

Dissenting Statement of Commissioner Christine S. Wilson
Trade Regulation Rule on Commercial Surveillance and Data Security
August 11, 2022

Throughout my tenure as an FTC Commissioner, I have encouraged Congress to pass comprehensive privacy legislation.¹ While I have great faith in markets to produce the best results for consumers, Econ 101 teaches that the prerequisites of healthy competition are sometimes absent. Markets do not operate efficiently, for example, when consumers do not have complete and accurate information about the characteristics of the products and services they are evaluating.² Neither do markets operate efficiently when the costs and benefits of a product are not fully borne by its producer and consumers – in other words, when a product creates what economists call externalities.³ Both of these shortcomings are on display in the areas of privacy and data security. In the language of economists, both information asymmetries and the presence of externalities lead to inefficient outcomes with respect to privacy and data security.

Federal privacy legislation would provide transparency to consumers regarding the full scope of data collection, and how collected data are used, shared, sold, and otherwise monetized. In addition, a comprehensive privacy law would give businesses much-needed clarity and certainty regarding the rules of the road in this important area, particularly given the patchwork of state laws that is emerging. And Congressional action would help fill the emerging gaps in sector-specific approaches created by evolving technologies and emerging demands for information. Perhaps most importantly, a national privacy law would help curb violations of our civil liberties.⁴

While I have long been concerned about data collection and usage, the events of 2020 laid bare new dangers and served only to deepen my concerns. During that tumultuous year, I wrote and spoke on several occasions regarding pressing privacy and civil liberties issues.⁵ In the face of continued Congressional inaction, I became willing to *consider* whether the Commission

¹ See Oral Statement of Commissioner Christine S. Wilson as Prepared for Delivery Before the U.S. House Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf; Oral Statement of Commissioner Christine S. Wilson Before the U.S. Senate Committee on Commerce, Science and Transportation (Apr. 20, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589180/opening_statement_final_for_postingrevd.pdf; Oral Statement of Commissioner Christine S. Wilson Before the U.S. Senate Committee on Commerce, Science and Transportation (Aug. 5, 2020), <https://www.commerce.senate.gov/services/files/25112CF8-991F-422C-8951-25895C9DE11D>; Oral Statement of Commissioner Christine S. Wilson as Prepared for Delivery Before the U.S. House Energy and Commerce Subcommittee on Consumer Protection and Commerce (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519254/commissioner_wilson_may_2019_ec_opening.pdf.

² ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS 625-626 (8th ed. 2017).

³ *Id.* at 626.

⁴ See Christine Wilson, Op-Ed, Coronavirus Demands a Privacy Law, WALL ST. J., May 13 2020, available at <https://www.wsj.com/articles/congress-needs-to-pass-a-coronavirus-privacy-law-11589410686>; Christine S. Wilson, Privacy and Public/Private Partnerships in a Pandemic, Keynote Remarks Privacy + Security Forum (May 7, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574938/wilson_-_remarks_at_privacy_security_academy_5-7-20.pdf; Christine Wilson, Privacy in the Time of Covid-19, TRUTH ON THE MARKET (Apr. 15, 2020), <https://truthonthemarket.com/author/christinewilsonicle/>.

⁵ *Id.*

should undertake a Section 18 rulemaking to address privacy and data security. But even then, I emphasized that an FTC rulemaking would be vastly inferior to federal privacy legislation.⁶ And I continue to believe that Congressional action is the best course.

I am heartened that Congress is now considering a bipartisan, bicameral bill that employs a sound, comprehensive, and nuanced approach to consumer privacy and data security. The American Data Privacy and Protection Act (ADPPA) rightly has earned broad acclaim in the House Committee on Energy and Commerce and the Subcommittee on Consumer Protection and Commerce, and is moving to a floor vote in the House.⁷ I am grateful to Ranking Member Roger Wicker, Chairman Frank Pallone, Chair Jan Schakowsky, Ranking Member Cathy McMorris Rodgers, and Ranking Member Gus Bilirakis for their thoughtful work, and I hope to see this bill become a law. The momentum of ADPPA plays a significant role in my “no” vote on the Advance Notice of Proposed Rulemaking (ANPRM) announced today. I am gravely concerned that opponents of the bill will use the ANPRM as an excuse to derail the ADPPA.

While the potential to derail the ADPPA plays a large role in my decision to dissent, I have several other misgivings about proceeding with the ANPRM. First, in July 2021, the Commission made changes to the Section 18 Rules of Practice that decrease opportunities for public input and vest significant authority for the rulemaking proceedings solely with the Chair.⁸ Second, the Commission is authorized to issue a notice of proposed rulemaking when it “has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent.”⁹ 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. Third, regulatory¹⁰ and enforcement¹¹ overreach increasingly has drawn sharp criticism from courts. Recent Supreme Court decisions indicate FTC rulemaking overreach likely will not fare well when subjected to judicial review. And fourth, Chair Khan’s public statements¹² give me no basis to believe that she will seek to ensure that proposed rule provisions

⁶ Oral Statement of Commissioner Christine S. Wilson as Prepared for Delivery Before the U.S. House Energy and Commerce Subcommittee on Consumer Protection and Commerce (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592954/2021-07-28_commr_wilson_house_ec_opening_statement_final.pdf.

⁷ Press Release, Bipartisan E&C Leaders Hail Committee Passage of the American Data Privacy and Protection Act (Jul. 20, 2022), <https://energycommerce.house.gov/newsroom/press-releases/bipartisan-ec-leaders-hail-committee-passage-of-the-american-data-privacy>

⁸ See Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf (detailing the changes to the Rules and concerns that the changes “fast-track regulation at the expense of public input, objectivity, and a full evidentiary record.”).

⁹ 15 U.S.C. 57a(b)(3).

¹⁰ *West Virginia v. EPA*, 597 U.S. ___, 2022 WL 2347278 (June 30, 2022) (striking down EPA regulations as outside of the agency’s Congressionally mandated authority).

¹¹ *AMG Capital Management, LLC v. FTC*, 593 U.S. __ (2021) (finding that the FTC exceeded its law enforcement authority under Section 13(b) of the FTC Act).

¹² See, e.g., Koenig, Bryan, *FTC’s Khan More Worried About Inaction Than Blowback*, LAW360 (Apr. 22, 2022), <https://www.law360.com/articles/1486611/ftc-s-khan-more-worried-about-inaction-than-blowback>; Scola, Nancy,

fit within the Congressionally circumscribed jurisdiction of the FTC. Neither has Chair Khan given me reason to believe that she harbors any concerns about harms that will befall the agency (and ultimately consumers) as a consequence of her overreach.

While baseline privacy legislation is important, I am pleased that Congress also is considering legislation that would provide heightened privacy protections for children.¹³ Recent research reveals that platforms use granular data to track children’s online behavior, serve highly curated feeds that increase engagement, and (in some instances) push kids towards harmful content.¹⁴ More broadly, the research reveals a “catastrophic wave of mood disorders (anxiety and depression) and related behaviors (self-harm and suicide)” among minors, and particularly teenage girls, who spend a significant amount of time on social media daily.¹⁵ The Kids Online Safety Act makes particularly noteworthy contributions, and I applaud Senators Richard Blumenthal and Marsha Blackburn on their work.

I appreciate that my newest colleague, Commissioner Alvaro Bedoya, brings to the Commission deep experience in the field of privacy and data security and shares my concerns about protecting children online.¹⁶ I look forward to working with him, FTC staff, and our fellow Commissioners to take constructive steps in this area, including advancing key research, heightening awareness, bringing enforcement actions, and concluding the Commission’s ongoing review of the Children’s Online Privacy Protection Act.

Lina Khan Isn’t Worried About Going Too Far, NY MAGAZINE (Oct. 27, 2021), <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html>.

¹³ Kids Online Safety Act, S.3663, 117th Congress (2021-22), <https://www.congress.gov/bill/117th-congress/senate-bill/3663/text>; Children and Teens’ Online Privacy Protection Act, S.1628, 117th Congress (2021-22), <https://www.congress.gov/bill/117th-congress/senate-bill/1628/text>; *see also* Cristiano Lima, *Senate panel advances bills to boost children’s safety online*, WASH. POST (Jul. 27, 2022), <https://www.washingtonpost.com/technology/2022/07/27/senate-child-safety-bill/>.

¹⁴ *See, e.g.*, Testimony of Jonathan Haidt, Teen Mental Health is Plummeting, and Social Media is a Major Contributing Cause, Before the Senate Judiciary Committee, Subcommittee on Technology, Privacy, and the Law (May 4, 2022), <https://www.judiciary.senate.gov/imo/media/doc/Haidt%20Testimony.pdf>.

¹⁵ *Id.*

¹⁶ I have given several speeches discussing these concerns. *See* Christine S. Wilson, *The FTC’s Role in Supporting Online Safety* (Nov. 21, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557684/commissioner_wilson_remarks_at_the_family_online_safety_institute_11-21-19.pdf; Christine S. Wilson, *Opening Remarks at FTC Workshop: The Future of the COPPA Rule* (Oct. 7, 2019), https://www.ftc.gov/system/files/documents/public_statements/1547693/wilson_ftc_coppa_workshop_opening_remarks_10-7-19.pdf; *see also* Christine S. Wilson, *Remarks at Global Antitrust Institute, FTC v. Facebook* (Dec. 11, 2019), https://www.ftc.gov/system/files/documents/public_statements/1557534/commissioner_wilson_remarks_at_global_antitrust_institute_12112019.pdf (discussing, *inter alia*, my work with staff to secure the provisions of the settlement that provide heightened review for products targeted to minors).