that legislation would better enable us to protect the privacy and security of consumers. Congress should clarify Section 13(b) to enable the Commission to obtain monetary redress for consumers, to get back for them what they have lost to fraudsters and other wrongdoers.⁴ I also support Congress enacting data security and privacy legislation enforced by the Federal Trade Commission.⁵

Misplaced Priorities

The Joint Explanatory Statement directs the Commission to report on current efforts and to identify enforcement needs, but the bulk of the Report submitted today is devoted to laying out the strategic priorities of the Commission majority. I am concerned that these priorities are to some extent misplaced, and that they reflect a disregard for statutory boundaries and replacement of market preferences with bureaucratic preferences that will render the agency less effective and also less devoted to the consumer protection that is our charge.

The priorities laid out in the Report neglect traditional areas of Commission focus, for example privacy and security practices that cause the most consumer harm, like stalking apps⁶, accuracy in consumer reporting⁷, and supporting the United States government goal of

significant expansion of the DPC's staffing, with an emphasis on strengthening the regulator's skills-base in the areas of legal, technology, investigations and communications bringing staffing levels to 150 at present").

³ U.K. Information Commissioner's Annual Report and Financial Statements 2019-20, <https://ico.org.uk/media/about-the-ico/documents/2618021/annual-report-2019-20-v83-certified.pdf>, at 103 ("As at 31 March 2020 the ICO had 768 permanent staff (720.3 full time equivalents)").

⁴ See Prepared Oral Statement of Commissioners Noah Joshua Phillips Before the House Committee on Energy and Commerce Subcommittee on Consumer Protection and Commerce, Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection," (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592981/prepared_statement_0728_house_ec_hearing_72821_posting.pdf.

⁵ See Prepared Statement of the Federal Trade Commission Before the Senate Committee on Commerce, Science, and Transportation, Hearing on "Oversight of the Federal Trade Commission," at n.22 (Aug. 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf.

⁶ Recently, for example the Commission announced its settlement with SpyFone, a company that sold a stalking app that allowed purchasers to secretly monitor the photos, text messages, web histories, GPS location, and other personal information of the phones on which they surreptitiously installed the app. *In the Matter of Support King, LLC (SpyFone.com)*, FTC File No. 1923003 (2021), <https://www.ftc.gov/enforcement/cases-proceedings/192-3003/support-king-llc-spyfonecom-matter>. See also, *In the Matter of Retina-X Studios, LLC, and James N. Johns, Jr.*, FTC File No. 1723118, Docket No. C-4711 (2020), <https://www.ftc.gov/enforcement/cases-proceedings/172-3118/retina-x-studios-llc-matter>.

⁷ The FTC has brought actions against tenant screening companies for violations of Fair Credit Reporting Act due to their inadequate procedures to ensure that they were furnishing accurate information about prospective tenants. See *U.S. v. AppFolio, Inc.*, Civ. Action No. 1:20-cv-03563 (D.D.C. 2020), <https://www.ftc.gov/enforcement/cases->

facilitating international trade in data.⁸ These have been hallmarks of Commission work in recent years.⁹

The call to increase Commission understanding of algorithms used to analyze data from consumers and to educate them and businesses about the potential negative impacts of their use is warranted. The Commission's education and outreach to the public and business community is one of our most effective tools to protect consumers, one we have levied in other areas of business and technological development implicating privacy such as data brokers and big data¹⁰, mobile security¹¹, facial recognition¹², and the Internet of Things.¹³

Competition and Privacy are not the Same

The Report states that the Commission will integrate competition and privacy enforcement, arguing that violations of consumer protection laws are facilitated by market power and that, conversely, privacy violations impede competition. It argues for "competition-based remedies"¹⁴, suggesting the use of remedies only available for antitrust violations where no such

[proceedings/1923016/appfolio-inc](https://www.ftc.gov/enforcement/cases-proceedings/152-3059/realpage-inc); *FTC v. RealPage, Inc.*, Civ. Action No. 3:18-cv-02737-N (N.D. Tex. 2018), <https://www.ftc.gov/enforcement/cases-proceedings/152-3059/realpage-inc>.

⁸ See United States Department of Commerce Press Release, *Intensifying Negotiations on Trans-Atlantic Data Privacy Flows: A Joint Press Statement by the U.S. Secretary of Commerce Gina Raimondo and European Commissioner for Justice Didier Reynders* (Mar. 25, 2021), <https://www.commerce.gov/news/press-release/2021/03/intensifying-negotiations-trans-atlantic-data-privacy-flows-joint-press> ("These negotiations underscore our shared commitment to privacy, data protection and the rule of law and our mutual recognition of the importance of transatlantic data flows to our respective citizens, economies, and societies.").

⁹ We have brought 60 enforcement actions under the EU-U.S. Privacy Shield Framework ("Privacy Shield") and its predecessor, and we stand ready to enforce any Privacy Shield successor program. We similarly protect data flows in the Asia-Pacific Region through our role as an enforcement authority for the APEC Cross-Border Privacy Rules. We must continue to actively engage with the international community to promote the ability for companies of all sizes to transfer data across borders in order to innovate, reach new customers, improve efficiency, enhance security, and reduce costs.

¹⁰ See FTC Report, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), <https://www.system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>; FTC Report, *Data Brokers: A Call for transparency and Accountability* (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

¹¹ See FTC Report, *Mobile Security Updates: Understanding the Issues* (Feb. 2018), https://www.system/files/documents/reports/mobile-security-updates-understanding-issues/mobile_security_updates_understanding_the_issues_publication_final.pdf.

¹² See FTC Staff Report, *Facing Facts: Best Practices for Common Uses of Facial Recognition Technologies* (Oct. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/facing-facts-best-practices-common-use-facial-recognition-technologies/121022facialechrpt.pdf>.

¹³ See FTC Staff Report, *Connected Cars Workshop* (Jan. 2018), https://www.ftc.gov/system/files/documents/reports/connected-cars-workshop-federal-trade-commission-staff-perspective/staff_perspective_connected_cars_0.pdf; FTC Staff Report, *The Internet of Things: Privacy and Security in a Connected World* (Jan. 2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

¹⁴ The Report refers to algorithmic deletion as a competition-based remedy, but it is unclear how this qualifies. Remedies in competition cases can require divestiture, but that is quite different from requiring the destruction or

violations have been established. The Report overstates the synchrony between competition and privacy.¹⁵ By way of illustration, many of the cases it cites as examples involve small companies with no discernible market power.¹⁶ And, while it is plausible that actions companies take that violate privacy may impede competition, numerous recent legal actions by States and foreign enforcers are predicated on the notion that initiatives undertaken by companies to *strengthen* privacy impede competition.¹⁷

Competition and privacy can align, but they do not always do so; and the Report reflects counterintuitive and unsupported assumptions about how often they do. For one, when it comes to consumer data, privacy counsels security and limited sharing; robust competition often involves opening up access. And the two legal doctrines work in different ways. Competition law protects the competitive process but otherwise lets market forces determine outcomes, whereas regulation imposes different outcomes than market forces would have produced. The failure of the market thus far to yield privacy outcomes satisfactory to many is precisely the argument for the privacy legislation the Report seeks. I am concerned that predicating enforcement resources on unsupported and counterintuitive assumptions about the alignment between privacy and competition is a recipe for ineffective enforcement and unfair application of the law.

The FTC Cannot Impose Remedies Not Authorized by Law

The Report calls attention to an array of remedies that the Commission intends to impose going forward. I support remedies that seek to stop illegal conduct and make consumers whole, and that are consistent with our legal authority. Where we are able to provide consumer redress and return money that they have lost, we should.

deletion of an asset. The Report says nothing about how deleting the algorithm strengthened competition (not just competitors) and benefited consumers.

¹⁵ See, e.g., Noah Joshua Phillips, *Should We Block This Merger? Some Thoughts in Converging Antitrust and Privacy*, Remarks at Center for Internet and Society, Stanford Law School (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf; Erika M. Douglas, *The New Antitrust/Data Privacy Interface*, Yale L.J. Forum, Vol. 130 (Jan. 18, 2021), <https://www.yalelawjournal.org/forum/the-new-antitrustdata-privacy-law-interface>.

¹⁶ See, e.g., *In the Matter of Everalbum, Inc.*, FTC File No. 1923172 (2021), <https://www.ftc.gov/enforcement/cases-proceedings/1923172/everalbum-inc-matter>; *In the Matter of Support King, LLC (SpyFone.com)*, FTC File No. 1923003 (2021), <https://www.ftc.gov/enforcement/cases-proceedings/192-3003/support-king-llc-spyfonecom-matter>.

¹⁷ See Texas Attorney General Press Release, *AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations* (Dec. 16 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-leads-multistate-coalition-lawsuit-against-google-anticompetitive-practices-and-deceptive>; See Competition and Markets Authority Press Release, *CMA to investigate Google's 'Privacy Sandbox' browser changes* (Jan. 8, 2021), <https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes>; Kate Park, *South Korea passes 'Anti-Google law' bill to curb Google, Apple in-app payment commission*, TechCrunch (Aug. 31, 2021, 6:30 AM), <https://techcrunch.com/2021/08/31/south-korea-passes-anti-google-law-bill-to-curb-google-apple-in-app-payment-commission/>.

We should not attempt to extract remedies for purposes not allowed by statute.¹⁸ For example, we should not use some of the remedies championed in the Report as they have sometimes previously been touted—*i.e.*, not as equitable relief but as mechanisms to punish, in the absence of penalty authority.¹⁹ We should also resist the temptation to use the opportunity of law enforcement to attempt to bar companies from engaging in legal conduct without a coherent and grounded theory of how such remedies are necessary to support the aim of the law. To the extent phrases used in the Report like “tackle these issues on a structural level” means simply letting a majority of commissioners run companies by regulatory fiat, that is a recipe for failure that would hurt the very consumers we are obligated to help. Our focus should remain on helping consumers, with appropriate regard for our legal authority. We have an obligation to stop illegal conduct (a remedy the Report largely omits), but we are not empowered to pursue any remedy that strikes our fancy or that we perceive as desirable. As the Supreme Court made clear in *AMG*, the words of the statute matter and the Commission may not exceed its statutory authority.²⁰

Regulatory Overreach

The Report states that the Commission should impose myriad privacy-related regulations on private actors because of the absence of broad federal privacy legislation. I believe there are some regulations the FTC can and should promulgate, but we are not a legislature; and the absence of action by Congress does not confer upon us one iota of legislative authority. One putative legal authority the Report cites does not exist, and our cabined Section 18 rulemaking authority is not a blank check to impose our preferences on businesses and consumers.²¹ The value judgments and tradeoffs that will be required of privacy legislation, for example, should be made by the People’s elected representatives.

¹⁸ The FTC does not have general penalty authority. Where Congress has given us specific civil penalty authority (e.g., the Fair Credit Reporting Act, the Children’s Online Privacy Protection Act), we should absolutely use it to ensure both specific and general deterrence. Otherwise, we may only seek equitable remedies.

¹⁹ See, e.g., Prepared Opening Statement of Commissioner Noah Joshua Phillips Before the United States Senate Committee on Commerce, Science, and Transportation, Hearing on “Strengthening the Federal Trade Commission’s Authority to Protect Consumers,” (April 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589176/formatted_prepared_statement_0420_senate_hearing_42021_final.pdf.

²⁰ *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).

²¹ Chair Khan’s separate statement on the Privacy Report, that the Commission should consider imposing “substantive limits rather than just procedural protections” on data collection and processing suggests precisely this risk. I continue to believe that the Commission should avoid usurping the legislative power to impose the preferences of a handful of commissioners on businesses and consumers alike. Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security, Commission File No. P065401 (Sep. 30, 2021).