

FTC Open Commission Meeting

May 18th 2023

Lina M. Khan:

Hey, good morning everybody. Thanks so much for joining us for today's open commission meeting. We're meeting in open session today to consider two items before the commission, both related to American's privacy. But as always, we'll get started by hearing from members of the public. And so I will turn it over to Doug, our head of Office of Public Affairs, to get us through that portion. Over to you Doug.

Doug Farrar:

I'm the director of public affairs at the FTC. And all of us at the FTC are looking forward to hearing from the public today. Please note that we are recording this event and some or all of it may be available to the public record in accordance with the commission's rules. Now I will call on several members of the public who have joined us and each person will be given two minutes to address the commission. So without further ado, I will begin with Berin Szoka. Berin, go right ahead.

Berin Szoka:

Thank you. I'm Berin Szoka, President of TechFreedom. In 2011, President Barack Obama declared that our regulatory system must allow for public participation in an open exchange of ideas. These are two different things and the FTC isn't really doing either. In 2015, the FTC issued its first policy statement on unfair methods of competition. It recently rescinded and replaced that statement. It never sought public comment as it's on our merger guidelines, but it should have.

Former Democratic FTC chair Bob Petoskey said so in 2008, as did Republican Commissioner Maureen Ohlhausen in 2015. Open mic sessions like this one are no substitute for written comments, but comments also aren't enough. The FTC needs to hear a real back and forth. That's why the Federal Communications Commission has required reply comments in all rulemakings for 75 years. The FTC itself did so for decades. TechFreedom recently requested a rebuttal round in non-compete rulemaking, the most significant in FTC history, but the commission has ignored us.

Workshops could also facilitate an open exchange of ideas but only if the commission gives participants enough time to explore hard issues. The series of 14 workshops organized by my colleague Bilal Sayyed in 2018 and 2019 offers a good model, most were multi-day. Most critical will be how the FTC conducts the hearings required by the Magnuson-Moss Act in Consumer Protection rulemakings. The commission recently released the agenda for its first Mag-Moss hearing held in a new rulemaking in decades. 13 speakers will get just five minutes each. Claiming that there were no disputed issues in material fact, the commission authorized no cross-examination, so the hearing officer will be merely a timekeeper. That's not a hearing, it's just another open mic session.

Despite broad consensus on stopping impersonation fraud, hard questions remain on how to craft a rule that won't affect comedians, actors, or even kid's Halloween costumes. If the commission won't allow a real exchange of ideas on even such an uncontroversial rulemaking, why should anyone expect it to do so in more complex rulemaking such as commercial surveillance, the commission must do more to meet President Obama's standard for open and participatory government. Thank you.

Doug Farrar:

Thank you very much. All right, Matt Kent. Matt.

Matt Kent:

Hey, good morning. I'm Matt Kent, Competition Policy Advocate with Public Citizen. Public Citizen is a nonprofit consumer advocacy organization with over 50 years of experience in advancing the public interest in federal policy. On behalf of our half a million members, supporters nationwide, we applaud the FTC's recent actions to decrease corporate concentration in the pharmaceutical industry, protect children's safety online, and institute a national ban on the use of non-compete clauses by employers.

On the first point, Public Citizen supports the commission's move to challenge the merger between Amgen and Horizon Therapeutics. Indicators are clear that competition in the pharma markets is lagging. We support a holistic merger analysis that analyzes product pipelines to account for impacts on innovation and competition as well as a firm's prior history of anti-competitive practices. Amgen built an expansive thicket of patents to prevent Emerald from facing competition for more than 30 years and abused this monopoly by sharply increasing the price by more than 450% since introduction. Ultimately, the FTC's move is good for patients who have endured sky high drug crisis as a result of market consolidation. Generally, we encourage the FTC to center merger analysis on the incipiency standard enshrined in the Clayton Act.

The second point, Public Citizen also supports the FTC's move to adjust its 2020 privacy order with Meta. Kids should not be an engine of profit for a social media company until Congress acts on its promise to ensure online privacy for kids and adults. It is critical that the FTC move forward aggressively to enforce the law in this space.

And finally, on non-competes, Public Citizen very much supports the FTC's reason NPRM on non-competes. It is crucial that the FTC use its rulemaking authority under Section 5 of the FTC Act. I've submitted formal comment on this, but to iterate, the commission must maintain a categorical ban on non-competes income limits, other compromises will create loopholes that will avoid the entire rules effect. Secondly, the requirement that employers notify workers of a clause rescission is very important. Workers cannot get out from under if they don't know their terms of employment have changed. Thank you very much.

Doug Farrar:

Thank you very much, Matt. All right, next we have Haley Hinkle. Haley,

Haley Hinkle:

Good morning. My name is Haley Hinkle and I am Policy Counsel for Fairplay. Fairplay is the leading independent watchdog of the children's media and marketing industries and we're committed to building a world where kids can be kids, free from the false promises of big tech. I am here today to emphasize Fairplay's, strong support for the FTC's recent action against Meta. The FTCs ordered to show cause and proposed order layout allegations through the eyes of a third party auditor that Meta has repeatedly violated user privacy and the terms of its agreements with the FTC.

Meta has time and again shown itself incapable of responsibly handling user data and Fairplay believes that the FTC's proposed prohibition on the monetization of minor's data is a necessary and proportionate response to these repeated violations. Kids and teens are the population most vulnerable to Meta's failure to comply with the law and appropriately handle data, minors data in particular is

highly sensitive. Fairplay released a report earlier this month outlining META'S long history of failure to protect minors.

That report highlights among other things that Meta's platforms perpetuate child abuse of exploitation, that Meta uses its advertising apparatus to surveil teens and target them when they are vulnerable that its recommendation systems regularly push harmful content to kids. And most recently, the company decided to open its Horizon World's platform to teens despite the clear dangers the virtual world poses to young people. Meta continues to put profit over the wellbeing of its users and in particular vulnerable minors and we commend the FTC's decisive action to address this problem. Thank you.

Doug Farrar:

Thank you very much, Haley. Next we have John Davidson. John.

John Davidson:

Chair Khan, Commissioner Slaughter, Commissioner Bedoya, thank you for the opportunity to speak to you today. I'm John Davidson, Director of Litigation at the Electronic Privacy Information Center. I just want to convey my thanks to the commission for proposing significant and game-changing modifications to the consent decree governing Meta's privacy and data protection practices. As you know, EPIC has spent more than a decade calling public attention to a seeming endless string of privacy violating business practices by both Facebook and Meta.

Meta has had all of that time and two separate consent decrees to clean up its act on privacy, but it's

Thank you. I'm Katharina Kopp with the Center for Digital Democracy. CDD strongly supports the FTC's proposed changes to the agency's 2020 privacy order with Facebook now called Meta, particularly the proposal to prohibit Meta from profiting from data of children and teens under 18. This measure is justified based on Meta's alleged repeated offenses and due to the unique and alarming risk its practices posed to children and teens. The decision is a long overdue intervention into what has become a huge crisis for young people. Meta and its platforms are at the center of a powerful, commercialized social media system that has spiraled out of control, threatening the privacy, mental health and wellbeing of children and adolescents. The evidence provided suggests that Meta violated FTC consent decrees repeatedly and seriously. In addition, it violated COPPA. We do not know the full extent of its failures, but across the board failures are apparent.

This has put the privacy of all users at risk, posing a substantial risk to the public. But young people are the ones that are most vulnerable and suffer most from Meta's unconstrained practices. Meta's apparent violations are unfolding amid an alarming rise in shocking incidents of suicide, self-harm and online abuse and exploitation among the

If the more comprehensive AI mode

Bilal Sayed:

Okay, thank you. In November, 2018, the Office of Policy Planning, working closely with the Bureaus of Competition, Consumer Protection, and Economics, held a two-day hearing on algorithms, artificial intelligence, and predictive analytics. Those two days of presentations and discussion remain the best

recognizing the proliferation of health apps and similar technologies, we are proposing modifications that underscore consistent with the language in the current rule and the commission's 2021 policy statement that the rule applies to such technologies. And it's also why recognizing that non-health related data can reveal sensitive health information in particular contexts that we make clear the data points such as location, browsing history, and recent purchases can fall within the scope of the rule.

And finally, it's why we are recommending changes that will facilitate better notice to consumers, so that people have more information when their sensitive health information is disclosed without their authorization. The changes we are proposing to the HBNR indicate the seriousness with which we take sensitive health data, and we're likewise squarely focused on protecting consumers' biometric information.

The commission and DPIP in particular have long raised concerns about the use of biometric information, including concerns regarding privacy, data security, and civil rights. Most recently in their Everalbum matter, we alleged the company among other things misrepresented that its facial recognition technology would not apply to videos and photos that users uploaded unless users turned it on. As part of the settlement, our order required the company to delete facial recognition models or algorithms developed with users photos or videos. The policy statement before the commission today reflects our concern with the increasing risks that biometric information technologies pose to the public as well as our continued commitment to using all of our tools to protect people from these harms.

Lina M. Khan:

Thanks so much, Ben, for walking us through the terrific work that DPIIP has been doing recently on protecting Americans' privacy. DPIIP has long been doing this work, but I think you're absolutely right that as people's day-to-day lives increasingly depend on these technologies, this work is more important than ever.

I also want to give a big thanks to the Kochava team in DPIIP, which is actively litigating one of these

well as from the commission's recent blog posts on AI, is that the flexible nature of the FTC Act really positions us as an agency to fully protect Americans privacy regardless of changing technologies. And the statement, the biometric policy statement in particular lays out very clearly how some of these traditional consumer protection authorities would apply to the risks created by biometric information technologies.

One thing in particular that I think is especially important is the note that businesses have to assess and address risks proactively rather than allowing these tools out into the wild and then engaging in cleanup after the fact or expecting third party groups, be it civil society groups or public enforcers to be doing the cleanup.

The policy statement also notes that the FTC Act allows us to act even before consumers are harmed. So the law requires us to show a likelihood of harm and I know we're going to be keeping that in mind as we continue to take a close look at these technologies.

Thank you to the team that worked on this policy statement. I know it was a real group effort across the agency, including Tiffany George, Ryan Mam, Ronnie Solomon, and Elisa Jillson in DPIP, Maggie Cole in Delta, Beth Freeborn in BE, Josephine Liu, Richard Gold, and Francesca Schroeder in OGC and Alejandro Rosenberg in the BCP front office. I also want to give a thanks to my recent attorney advisor who recently departed, Rashida Richardson for all of her great work here too.

Now quickly just switching over to the Health Breach Notification Rule. This really, I think underscores the agency's commitment to making sure we're using all of our tools to protect American's privacy. And it's been really terrific for us to be able to reactivate the Health Breach Notification Rule to make sure we're using it to its full extent.

and security says she can't go in. They say that she has been involved in a fight there the prior March. But in reality she had never set foot in that skating rink. What had happened was that the skate rinks security system, their face recognition system had said with 97% confidence that she was a match for some other teenage girl who had apparently allegedly been involved in a fight.

Unfortunately, this isn't just happening in skating rinks. This is happening in increasingly important decisions and moments in our lives. When students log online to take a remote exam, when people literally try to walk into the front door of their apartment building. When they go shopping, increasingly automated face recognition algorithms decide for them whether they can do that. And unfortunately, if you are a woman, if you are a kid or a teen, if you are trans or non-binary or if you have a dark complexion, research suggests that biometric technology does not perform as well on you as it does other people. And that is a problem. For most of our history. Surveillance technology has tracked our technology, your car, your phone, your computer. Biometric technology tracks your

and I'm grateful to be associated with it. I'm looking forward to voting for it. Thank you, Chair Khan, back to you.

Commissioner Slaughter:

Madam Chair. Do you mind if I jump back in for one-

Lina M. Khan:

Please go ahead.

Commissioner Slaughter:

One second? Listening to Commissioner Bedoya's extremely erudite and passionate comments about

Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Lina M. Khan:

And I vote yes. The motion passes unanimously. I'll now move that the commission also approve and publish the notice of proposed rulemaking to amend the Health Breach Notification Rule circulated on May 18th, 2023 under matter number P 2 0 5 4 0 5. Is there a second?

Commissioner Slaughter:

I second Madam Chair.

Lina M. Khan:

The motion being seconded. I'll call it for a vote. Commissioner Slaughter?

Commissioner Slaughter:

Yes.

Lina M. Khan:

Commissioner Bedoya?

Commissioner Bedoya:

Yes.

Lina M. Khan:

And I vote yes, the motion passes unanimously. Again, really thank you so much again to the DPIP staff