



May 31, 2019

Via Electronic Submission to: www.regulations.gov

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

**Re: Public Comment for FTC Hearings on Competition and Consumer Protection
in the 21st Century [Docket No. FTC-2018-0098-0003 Topic # 5]**

**Comments of the Consumer Advocacy & Protection Society (CAPS) at
University of California, Berkeley, School of Law**

Dear Mr. Clark:

The Consumer Advocacy and Protection Society (“CAPS”) is a student-run organization dedicated to the promotion of consumer law and consumer protection at the University of California, Berkeley, School of Law. The Consumer Advocacy and Protection Society is pleased to submit this letter to the Federal Trade Commission (“FTC”) in response to the Commission’s

Hearings on Competition and Consumer Protection in the 21st Century.¹ Specifically, we submit this comment in response to the privacy aspects of Topic #5.

The FTC is rightly concerned with the balance between intervention and competition in regulating the technology sector.² The potential loss of market competitiveness due to higher FTC interventions is real, but easy to overestimate as the current information market has evolved largely in the absence of US Government intervention.³ The highest potential fine in FTC history amounts to a penalty of only two weeks of revenue to Facebook for egregious violations of a prior consumer privacy consent decree.⁴ Ideally, intervention makes space for competition by limiting monopolistic overreach.⁵ Technology companies accumulating wealth in the form of personal data face more meaningful checks and balances from non-US markets (e.g. GDPR).⁶ It is impossible to measure the potential cost of intervention against the theoretical competition that may emerge, but the cost of under-intervention is clear from the need to hold these hearings.

¹ See *FTC Hearing #12: The FTC's Approach to Consumer Privacy*, FTC.gov, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-competition-consumer-protection-21st-century-february-2019>.

² *Id.*

³ See *Facebook and the Cost of Monopoly*, Stratechery (Apr. 19, 2017), <https://stratechery.com/2017/facebook-and-the-cost-of-monopoly/>.

⁴ See Mike Isaac & Cecilia Kang, *Facebook Expects to Be Fined Up to \$5 Billion by F.T.C. Over Privacy Issues*, The New York Times (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/technology/facebook-ftc-fine-privacy.html>

⁵ See David Dayen, *How to Think About Breaking Up Big Tech*, The Intercept (Apr. 1, 2019), <https://theintercept.com/2019/04/01/elizabeth-warren-tech-regulation-2020/>.

⁶ See Todd William, *What US Business Owners Need To Know About GDPR*, Forbes (Mar. 26, 2019), <https://www.forbes.com/sites/forbesnycouncil/2019/03/26/what-us-business-owners-need-to-know-about-gdpr/>.

Typically, the FTC uses an ex post regulatory scheme, which attempts to intervene after the privacy-breaching act has occurred.⁷ These are acceptable when: (1) investigating and punishing harms addressed by consumer complaints⁸; (2) punishing and preventing unfair methods of competition, deceptive acts, and practices⁹; and (3) issuing consent orders and engaging in privacy enforcement.¹⁰

Contemporary state ex ante regulatory approaches, unlike ex post schemes, provide incentives for businesses to protect consumer privacy before any breach occurs. As former Commissioner Terrell McSweeney once wrote, “some harms to innovation are hard to detect and equally hard to remedy through ex post enforcement. In those situations a hybrid system of clear, appropriately tailored ex ante rules coupled with ex post enforcement may be justified.”¹¹ When California passed the California Consumer Privacy Act (CCPA) in 2018, it became the first state to introduce comprehensive restrictions on data collection and privacy.¹² The CCPA requires

⁷ See Jennifer Huddleston & Andrea O’Sullivan, *New GAO Report Says It’s Time for Federal Data Privacy Legislation. But What Kind?*, Mercatus Center at George Mason University (Feb. 25, 2019), <https://www.mercatus.org/bridge/commentary/new-gao-report-says-its-time-federal-data-privacy-legislation-what-kind>.

⁸ See Hon. Maureen K. Ohlhausen, *The FTC’s Knowledge Problem: How to Protect Consumers Online*, FTC.gov, https://www.ftc.gov/system/files/documents/public_statements/818521/1509fccohlhausen.pdf.

⁹ *Id.*

¹⁰ See Huddleston & O’Sullivan, *supra*.

¹¹ Terrell McSweeney, *FTC 2.0: Keeping Pace with Online Platforms*, 32 *BERKELEY Tech L.J.* 1027, 1039 (2017).

¹² Caitlin Chin, *The U.S. Privacy Landscape Post-GDPR*, Georgetown Public Policy Review (Aug. 1, 2018), <http://gppreview.com/2018/08/01/the-u-s-privacy-landscape-post-gdpr/>.

companies to allow consumers to access and delete personal information, which is defined as any data that could be linked, even indirectly, with an individual or household.¹³

At the federal level, Congress faces strong public demand to enact more substantial consumer privacy legislation that provides the FTC with an opening to broaden its authority.¹⁴ Currently, the FTC must ask Congress for rule-making authority on each issue, creating a highly delayed system.¹⁵ We believe the FTC should have more rule-making authority because without it, the FTC is not capable of fulfilling its basic statutory mandate.¹⁶ In order to be able to properly fulfill its duties, the FTC has to be able to create rules that will allow it to effectively enforce a significant consumer privacy overhaul.¹⁷ Additionally, giving the FTC this rule-making authority will increase the efficiency of the rule-making process, which in turn would generate laws that are more up to date with newly developing technologies.¹⁸ Current actions available to the FTC (such as creation of guides or individual adjudications) simply lack the immediacy necessary to deal with the realities of the constantly evolving technology in our society.¹⁹

¹³ *Id.*

¹⁴ See Lee Rainie, *Americans' Complicated Feelings about Social Media in an Era of Privacy Concerns*, Fact Tank (Mar. 27, 2018), <https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/>.

¹⁵ *Id.*

¹⁶ See David A. Balto, *Bring the FTC into the 21st Century*, The Hill (May 4, 2010), <https://thehill.com/opinion/op-ed/95947-bring-the-ftc-into-the-21st-century>.

¹⁷ *Id.*

¹⁸ Jefferey S. Lubbers, It's Time to Remove the "Mossified" Procedures for FTC Rulemaking, 81 GEO. WASH. L. REV. 1970, 1997 (2015).

¹⁹ Cooper J. Spinelli, Far from Fair, Farther from Efficient: The FTC and the Hyper Formalization of Informal Rulemaking, 6 LEGISLATION & POLICY BRIEF 129, 165 (2014).

Further, the FTC’s civil penalty authority should be expanded to allow for consumer privacy protections because it would incentivize companies to keep consumer information safe.²⁰ This has been requested by the FTC numerous times, including in May 2019 testimony by Commissioners Simons, Phillips, Chopra, Slaughter, and Wilson: “To better equip the Commission to meet its statutory mission to protect consumers, we urge Congress to enact privacy and data security legislation, enforceable by the FTC, which grants the agency civil penalty authority, targeted APA rulemaking authority, and jurisdiction over non-profits and common carriers.”²¹

Current interventions focus on first-party responsibility to the exclusion of third-party accountability.²² Creating transitive interventions would enforce the goals of data privacy regulation from the initial collector to the final aggregator. Customers cannot make informed choices without greater education by and enforcement against third-parties.²³

²⁰ See *Reforming the U.S. Approach to Data Protection and Privacy*, Council on Foreign Relations (Jan. 30, 2018), <https://www.cfr.org/report/reforming-us-approach-data-protection>.

²¹ See *Hearing On “Oversight of the FTC: Strengthening Protections for Americans’ Privacy and Data Security”*, HouseFTC.gov (May 8, 2019), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-oversight-of-the-federal-trade-commission-strengthening>.

²² See *FTC Privacy & Data Security Update: 2018*, FTC.gov (2018), <https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2018/2018-privacy-data-security-report-508.pdf>.

²³ See FTC Report, *Protecting Consumer Privacy in an Era of Rapid Change*, FTC.gov (Mar. 2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.

Without wider latitude in the rule-making process and a more aggressive approach, the FTC will continue to play second fiddle in the consumer privacy conversation. Decisions made overseas by governments quashing the competitiveness of American companies will govern information capital markets. The U.S. must maintain the market it built by properly policing: (1) the type and sensitivity of data companies can collect and transfer; (2) how the data can be used; (3) how the data can be secured; and (4) how consumers are notified of data collection and use.



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