

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

Dissenting Statement of Commissioner Andrew N. Ferguson Joined by Commissioner Melissa Holyoak Regarding the Surveillance Pricing 6(b) Staff Research Summaries Matter Number P246202

January 17, 2025

Less than six months after the Commission unanimously launched its Section 6(b) study into the practice of personalized pricing, the outgoing Democratic majority rushes out "research summaries" of what staff has gleaned from a couple months of productions. It does so in order to issue another press release just before President Trump takes office. Slowly dripping out information obtained during the Section 6(b) process, rather than carefully studying the material produced and issuing a comprehensive final report, does not serve the public interest. I dissent.

As I explained when I voted to launch this study, Section 6(b) studies are among our most important duties.¹ Congress has entrusted us with "secur[ing], evaluat[ing] and report[ing] facts which reveal[] the structure of our economy."² This work accords with our "fundamental character," which is that of "a fact-finding body."³ Thus, Section 6 of the FTC Act enables the Commission to conduct wide-ranging studies,⁴ and also allows it to "make public from time to time ... portions of the information obtained by it ... as are in the public interest."⁵

We have completed scores of rigorous 6(b) studies over the last century, many of which have contributed to the public's discussion of issues of national importance and have informed federal legislation.⁶ I am confident this study will be no different—when it is completed. The American public and Congress will surely value what the Commission ultimately learns and shares as to whether and how consumers' private data may be used to affect their pocketbooks, especially as the future of our nation's privacy laws is being considered.⁷

Unfortunately, today's research summaries are far from a comprehensive report. Interim reports for 6(b) studies are unusual enough;⁸ research summaries "designed to showcase ideas"

¹ Concurring Statement of Comm'r Andrew N. Ferguson, Surveillance Pricing Intermediaries, Matter No. P246202, at 1 (July 23, 2024) ("Ferguson Surveillance Pricing 6(b) Statement").

² Paul Rand Dixon, The Federal Trade Commission: Its Fact Finding Responsibilities and Powers, 46 Marq. L. Rev. 17, 17 (1962).

³ *Id.* at 18.

⁴ 15 U.S.C. § 46(b).

⁵ *Id.* § 46(f).

⁶ Ferguson Surveillance Pricing 6(b) Statement at 2 n.4; Concurring Statement of Comm'r Andrew N. Ferguson, Regarding the Pharmacy Benefit Managers Interim Staff Report, Matter No. P221200, at 2 (July 9, 2024) ("Ferguson PBM 6(b) Interim Report Statement").

⁷ Ferguson Surveillance Pricing 6(b) Statement at 2.

⁸ Ferguson PBM 6(b) Interim Report Statement at 2.

and "initial observations"⁹ for a Section 6(b) study are unprecedented. The Democratic majority justifies its unorthodox maneuver by likening the research summaries to "pre-publication[s]" such as beta versions in the technology sector or "draft chapters, manuscripts, extended abstracts, and tiny papers" in other fields.¹⁰ But what is done in other fields is not necessarily the correct approach for the Commission, which has the power of compulsory process over private firms and individuals, and which exercises a public trust in the Section 6(b) process.

I appreciate staff's hard work to date gathering, and beginning to review and analyze the information it has thus far obtained. But issuing these research summaries degrades the Commission's Section 6(b) process. The Commission should not be releasing staff's early impressions that "can be outdated with new information" because the fact gathering process on the very issues being presented to the public is still underway.¹¹ Publishing "ideas" and "initial observations" accompanied by hypothetical use cases rather than robust factual findings may undermine the trust placed in the Commission's Section 6(b) work. It may also undermine order recipients' willingness to cooperate and participate if they fear the Commission will release damaging information in isolation before they have been able to produce all the relevant data and engage with Commission staff.

As the research summaries make clear, "there is much more work to do," particularly with respect to identifying "more definitive impacts to prices or market participants"¹²—the motivating principle underlying the study. The Commission should allow staff to do its work and issue a final, fact-based report, rather than rush to meet a nakedly political deadline to present something, anything, to the public.

I therefore respectfully dissent.

⁹ FTC Surveillance Pricing 6(b) Research Summaries: A Staff Perspective, at 1 (Jan. 2025).

¹⁰ Ibid.

¹¹ *Id*. at 2.

¹² *Id.* at 1, 10.