



Office of Commissioner
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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ALVARO M. BEDOYA

Regarding the Commercial Surveillance Data Security Advance Notice of Proposed Rulemaking

August 11, 2022

Our nation is the world’s unquestioned leader on technology. We are the world’s unquestioned leader in the data economy. And yet we are almost alone in our lack of meaningful protections for this infrastructure. We lack a modern data security law. We lack a baseline consumer privacy rule. We lack civil rights protections suitable for the digital age. This is a landscape ripe for abuse.

Now it is time to act. Today, we are beginning the hard work of considering new rules to protect people from unfair or deceptive commercial surveillance and data security practices.

My friend Commissioner Phillips argues that this Advance Notice of Proposed Rulemaking (“ANPR”) “recast[s] the Commission as a legislature,” and “reaches outside the jurisdiction of the FTC.”¹ I respectfully disagree. Today, we’re just asking questions, exactly as Congress has directed us to do.² At this *most* preliminary step, breadth is a feature, not a bug. We need a diverse range of public comments to help us discern whether and how to proceed with Notices of Proposed Rulemaking. There is much more process to come.

In 1975, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (the “Magnuson-Moss Act”).³ That Act made explicit the Commission’s authority to prescribe rules prohibiting unfair or deceptive trade practices. It also set out steps for doing so, including providing informal oral hearings with a limited right of cross examination, which were consistent with best practices of that time.⁴ In the decade following its passage, the Magnuson-Moss Act was viewed as “substantially increasing the agency’s rulemaking powers.”⁵

¹ Dissenting Statement of Commissioner Noah Joshua Phillips, *Commercial Surveillance and Data Security Advance Notice of Proposed Rulemaking* (Aug. 11, 2022).

² Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374.

³ Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

⁴ *Id.* at sec. 202 (adding § 18(c) of the FTC Act).

⁵ Kurt Walters, *Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC*, 16 *Harvard L. & Pol’y Rev.* (forthcoming 2022) (manuscript at 13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3875970.

Together with Congress’s modest amendments to this process in 1980⁶ and 1994,⁷ federal law now gives us a clear roadmap for this work.⁸ We will follow it to the letter.

The bipartisan American Data Privacy and Protection Act (ADPPA) is the strongest privacy bill that has ever been this close to passing. I hope it does pass. I hope it passes soon. What Chairman Frank Pallone, Ranking Member Cathy McMorris Rodgers, Senator Roger Wicker and their colleagues have accomplished is formidable and promising.

This ANPR will not interfere with that effort. I want to be clear: Should the ADPPA pass, I will not vote for any rule that overlaps with it. There are no grounds to point to this process as reason to delay passage of that legislation.

Turning finally to the substance of the ANPR itself: It is a priority for me that the Commission, throughout this rulemaking process, stays focused on the needs of people who are most at risk of being left behind by new technology in the modern economy.⁹ So while I will be interested in answers to all of our questions, I am keenly interested to learn about:

1. Emerging discrimination issues (Questions 65–72), especially from civil rights experts and affected communities. I agree with Commissioner Slaughter and Chair Khan that our unfairness authority is a powerful tool for combatting discrimination.¹⁰ It *clearly* is.¹¹ Given significant gaps in federal antidiscrimination laws, especially related to internet platforms and technology companies,¹² I believe the Commission must act to protect

⁶ Pub. L. No. 96-252, 94 Stat. 374 (1980).

⁷ Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, §§ 3, 5, 108 Stat. 1691, 1691–92.

⁸ 15 U.S.C. § 57a (2018).

⁹ Alvaro M. Bedoya, *Remarks of Commissioner Alvaro M. Bedoya at the National Association of Attorneys General Presidential Summit* (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/speeches/remarks-commissioner-alvaro-m-bedoya-national-association-attorneys-general-presidential-summit>.

¹⁰ See Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter, *Matter of Napleton Automotive Group* (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf (“[W]e take this as an opportunity to offer how the Commission should evaluate under its unfairness authority any discrimination that is found to be based on disparate treatment or have a disparate impact.”); Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission* (Aug. 2021), https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms_and_economic_justice_master_final.pdf.

¹¹ When a business substantially injures a person *because of who they are*, and that injury is not reasonably avoidable or outweighed by a countervailing benefit, that business has acted unlawfully. See Federal Trade Commission, *Policy Statement on Unfairness* (Dec. 17, 1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> (“[t]o justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”).

¹² For example, Title VII of the Civil Rights Act of 1964 covers employers and employment agencies, but does not directly address hiring technology vendors, digital sourcing platforms, and other companies that intermediate people’s access to employment opportunity. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. Similarly, the Equal Credit Opportunity Act (ECOA) primarily covers “creditors.” See ECOA, 15 U.S.C. § 1691(a) (2014). This scope creates similar coverage questions, including in financial markets related to hiring education. See, e.g., Stephen Hayes & Kali Schellenberg, *Discrimination is “Unfair”: Interpreting UDA(A)P to Prohibit Discrimination*, Student Borrower Protection Center (Apr. 2021), at 11, https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf.

people's civil rights.

2. The mental health of kids and teens (Question 17), especially from youth development experts and psychologists. A growing body of evidence suggests that teenagers, particularly teenage girls, who spend more than two or three hours daily on social media, suffer from increased rates of depression, anxiety, and thoughts of suicide and self-harm.¹³ This is a nuanced issue, and peer-reviewed research is still developing.¹⁴ But this nuance does not diminish the urgency of this work, and in fact heightens our need for comments on it. I appreciate especially the partnership of Commissioner Wilson in this area.
3. How to protect non-English speaking communities from fraud and other abusive data practices (Question 58), especially from affinity groups, internet platforms, and experts in fraud prevention practices. We know that many non-English language communities are disproportionately targeted in the offline world, and I am worried the story is even worse online. I'd like to hear more about how new rules might encourage more effective enforcement by both the Commission and private firms against scams and fraud.
4. How to protect against unfair or deceptive practices related to biometrics (Questions 37–38). A new generation of remote biometric technology is transforming our ability to move in public with some semblance of privacy. I'd welcome proposals for how rules may address and prevent abuse and harmful invasions of privacy.

I want to recognize Commissioner Slaughter for her early vision on this rulemaking process,¹⁵ Chair Khan for her leadership in moving this effort forward, and all the agency staff who worked on it. Although my Republican colleagues are voting against this ANPR, I want them and the public to know I'll still seek their input throughout the process that follows.

I am most grateful to the members of the public, civil society, and small businesses community who will take the time to comment on this ANPR. We need your input. We will read it carefully and with interest.

¹³ Jean M. Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 *Clinical Psychological Science* 1, 3, 10 (Jan. 2018), <https://doi.org/10.1177/2167702617723376>; Hugues Sampasa-Kanyiga & Rosamund Lewis, *Frequent use of social networking sites is associated with poor psychological functioning among children and adolescents*, 18(7) *Cyberpsychology, Behavior, and Social Networking* 380 (Jul. 2015), https://www.researchgate.net/publication/280059931_Frequent_Use_of_Social_Networking_Sites_Is_Associated_w_ith_Poor_Psychological_Functioning_Among_Children_and_Adolescents.

¹⁴ See, e.g., Amy Orban & Andrew K. Przybylski, *The association between adolescent well-being and digital technology use*, 3 *Nature Human Behaviour* 173 (Feb. 2019), <https://www.nature.com/articles/s41562-018-0506-1> (criticizing Twenge et al. at *supra* note 13).

¹⁵ See, e.g., Rebecca Kelly Slaughter, *The Near Future of U.S. Privacy Law*, Silicon Flatirons-University of Colorado Law School (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf (“I believe the time has come to consider a Mag-Moss data-protection rule.”).