NetChoice Comment for the Record: FTC Open Meeting, September 15, 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 important issues it will consider at its open meeting on September 15, 2021.

As discussed below, we ask that the FTC:

- Work with Congress to pass a federal privacy law rather than take matters into its own hands based on vague or nonexistent statutory authority;
- Ensure any report on HSR's viability in the 21st Century study more than just digital markets already targeted by the Commission for disfavored treatment;
- Establish procedures for meaningful public input that are reasonable and consistent with the agency's statutory authority; and
- Vote **against** repealing the bipartisan Vertical Merger Guidelines.

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

The Problems with Adopting Major Policy Changes without Providing Adequate Opportunity for Meaningful Public Comment

Before we discuss the issues at hand we must again[2] express our disappointment in the Commission's seeming lack of effort in soliciting public input. Previously public comment was allowed for as little as fifteen days -- again without providing the actual text of the underlying changes. For the Sept 15, 2021 open meeting this

[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.

[2] *See* NetChoice Comment for the Record: FTC Open Meeting, July 21, 2021

window for public comment was less than three business days and only five days total. Moreover, this notice and comment period fell during the Jewish Holy Week.

This continued diminution in public comment periods, whether intentional or otherwise, gives the impression that the Commission and it's new Chair are not seriously interested in comments from the public. This is especially confusion since, in May 2020, Chair Khan and Commissioner Chopra published a law review article themselves arguing that FTC rules should be established through:

> "[A] transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy"

and that the agency should

> "[C]onsider and address all submitted comments before issuing the final rule."[3]

We agree. Such opportunities for public input and opportunities for FTC staff to speak about proposed and past decisions with the public help to ensure public trust in the Commission. As an agency designated to protect consumers, it's critical to recognize that trust is a two-way street -- as Chair Khan and Commissioner Chopra suggested in their May 2020 article.

But it is hard to square these assertions with the Commission's recent behavior unless it is to be believed that public input is invaluable for the making of a rule, but not for decisions to fundamentally overhaul the rulemaking process itself. Public input is important not just for rulemaking, but for any major decision made by the FTC that substantially impacts its approach to regulation and enforcement.

This is the third open meeting at the FTC since Commissioner Khan was appointed with less than the standard 30 days for public comment and shows a continued effort to shorten that window for comments to now less than a week.

To describe this time period for public comment as inadequate would be an understatement and the FTC's consideration of the public comments was clearly not meaningful given the Commission quite literally took no time to actually read or contemplate the comments. Even more concerning, the proposals adopted at this meeting were some of the most significant proposals that the FTC has adopted in decades. They involved rescinding a policy statement that tied the FTC's enforcement principles to the lodestar of American antitrust analysis: consumer welfare. They also involved gutting the reasonable restrictions imposed on the FTC's

[3] Rohit Chopra and Lina M. Khan, *The case for "unfair methods of competition" rulemaking*, 87(2) University of Chicago Law Review 357, 368-69 (2020).

rulemaking procedures and removing requirements that ensured the public had a role to play in such a process.

These are major changes that the FTC should have wanted to make only after receiving meaningful input from the public. In fact, these are changes that make the need for public comment all the more necessary, as they remove reasonable restraints on the FTC's broad and potentially devastating power. As Commissioner Wilson and Commission Phillips argue in one of their dissents to these decisions, "What the changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record."[4]

Unfortunately, rather than changing course, the Commission continued providing *less time for public comment* for its second open meeting -- fewer than 7 days for public comment, two of which are over the weekend, and *even less time for public comment* for its third open meeting -- fewer than 5 days for public comment, two of which are over the weekend.

While we are grateful that the FTC decided to include at least some period between when the comments are due and when the voting will actually take place this time around, we are skeptical that three days is sufficient to meaningfully consider the significant amount of public commentary it receives on these important issues.

Going forward, we ask that the Commission provide adequate time for public comments and meaningfully consider such comments before adopting major policy changes that will impact the entire United States economy.

Proposed Policy Statement on Privacy Breaches by Health Apps and Connected Devices

Since the term "privacy breach" is not a term of art used in data security or privacy discussions, and given the inability to view the proposed policy statements themselves, and due to the virtually unprecedented less than five-day opportunity for public comments, we presume in our following comments that when the FTC says "privacy breaches" it is referring to "data breaches."

Companies across the United States recognize that the protection of its customers' or users' data is vital to its long term success. NetChoice agrees in principle with the FTC's interest in focusing attention on this critical matter but remains confused as to the value of focusing specifically on "health apps and connected devices."[5]

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[4] Federal Trade Commission, Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (Jul. 9, 2021), https://www.ftc.gov/public-statements/2021/07/dissenting-statement-commissioners-noah-joshua-phillips-christine-s-wilson.

[5] FTC Announces Tentative Agenda for September 15 Open Commission Meeting

Common sense and past FTC actions show that dividing attention up along narrowly conceived industry lines would lead to politicized enforcement and insufficient outcomes for consumers. Data breaches can come from anywhere, and affect every type of company - whether that is a technology company or retailer, traditionally understood. Instead of expending limited FTC resources ignoring the majority of the data breach problem, focus should be turned to Congressional efforts to pass a comprehensive privacy law that gives companies clear guidelines to follow and gives the FTC clearly delineated enforcement authority.

The Wyndham data breach case is an illustrative example for why the FTC should not get silo its attention to a particular industry or marketplace. When the FTC sued Wyndham Worldwide Corporation, it did so because it alleged that "data security failures led to three data breaches" in under two years resulting in the theft of millions of dollars and the violation of personal account information.[6] After years of litigation and costly proceedings bogged down with questions of FTC authority, Wyndham settled. Wyndham is not a technology company, nor is it a health app. Regardless, it collects and stores sensitive consumer data and has an obligation to protect it, as do the vast majority of other companies. Large retailers like Target have regularly been the subject of data breach controversy.[7] The desire to pursue a particular type of company for infringements in their data practices is a distinction without a difference.

LabMD's hollow victory over the FTC is perhaps more illuminating for the overall point. In that case, the FTC moved against LabMD, a company which tested samples for urologists, for failures in its data privacy regime.[8] After half a decade in litigation, the Eleventh Circuit unanimously held that the FTC complaint was unenforceable, charging that the FTC had attempted to overhaul LabMD with minimal specificity.[9] Along the way to that defeat, the Commission had regularly upheld as obvious its authority to pursue the case against LabMD, a claim that was summarily dismissed. Regardless, the legal proceedings against LabMD caused its collapse. While the FTC failed to make its case, LabMD suffered the consequences.

The Wyndham and LabMD cases build upon each other to make two critical points:

> First, that data breaches can come from any source.
>
> Second, that due to a lack of clarity from Congress, the FTC is often pursuing cases it may not have the authority to.

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[6] Wyndham Settles FTC Charges It Unfairly Placed Consumers' Payment Card Information At Risk, FTC Blog

[7] Target Settles 2013 Hacked Customer Data Breach For $18.5 Million, NBC story

[8] A Leak Wounded This Company. Fighting the Feds Finished It Off, Bloomberg story

[9] The Anatomy of an FTC Data Security Lawsuit, S&W Cybersecurity and Data Privacy Law Blog

This hyper focus on health apps and connected devices issues will ultimately not be solved by the Commission getting distracted by one disfavored industry or another and charging private companies to litigate the edges of its authority.

What businesses and consumers across this country need is a comprehensive federal privacy law that will bring clarity, uniformity, and transparency. That way businesses can better understand their obligations and consumers can be confident that the FTC is interested in their welfare, and not distracted with expanding the authority of the Commission.

Non-HSR Reported Acquisitions by Select Technology Platforms, 2010-2019: An FTC Study

Regarding the Commission's vote on the public release of the report on an FTC inquiry into the structure of unreported acquisitions by large technology platforms: by discussing only mergers within the technology sector, the Commission makes clear their intention to use merger guidelines as a tool to target politically disfavored businesses, rather than to protect consumers from truly anticompetitive conduct.

Not only does this reinforce the impression that the FTC is focused only on the technology industry, but any report which does not acknowledge trends in the economy more broadly is not valuable to identifying harmful anti competitive behavior. Instead, seeking to attack those which are politically disfavored.

The use of investigatory power to influence mergers and acquisitions because of a predisposed dislike of a given industry is a gross abuse of FTC power. By investigating mergers which have occured within the legal guidelines set by the FTC, the Commission is intimidating legal mergers and acquisitions which promote innovation and benefit consumer welfare. This, in tandem with the recent lack of transparency being displayed by the Commission, highlights the current trajectory towards politically motivated antitrust enforcement. So, prior to releasing this report, Chair Khan must rescind the gag order on Commission staff and restore Commissioner access to internal documents, ensuring transparency within the FTC.

Proposed Revisions to FTC Procedural Rules Concerning Petitions for Rulemaking

An enormous amount of effort and energy will not be expended here in this section to reiterate what NetChoice and others have raised already raised to the Commission[10] and what the Commission has repeatedly ignored: namely that the

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

FTC is sprinting down a dangerous road outside of the guardrails Congress has put in place to confine the authority of the FTC.

The FTC and its rulemaking authority are not bound by the imagination of the Commission. They are bound by Congress.

As we have written previously to the Commission, the FTC's rulemaking authority, derived from Section 18 ("Magnuson-Moss") of the FTC Act, differs fundamentally from other agency rulemaking under the Administrative Procedures Act. Section 18 carries with it additional statutory requirements that curb the FTC's discretion and that the Commission is obligated to abide by.[11] Congress again went out of its way to constrain the FTC's rulemaking overzealousness of the 1960s and 70s, passing the Magnuson-Moss Warranty of 1975 and the FTC Improvements Act of 1980. Congress was exceedingly clear as to its motivations for passing this legislation. 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.'"[12] The Commission's current efforts over the past few months, and contained within this Open Meeting's "Tentative" Agenda, fly in the face of Congressional intent.

If the FTC is dead set on exceeding its Congressionally mandated statutory authority, it must engage meaningfully with the public and with stakeholders, and allow for extensive feedback throughout the rulemaking process - not simply after votes have been taken. At minimum, the FTC should:

- Submit to the Federal Register a copy of proposed rules; at least 30 days in advanced - consistent with APA rulemaking requirements
- Allow for the submission of public comments with sufficient time given to prepare and submit those comments
- Require full consideration of those comments prior to any vote taken on the underlying subject matter
- Provide FTC feedback to those comments prior to any vote taken on the underlying subject matter

Much has been promised in the way of a more open, collaborative, and collegial FTC process.

What remains is largely an elaborate performance in transparency. Feedback from members of the public is still only welcome after votes have taken place, sitting Commissioners are denied access to important FTC documents and information,

[11] Ibid

[12] 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).

and even this tentative agenda was released with such short notice as to only allow for two and a half days of the standard work week with which to file comments. At this stage, the Chair's promises of reform ring hollow, and the Commission is falling woefully short of its obligations to the public.

Proposed Withdrawal of 2020 Vertical Merger Guidelines

The Commission should vote against rescinding the Vertical Merger Guidelines adopted in June 2020 and the Commentary on Vertical Merger Enforcement issued in December 2020.

Overall, the Vertical Merger Guidelines reflect a well-considered, balanced approach that helps enforcement agencies identify anticompetitive mergers while maintaining the ability to identify and appreciate the many cases in which such mergers are likely to be procompetitive. It was adopted by both the FTC and DOJ, the United States' two primary antitrust enforcers, after extensive research and consideration.

As intended, it has helped provide market participants with a greater level of clarity regarding how federal enforcers will analyze vertical merger cases and when such mergers are likely to be challenged as anticompetitive. These guidelines serve to promote transparency, clarity, and consistency. Repealing these guidelines, particularly when they were issued such a short time ago, will throw the values out the window, preventing businesses from making informed decisions regarding high-cost transactions and undermining public trust in the FTC and the various other guidelines it has issued.

The Commission should continue to take into consideration both the anticompetitive and procompetitive potential of vertical mergers. There is no question vertical mergers can have anticompetitive effects that the FTC should meaningfully consider when making enforcement decisions. In fact, the very goal of the vertical merger guidelines is to identify various factors that the enforcers should identify and assess when analyzing the competitive effects of vertical mergers. The bulk of these guidelines is spent on providing the FTC and DOJ with an analytical framework for identifying anticompetitive mergers and the factors that make them more likely. However, vertical mergers have a great potential to produce procompetitive effects as well, and the FTC should also take this potential into account when making enforcement decisions.

The economy constantly finds new and better ways to serve the needs of consumers. A core component of this dynamism is the ability of businesses to merge with one another or acquire entities to provide innovative products and services that take advantage of each companies' comparative advantage in a way that could not be achieved in a premerger world. This innovation is possible only because of gained efficiencies and the development of capabilities that did not exist previously.

Acquisitions and mergers are about far more than just acquiring another business, they're about gaining infrastructure, talent, intellectual property, and a variety of other capabilities that can help both businesses provide better products and services to consumers going forward.

Take the Amazon-Whole Foods acquisition, for example. This partnership sparked incredible innovation, much of which has been particularly important during the ongoing COVID-19 pandemic. From at-home delivery to pick-up lockers that minimize the need for interpersonal contact, Whole Foods was able to develop and integrate several new services that would have been unthinkable just five years ago. In addition, many consumers have seen significant price decreases since the acquisition, because of continuous pricing cutting and Whole Food's post-merger Amazon Prime discounting program.

By imposing cumbersome prior approval requirements, the FTC risks deterring these kinds of consumer-welfare enhancing mergers and undermining the enormous potential for innovation that comes with them. Decisions regarding mergers and acquisitions are made on the margin and an increase in the cost of these transactions or the risk that they will not be approved even after the expense of significant administrative costs can have the effect of killing them before they ever even have the chance to be reviewed by the FTC.

So, many of these transactions that would spur innovation and promote economic growth will never see the light of day, regardless of whether the FTC would have ultimately approved them. By artificially deterring what would be procompetitive transactions, the FTC would risk not only undermining innovation but also weakening the United States' economic position in the global community.

Mergers and acquisitions do not just allow businesses to develop new and innovative products and services, they also provide businesses with the tools necessary to both improve and lower the prices of their currently existing products and services. The purchase of a company with superior data security capabilities allows an existing firm to improve their offerings by providing their customers greater privacy protections in the services they already supply. The purchase of a company with superior manufacturing capabilities allows an existing firm to make their production capabilities far more efficient, leading to lower prices for their customers. By raising the cost of these types of procompetitive transactions, the FTC risks harming consumers when it comes to innovation, price, and quality. All of this is particularly pronounced when it comes to vertical mergers. According to the research, "the evidence on the consequences of vertical mergers suggests that consumers mostly benefit . . ."[13]

[13] Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. Econ. Literature 629, 663 (2007).

Moreover, the Vertical Merger Guidelines were adopted by both the FTC and DOJ after broad consensus and considerable opportunity for public input. They reflect a balanced approach that takes into account both the procompetitive and anticompetitive potential of vertical mergers.

Public comments were received well in advance of the guidelines being formally adopted. At the very least, the FTC should allow greater opportunity for public input before voting to rescind such guidelines. The Commission announced this meeting just a week before it is scheduled to take place and provided less than 5 days, two of which are over the weekend, for public comment. Considerable public input was taken into account when adopting these guidelines and it should be taken into account when deciding whether to rescind them.

Finally, the Vertical Merger Guidelines were adopted only a year ago in an effort to increase transparency, promote predictability, and encourage consistency in how these types of mergers will be treated by federal enforcers. Rescinding them so shortly after they were adopted would greatly undermine each of these laudable goals.

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

Zach Lilly, Policy Manager

NetChoice