



January 26, 2022

Via Electronic Submission

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Petition for Rulemaking by Accountable Tech (FTC-2021-0070)

The U.S. Chamber of Commerce (“the Chamber”), appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) Solicitation for Public Comments on a Petition for Rulemaking by Accountable Tech¹(“Petition” or “Proposal”). This Petition requests the promulgation of regulations to prohibit so-called “surveillance advertising,” otherwise known as tailored/targeted online advertising.

For several reasons, the Commission cannot grant this Petition which is effectively a proposal that the FTC issue privacy rules under another name. The Petition notably:

1. Calls for the FTC to elevate form over substance in an attempt to ignore procedural guardrails put in place by the Magnusson-Moss Act;
2. Asks the FTC to add to an already-convoluted patchwork of data protection regulations, further exacerbating consumer and small business harm; and
3. Proposes an overbroad ban on tailored advertising which would ignore consumer preferences and harm competition.

Perhaps most significantly, Accountable Tech proposes that the FTC achieve all of the above by promulgating a rule or set of rules (the Petition fails to set out rule language or structure) that would govern a purported “unfair method of competition” (“UMC”). But the FTC’s authority to make rules governing UMC is far from settled. Indeed, it was the subject of vigorous debate during the agency’s 2020 *Workshop on Non-Compete Clauses Used in Employment Contracts*, an event the Petition mischaracterizes as the FTC’s “acknowledgement of] its ability to conduct competition rulemaking.”²

I. The Petition Calls FTC to Unlawfully Circumvent Procedural Guardrails In Consumer Protection Matters

Accountable Tech’s Petition is a proposed privacy rulemaking clothed as a competition matter to avoid legally required procedural safeguards. Petitioners use the word “privacy” **83** times to express the alleged privacy harms to consumers they are attempting to address. Although the Petition seeks to regulate a privacy matter under the Commission’s authority to enforce against “unfair methods of competition,” the FTC has a longstanding history of viewing

¹ 86 Fed. Reg. 73206.

² Pet. at 8.

data protection and privacy matters as “unfair and deceptive practices.”³ Even in 2021, the Commission did not file a single privacy or security complaint under its UMC authority. It is clear that Accountable Tech asserts authority for its Proposal under FTC’s UMC authority in an attempt to avoid Congressionally mandated rulemaking safeguards.

The Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 (“Magnuson-Moss Act”) establishes procedural safeguards under Section 18 of the FTC Act for establishing trade rules in general consumer protection matters under the Commission’s authority to enforce against “unfair and deceptive practices.”⁴ Congress specifically stated that in Section 18 “[t]he Commission shall have *no* authority...other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices...”⁵

Congress provided these enhanced procedural safeguards under the Magnuson-Moss Act to make rules because of the Commission’s broad authority to enforce against unfair and deceptive practices. The Magnuson-Moss Act requires in consumer protection matters that the Commission follow additional procedures to traditional Administrative Procedure Act (“APA”) rulemakings including issuance of Advance Notice of Proposed Rulemakings, reporting requirements to committees of jurisdiction in Congress, and holding informal hearings that give the public the opportunity to question the Commission.⁶

Furthermore, because the Commission lacks general APA rulemaking authority for data privacy matters, Congress had to specifically grant such power in the Gramm-Leach-Bliley Act⁷, CAN-SPAM Act⁸, Telemarketing Sales Act⁹, and Children’s Online Privacy Protection Act¹⁰. It is clear through legislative history and the text of the FTC Act itself, the Commission lacks the authority to promulgate privacy and data protection rules under APA rulemaking outside the context of specific grants of authority in sectoral legislation.

II. The FTC Lacks General Statutory Authority to Grant the Petition Deeming Tailored Advertising an Unfair Method of Competition

The FTC Act’s text, structure, and history, as well as recent guidance from the Supreme Court, all point in the same direction: the FTC lacks statutory authority to act on Accountable Tech’s Petition. Section 5 of the FTC Act prohibits “unfair methods of competition” (UMC), and Section 6(g) states that the Commission “shall have power ... [f]rom time to time to classify corporations and ... to make rules or regulations for the purpose of carrying out the [Act’s] provisions.” 15 U.S.C. §§ 45, 46(g). Nothing in the Act’s text expressly gives the FTC rulemaking authority to prohibit competitive methods that the FTC deems unfair. Nowhere, for example, does the Act state that the FTC “shall or may” promulgate rules to determine whether certain types of competitive methods are fair or unfair, to supplant state law, or to invalidate entire categories of advertising on competitive grounds. Indeed, such a broad grant of statutory

³ See Privacy and Security Enforcement, Federal Trade Commission *available at* <https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement>.

⁴ See Pub. Law 93-637 (Jan. 4, 1975).

⁵ 45 U.S.C. § 57(a)(2) (emphasis added).

⁶ 15 U.S.C. §57(b)-(d).

⁷ 15 U.S.C. § 6804.

⁸ 15 U.S.C. § 7711.

⁹ 15 U.S.C. § 6102.

¹⁰ 15 U.S.C. § 6502.

authority would have been extraordinary, as it would have allowed a majority of just three commissioners, independent of and with little guidance from the President or Congress, to dictate commercial practices, and override state laws, across virtually the entire U.S. economy.

The FTC Act's structure confirms that the FTC lacks UMC rulemaking authority. In sharp contrast to the text's silence on such authority, Congress expressly granted the FTC authority to promulgate other rules. For example, statutes such as the Children's Online Privacy Protection Act and Telemarketing and Consumer Fraud and Abuse Prevention Act expressly grant the FTC the authority to engage in notice and comment rulemaking to enforce their provisions.¹¹ Congress also provided the FTC explicit rulemaking authority for unfair and deceptive acts and practices through the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975. In these statutes, Congress clearly defined the scope of its delegation to the FTC, either in terms of a proposed rule's substantive scope or its procedural path, or both. The fact that Congress failed set forth any guidance or guardrails for UMC rulemaking authority strongly suggests that no such authority exists.

Moreover, the FTC Act fails to provide for any sanctions for violations of rules promulgated pursuant to Section 6. Again, this omission strongly suggests that Congress never intended to give the FTC substantive, binding UMC rulemaking authority at all. As the American Bar Association explained, the Act's "fail[ure] to provide any sanctions for violating any rule adopted pursuant to Section 6(g) . . . strongly suggest[s] that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act."¹²

Perhaps recognizing these textual and structural shortfalls, as a matter of history, the FTC has hesitated to assert that it has UMC rulemaking authority. Until 1962, and for more than half a century since the enactment of Magnuson-Moss in 1975, the FTC never attempted to promulgate a UMC rule. The time period since 1975 spans eight Presidential administrations, from both major political parties, and FTC chairs and commissioners with widely differing philosophies and priorities. Indeed, even prior to 1975, only once had the FTC's authority to conduct rulemaking under Section 6(g) been tested in court. In *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the FTC promulgated a rule defining the failure to post octane rating numbers on gasoline pumps at service stations as "an unfair method of competition and an unfair or deceptive act or practice." The D.C. Circuit found that Section 6(g) conferred such authority, which led Congress to enact Magnuson-Moss. Critically, Magnuson-Moss expressly confers rulemaking authority for unfair and deceptive acts and practices, but not unfair methods of competition. Since that time, the FTC has never claimed UMC rulemaking authority. That silence speaks volumes.

Recent court decisions confirm that the FTC cannot assert broad authority without an express grant from Congress. In *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court unanimously rejected the FTC's claim that it could assert broad remedial powers without an express grant of authority from Congress. In its decision, the Court stressed that the

¹¹ See Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1789, 1991-92 (Nov. 2015).

¹² ABA, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues"* at 54.

Commission must operate within the express confines of the statutory language: “to read those words [in Section 13(b)] as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision’s subject matter.” For decades now, the Supreme Court has made clear that an agency’s authority extends only so far as the relevant statute’s express language. As the Court has explained, “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Applying these principles, the Section 6(g) is best understood as granting the FTC ministerial, not legislative authority, to specify how it will carry out its adjudicative, investigative, and informative functions.

Finally, under the Constitution, the FTC lacks legal authority to define the term “unfair methods of competition” given the ambiguity inherent in that phrase. The nondelegation doctrine requires Congress to provide “an intelligible principle” to assist the agency to which it has delegated legislative discretion. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928); *Gundy v. United States*, 139 S. Ct. 2116 (2019). In *Gundy*, the dissent cited to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), where the Supreme Court struck down Congress’s delegation of authority based on language very similar to Section 5 of the FTC Act. The FTC Act prohibits unfair methods of competition – so what, exactly, is “unfair”? No doubt, the nation’s 535 legislators would provide roughly as many different answers to that question depending on the type of practice at issue. Indeed, it is quite possible that the FTC’s five commissioners themselves would disagree as to the parameters of what is or is not “unfair.” The inherent ambiguity in that term, and lack of guidance from Congress, leaves any proposed UMC rule constitutionally suspect.

III. A Ban on Tailored Advertising Would Hinder Small Businesses and Ignore Consumer Preferences.

Accountable Tech’s Proposal would harm small businesses by depriving them of a valuable tool to reach consumers by a method their customers prefer. At a time when small businesses are struggling with rising costs resulting from COVID-19 pandemic-related disruptions and labor shortages, tailored digital marketing has enabled small businesses to compete with larger companies. Small businesses are customers themselves of advertising services which help provide tailored advertising to enable them to maximize their reach to likely consumers without expending large widespread costs associated with mass marketing. More than two-thirds of US small businesses say they would lack a cost-effective means to advertise without online advertising. Efficient and cost-effective online advertising—across a range of websites, apps, and technologies—saves US small businesses an estimated \$163 billion annually.¹³ And businesses with the lowest revenues report the heaviest reliance on online advertising.¹⁴

At a time when inflation has recently reached a 30-year high and is now threatening to erode labor compensation and fuel economic inequalities, disrupting digital advertising and marketing solutions used by millions of small retailers would exacerbate, not alleviate, inflationary pressures. By making consumers more informed (by delivering relevant

¹³ <https://sbecouncil.org/2019/09/10/online-advertising-delivers-big-benefits-for-small-businesses/>

¹⁴ *Id.*

advertisements, revealing prices, and facilitating price comparisons) digital platforms promote price competition and reduce consumer prices.

Not only does tailored advertising benefit small businesses, but consumers also prefer marketing from companies that is relevant to them. Countless public opinion polls have shown that American consumers prefer relevant and tailored advertising online.¹⁵ Consumers overwhelmingly are more likely to make purchases when there is a personalized experience.¹⁶ It is evident that if the Commission were to grant and adopt Accountable Tech’s Petition, the FTC would do more damage to America’s competitive online marketplace because they would deprive small businesses of an effective tool to compete and reach likely customers.

All of these statements and studies undermine the case for a blanket ban on tailored ads. The Federal Trade Commission, Department of Justice, and most studies conclude that advertising serves legitimate rationales and enhance consumer welfare. Only if tailored ads were always, or even almost always, anticompetitive, would grounds exist to consider a categorical ban or arbitrary limits. The contrary is true.

To the extent that particular advertisement or advertising practice may harm consumers, agencies and courts must continue to evaluate them on an individual basis. In *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001), for example, the court explained that the same type of conduct can foster or hinder competition, depending on the context:

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts which reduce social welfare, and competitive acts, which increase it.

As a result, antitrust agencies should continue to adhere to individualized assessments under the rule of reason. In connection with last year’s antitrust hearings before the House of Representatives, most surveyed scholars concluded that existing antitrust law is adequate to combat anticompetitive practices. For example, one group of antitrust economists, scholars, and practitioners wrote that “[t]he antitrust laws as written are adequate to prevent anticompetitive monopolization, exclusionary conduct, and other harmful vertical conduct.”¹⁷

Accordingly, instead of adopting a rule, the FTC should combat potentially anticompetitive advertising through its traditional tools such as case-by-case litigation, *amicus* briefs, speeches, and reports. For instance, the petition repeatedly complains about the advertising practices of large platforms, accusing those companies of “essentially defrauding advertisers” and engaging in “flagrant self-dealing.” Pet. at 6. But an FTC rule would impact

¹⁵ Study: 71% of consumers prefer personalized ads available at <https://www.marketingdive.com/news/study-71-of-consumers-prefer-personalized-ads/418831/>.

¹⁶ “New Epsilon research indicates 80% of consumers are more likely to make purchases when brands offer personalized experiences,” available at <https://www.epsilon.com/us/about-us/pressroom/new-epsilon-research-indicates-80-of-consumers-are-more-likely-to-make-a-purchase-when-brands-offer-personalized-experiences>.

¹⁷ Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets at 8 (May 15, 2020) (“The antitrust laws as written are adequate to prevent anticompetitive monopolization, exclusionary conduct, and other harmful vertical conduct”). See also Comments of Thomas Lambert at 3-4 (April 17, 2020) (noting that exclusive contracts can benefit consumers and that the rule of reason is working well).

businesses of all sizes and would even affect non-platforms. If the Commission concludes that the Petition has identified actual anticompetitive use of “surveillance advertising,” it should leverage its extensive litigation experience to bring a Sherman Act case against specific platforms rather than engage in unwarranted, overbroad, and potentially unconstitutional rulemaking. In sum, litigation and *amicus* briefs would better help courts to identify specific instances in which certain practices harm competition. Through these traditional tools, which adhere closely to the FTC’s statutory authority and traditional practice, the FTC could effectively combat problematic practices while leaving reasonable ones in place.

Finally, if the FTC truly believes that tailored ads should be deemed anticompetitive, it is free to advocate for that position through competition advocacy filings, reports, and speeches. Through these tools of persuasion -- which, again, fall well within the FTC’s statutory authority and traditional practice -- the FTC would have the opportunity to educate elected officials, as well as the business community and employees. No doubt the public would benefit from such a robust discussion.

IV. Granting the Petition Would Further Exacerbate a Growing State Patchwork of Data Protection Regulations

As explained earlier, the Commission lacks general authority to regulate unfair methods of competition through the rulemaking process. The Commission should reject the Petition for that reason alone. Concurrently, the Commission should also reject the call to ban tailored advertising as a consumer protection matter as well and the Chamber urges the FTC to refrain from engaging in data protection and privacy rulemakings because they will further exacerbate a growing patchwork of state laws that are emerging.¹⁸

An FTC rulemaking concerning data privacy will create a new level of complexity for small businesses to navigate as they are already having to comply with new data regimes in the states of California, Virginia, and Colorado. The California Consumer Privacy Act regulations were estimated to cost small businesses \$50,000 to comply.¹⁹

Complexity in regulations favors larger corporations and any activity to regulate consumer privacy—absent a national privacy law—would harm small businesses. For this reason, we ask the Commission to work with Congress to pass a national privacy law that protects all Americans equally.

V. Conclusion

The FTC lacks legal authority to promulgate regulations under its unfair methods of competition authority that would prohibit tailored ads, and if the FTC nevertheless chooses to do so, such a rule would harm consumers by banning the many pro-competitive aspects of such advertisements. Tailored ads foster competition by providing end consumers with valuable information about goods and services that they may want. Tailored ads also promote competition by allowing the business consumers that purchase online ads, in particular small businesses, to spend their advertising dollars more efficiently. To the extent that a particular ad,

¹⁸ https://americaninnovators.com/wp-content/uploads/2022/01/CTEC_Privacy2022_HeatMap_v1.pdf

¹⁹ https://www.dof.ca.gov/Forecasting/Economics/Major_Regulations/Major_Regulations_Table/documents/CCPA_Regulations-SRIA-DOF.pdf

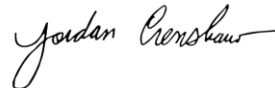
or advertising practice, may harm competition or consumers, the FTC can and should challenge that particular practice through case-by-case adjudication. If the FTC desires to address alleged privacy harms in the advertising ecosystem, it should address the matter on a case-by-case basis under its current authority and work with Congress to pass a national privacy law.

The Chamber looks forward to working with you ensure that small businesses and consumers continue to enjoy the benefits of the digital ecosystem and are protected from harmful conduct.

Sincerely,



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