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Administrative Law / FTC Launches Commercial Surveillance Rulemaking

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Svetlana S. Gans and Natalie Hausknecht — 17 August 2022



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The Federal Trade Commission (FTC) launched one of the most ambitious rulemakings in agency history Aug. 11, with its 3-2 vote to initiate Advance Notice of Proposed Rulemaking (ANPRM) on commercial surveillance and data security. The divided vote, which broke down on partisan lines, stands in stark contrast to recent bipartisan efforts on Capitol Hill, particularly on the comprehensive American Data Privacy and Protection Act (ADPPA).

Although the rulemaking purports to pursue a new “privacy and data security” regime, it targets far more than consumer privacy. The ANPRM lays out a sweeping project to rethink the regulatory landscape governing nearly every facet of the U.S. internet economy, from advertising to anti-discrimination law, and even to labor relations. Any entity that uses the internet (even for internal purposes) is likely to be affected by this latest FTC action, and public participation in the proposed rulemaking will be important to ensure the agency gets it right.

Summary of the ANPRM

The vague scope of the FTC’s latest ANPRM begins at its title: “Commercial Surveillance and Data Security” Rulemaking. The announcement states the FTC intends to explore rules “cracking down” on the “business of collecting, analyzing, and profiting from information about people.” The ANPRM then defines the scope of

“commercial surveillance” to include virtually any data activity. For example, the ANPRM explains that it includes practices used “to set prices, curate newsfeeds, serve advertisements, and conduct research on people’s behavior, *among other things*.” The ANPRM also goes on to say that it is concerned about practices “outside of the retail consumer setting” that the agency traditionally regulates. Indeed, the ANPRM defines “consumer” to include “businesses and workers, not just individuals who buy or exchange data for retail goods and services.”

Unlike the bipartisan ADPPA, the ANPRM also takes aim at the “consent” model that the FTC has long advocated to ensure consumers make informed choices about their data online. It claims that “consumers may become resigned to” data practices and “have little to no actual control over what happens to their information.” It also suggests that consumers “do not generally understand” data practices, such that their permission could be “meaningful”—making express consumer consent to data practices “irrelevant.”

The ANPRM further lists a disparate set of additional FTC concerns, from “pernicious dark pattern practices” to “lax data security practices” to “sophisticated digital advertising systems” to “stalking apps,” “cyber bullying, cyberstalking, and the distribution of child sexual abuse material,” and the use of “social media” among “kids and teens.” It “finally” wraps up with a reference to “growing reliance on automated systems” that may create “new forms and mechanisms for discrimination” in areas like housing, employment, and healthcare. The issue the agency expresses about these automated systems is with apparent “disparate outcomes” “even when automated systems consider only *unprotected* consumer traits.”

Having set out these concerns, the ANPRM seeks to justify a new rulemaking via a list of what it describes as “decades” of “consumer data privacy and security” enforcement actions. The rulemaking then requests that the public answer 95 questions, covering many different legal and factual issues. For example, the agency requests the public weigh in on the practices “companies use to surveil consumers,” intangible and unmeasurable “harms” created by such practices, the most harmful practices affecting children and teens, techniques that “manipulate consumers into prolonging online activity,” how the commission should balance costs and benefits from any regulation, biometric data practices, algorithmic errors and disparate impacts, the viability of consumer consent, the opacity of “consumer surveillance practices,” and even potential remedies the agency should consider.

Commissioner Statements in Support of the ANPR

Every Democratic commissioner issued a separate supporting statement. Chair Lina Khan’s statement justified the rulemaking grounds that the FTC is the “de facto law enforcer in this domain.” She also doubled-down on the decision to address not only consumer privacy, but issues affecting all “opportunities in our economy and society, as well as core civil liberties and civil rights” and described being “especially eager to build a record” related to: the limits of “notice and consent” frameworks, as opposed to withdrawing permission for data collection “in the first place”; how to navigate “information asymmetries” with companies; how to address certain “business models” “premised on” persistent tracking; discrimination in automated processes; and workplace surveillance.

Commissioner Rebecca Kelly Slaughter’s longer statement more explicitly attacked the agency’s “notice-and-consent regime” as having “failed to protect users.” She expressed hope that the new rules would take on biometric or location tracking, algorithmic decision-making, and lax data security practices as “long overdue.” Commission Slaughter further brushed aside concerns that the rulemaking was inappropriate while Congress considered comprehensive privacy legislation, asserting that the magnitude of the rulemaking was a reason to do it—not shy away. She also expressed interest in data-minimization specifications, discriminatory algorithms, and kids and teens issues.

Commissioner Alvaro Bedoya’s short statement likewise expressed support for acting. However, he noted the public comment period would help the agency “discern *whether* and how to proceed.” Like his colleagues, he identified his particular interest in “emerging discrimination issues”: the mental health of kids and teens; the protection of non-English speaking communities; and biometric data. On the pending privacy legislation, he noted that:

[ADPPA] is the strongest privacy bill that has ever been this close to passing. I hope it does pass. I hope it passes soon.... This ANPRM 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.

Commissioner Statements Opposed to the ANPRM

Both Republican commissioners published dissents. Commissioner Christine S. Wilson's urged deference to Congress as it considers a comprehensive privacy law. Yet she also expressed broader concern about the FTC's recent changes to its Section 18 rulemaking process that "decrease opportunities for public input and vest significant authority for the rulemaking proceedings solely with the Chair" and the unjustified targeting of practices not subject to prior enforcement action. Notably, Commissioner Wilson also worried the rulemaking was unlikely to survive judicial scrutiny, indicating that Chair Khan's statements give her "no basis to believe that she will seek to ensure that proposed rule provisions fit within the Congressionally circumscribed jurisdiction of the FTC."

Commissioner Noah Phillips' dissent criticized the ANPRM for failing to provide "notice of anything" and thus stripping the public of its participation rights. He argued that the ANPRM's "myriad" questions appear to be a "mechanism to fish for legal theories that might justify outlandish regulatory ambition outside our jurisdiction." He further noted that the rulemaking positions the FTC as a legislature to regulate in areas outside of its expertise (e.g., labor law) with potentially disastrous economic costs that it is ill-equipped to understand.

Commissioner Phillips further argued the ANPRM attacks disparate practices based on an "amalgam of cases concerning very different business models and conduct" that cannot show the prevalence of misconduct required for Section 18 rulemaking. He also criticized the FTC for abandoning its own informed-consent model based on paternalistic musings about individuals' ability to decide for themselves. And finally, he criticized the FTC's apparent overreach in claiming the mantle of "civil rights enforcer" when it was never given that explicit authority by Congress to declare discrimination or disparate impacts unlawful in this space.

Implications for Regulated Entities and Others Concerned with Potential Agency Overreach

The sheer breadth of the ANPRM demands the avid attention of potentially regulated entities or those concerned with the FTC's aggressive rulemaking agenda. The public should seek to meaningfully participate in the rulemaking process to ensure the FTC considers a broad array of viewpoints and has the facts before it necessary to properly define the scope of its own authority and the consequences of any proposed privacy regulation. For example, the FTC may issue a notice of proposed rulemaking defining acts or practices as unfair or deceptive "only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are *prevalent*."(emphasis added).

15 U.S. Code § 57a also states that the FTC may make a determination that unfair or deceptive acts or practices are prevalent only if: "(A) it has issued cease and desist orders regarding such acts or practices, or (B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices." That means that, under the Magnuson-Moss Section 18 rulemaking that the FTC must use here, the agency must show (1) the prevalence of the practices (2) how they are unfair or deceptive, and (3) the economic effect of the rule, including on small businesses and consumers. Any final regulatory analysis also must assess the rule's costs and benefits and why it was chosen over alternatives. On each count, effective advocacy supported by empirical and sound economic analysis by the public may prove dispositive.

The FTC may have a particularly difficult time meeting this burden of proof with many of the innocuous (and currently permitted) practices identified in the ANPRM. For example, modern online commerce like automated decision-making is a part of the engine that has powered a decade of innovation, lowered logistical and opportunity costs, and opened up amazing new possibilities for small businesses seeking to serve local consumers and their communities. Commissioner Wilson makes this point well:

Many practices discussed in this ANPRM are presented as clearly deceptive or unfair despite the fact that they stretch far beyond practices with which we are familiar, given our extensive law enforcement experience. Indeed, the ANPRM wanders far afield of areas for which we have clear evidence of a widespread pattern of unfair or deceptive practices.

The FTC also may be setting itself on an imminent collision course with the “major questions” doctrine, in particular. On the last day of its term this year, the Supreme Court handed down *West Virginia v. Environmental Protection Agency*, which applied the “major questions doctrine” to rule that the EPA can’t base its controversial Clean Power Plan on a novel interpretation of a relatively obscure provision of the Clean Air Act. An agency rule of such vast “economic and political significance,” Chief Justice John Roberts wrote, requires “clear congressional authorization.” (See “The FTC Heads for Legal Trouble” by Svetlana Gans and Eugene Scalia.) Parties are likely to argue the same holds true here with regard to the FTC’s potential regulatory extension into areas like anti-discrimination and labor law. If the FTC remains on this aggressive course, any final privacy rulemaking could also be a tempting target for a reinvigorated nondelegation doctrine.

Some members of Congress also may question the wisdom of the ANPRM venturing into the privacy realm at all right now, a point advanced by several of the commissioners. Shortly after the FTC’s announcement, House Energy and Commerce Committee Chairman Frank Pallone Jr. (D-N.J.) stated:

I appreciate the FTC’s effort to use the tools it has to protect consumers, but Congress has a responsibility to pass comprehensive federal privacy legislation to better equip the agency, and others, to protect consumers to the greatest extent.

Sen. Roger Wicker (R-Miss.), the ranking member on the Senate Commerce Committee and a leading GOP supporter of the bipartisan legislation, likewise said that the FTC’s move helps “underscore the urgency for the House to bring [ADPPA] to the floor and for the Senate Commerce Committee to advance it through committee.”

The FTC’s ANPRM will likely have broad implications for the U.S. economy. Stakeholders can participate in the rulemaking in several ways, including registering by Aug. 31 to speak at the FTC’s Sept. 8 public forum. Stakeholders should also consider submitting public comments and empirical evidence within 60-days of the ANPRM’s publication in the Federal Register, and insist that the FTC hold informal hearings as required under the Magnuson-Moss Act.

While the FTC is rightfully the nation’s top consumer cop, an advanced notice of this scope demands active public awareness and participation to ensure the agency gets it right.

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