

NetChoice Comment for the Record: FTC Open Meeting, October 21, 2021

NetChoice¹ 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 at its open meeting on October 21, 2021

As discussed below, we outline our disappointment with the recent activities which continue to undermine public trust in the Commission. In particular, we are disappointed with the Commission's continuously shrinking public comment window,

We appreciate the Commission's consideration of our views, welcome the opportunity to provide any additional information or answer any questions, and hope the FTC will return to an age of bi-partisan work.

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

We must again² express our disappointment in the Commission's seeming lack of effort in soliciting public input. Previously public comment was allowed for as little as three days -- again without providing the actual text of the underlying changes. For the Sept 15, 2021 open meeting this 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. And for this comment period it was a mere three days.

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

This continued diminution in public comment periods, whether intentional or otherwise, gives the impression that the Commission and its new Chair are not seriously interested in comments from the public. This is especially confusing 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. These meetings also have no scheduled pattern of recurrence that would otherwise notify the public that they had a potential opportunity to submit comments or feedback on upcoming or recent actions.

Not only is the pre-meeting time period for public comment inadequate by most existing procedural standards, the FTC's behavior has indicated it has not taken into consideration the public comments submitted. This is evidenced not only by the deadline and short period of time for submission, but also the Commission's hearing from registered speakers only after votes on the agenda have occurred. The result is

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).

commissioners have no time to actually read or contemplate the comments submitted on some of the most significant proposals that the FTC has adopted in decades. The actions involved rescinding a policy statement that tied the FTC's enforcement principles to the lodestar of American antitrust analysis: consumer welfare. The actions also involved gutting the reasonable restrictions imposed on the FTC's 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 a result, there have been not only objections to the policy changes but the process (or lack of process) through which they are made. 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, if the FTC's true goal is greater public input and transparency as it has indicated, 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.

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>.

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

Jennifer Huddleston, Policy Counsel

Trace Mitchell, Policy Counsel

Zach Lilly, Policy Manager

NetChoice