

Dissenting Statement of Commissioner Noah Joshua Phillips
Social Media and Video Streaming Service Providers Privacy 6(b) Project
Matter No. P205402

December 4, 2020

Today my colleagues have issued Section 6(b) orders to nine technology companies, including social media, to “compile data concerning the privacy policies, procedures, and practices of [such] providers, including the method and manner in which they collect, use, store, and disclose information about users and their devices.”¹ Were this in fact the case, I would gladly join them. But it is not. The 6(b) orders are instead an undisciplined foray into a wide variety of topics, some only tangentially related to the stated focus of this investigation. The actions undertaken today trade a real opportunity to use scarce government resources to advance public understanding of consumer data privacy practices—critical to informing ongoing policy discussions in the United States and internationally—for the appearance of action on a litany of gripes with technology companies. The breadth of the inquiry, the tangential relationship of its parts, and the dissimilarity of the recipients combine to render these orders unlikely to produce the kind of information the public needs, and certain to divert scarce Commission resources better directed elsewhere. I dissent.

In enacting Section 6 of the Federal Trade Commission Act, Congress vested the agency with the specific power to “gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce”.² Section 6(b) orders operate as subpoenas, legally compelling targets to share information, but outside the context of a law enforcement investigation.

Congress intended the Commission to execute its Section 6 authority to serve the public interest: to inform the Commission, to make recommendations to Congress about legislation, and to publish reports about business practices for public dissemination.³ With that authority comes the responsibility to exercise it in a manner designed to serve those functions. To our predecessors’ credit, the agency historically has conducted investigations across a wide range of industries, writing reports that have culminated in achievements as varied as the creation of the Securities and Exchange Commission,⁴ the first Congressional legislation on cigarette health warnings,⁵ a

¹ Resolution Directing Use of Compulsory Process to Collect Information Regarding Social Media and Video Streaming Service Providers’ Privacy Practices.

² 15 U.S.C. § 46(a).

³ 15 U.S.C. § 46(f).

⁴ The *Utility Corporations Report* (final report published in 1935), studying the practices of electric and gas public utility corporations, led to the passage of four separate pieces of legislation including the Public Utility Holding Company Act, 15 U.S.C. § 79, and the Securities Act, 15 U.S.C. § 77, which created the Securities and Exchange Commission.

⁵ The FTC’s 1964 *Staff Report on Cigarette Advertising and Output*, a study of the role played by the cigarette industry in the U.S. economy and an examination of the claims used in advertising to promote the industry’s products, was a precursor to the groundbreaking *Trade Regulation Rule for the Prevention of Unfair or Deceptive*

well-regarded examination of the entertainment industry's compliance with its self-regulatory guidelines,⁶ and an extensive analysis of the patent assertion entity industry,⁷ to name only a few.

I do not think today's action lives up to that tradition, and I write to note what I believe are some of its most significant flaws.

The Section 6(b) Orders Are Not Designed to Generate Useful Information for the Public

Effective 6(b) orders look carefully at business practices in which companies engage in a manner designed to elicit information, understand it, and then present it to the public in way that is usable and can form a basis for sound public policy.

The first step is to select a group of recipients that will permit such examination, usually a group of firms engaged in conduct that can be compared.⁸ But the logic behind the choice of recipients here is not clear at all. The 6(b) orders target nine entities: Facebook, WhatsApp, Snap, Twitter, YouTube, ByteDance, Twitch, Reddit, and Discord. These are different companies, some of which have strikingly different business models. And the orders omit other companies engaged in business practices similar to recipients, for example, Apple, Gab, GroupMe, LinkedIn, Parler, Rumble, and Tumblr, not to mention other firms the data practices of which have drawn significant government concern, like WeChat.⁹ The only plausible benefit to drawing the lines the Commission has is targeting a number of high profile companies and, by limiting the number

Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking in 1964, which led to the first Congressional legislation on cigarette health warnings.

⁶ FTC Press Release, FTC Releases Report on the Marketing of Violent Entertainment to Children, Sept. 11, 2000, <https://www.ftc.gov/news-events/press-releases/2000/09/ftc-releases-report-marketing-violent-entertainment-children>.

⁷ FTC Press Release, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition, Sept. 27, 2013, <https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact>.

⁸ In its inquiry of the privacy practices of broadband providers, following the Federal Communications Commission's restoration of broadband privacy oversight to the Commission, the Commission took a more focused approach, sending narrowly tailored information requests to seven broadband providers. FTC Press Release, FTC Seeks to Examine the Privacy Practices of Broadband Providers, Mar. 26, 2019, <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers>.

⁹ U.S. Department of Commerce Press Release, Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States, Sept. 18, 2020, <https://www.commerce.gov/news/press-releases/2020/09/commerce-department-prohibits-wechat-and-tiktok-transactions-protect>.

to nine, avoiding the review process required under the Paperwork Reduction Act,¹⁰ which is not triggered if fewer than ten entities are subject to requests.¹¹

Under the PRA, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) analyzes government information requests for burden to avoid unnecessary or duplicative requests for information and ensure that data collected are accurate, helpful, and a good fit for their proposed use.¹² The PRA also mandates a public comment process to guide requests toward high-quality and useful data.¹³ Concern about accountability and fairness in agency actions led the President to issue Executive Order 13892, which among other things requires compliance with the PRA in the collection of information.¹⁴

For an undertaking of this scope, failing to submit to PRA review is not a good thing; and the 6(b) orders issued today would have benefited immensely from the important checks and balances that process and Executive Order 13892 are designed to ensure.

The 6(b) orders are rife with broad (and sometimes vague) specifications that burden analysis and oversight could have helped reduce. For example, under Specification 12, compelled information includes:

*all Documents Relating to the Company's or any other Person's strategies or plans, Including, but not limited to: a) business strategies or plans; b) short-term and long-range strategies and objectives; c) expansion or retrenchment strategies or plans; d) research and development efforts; e) sales and marketing strategies or plans, Including, but not limited to, strategies or plans to expand the Company's customer base or increase sales and marketing to particular customer segments (e.g., a user demographic); f) strategies or plans to reduce costs, improve products or services (e.g., expanding features or functionality), or otherwise become more competitive; g) plans to enter into or exit from the sale or provision of any Relevant Product or other product or service; h) presentations to management committees, executive committees, and boards of directors; and i) budgets and financial projections.*¹⁵

¹⁰ See 44 U.S.C. § 3501 *et seq.* The PRA requires review by the Office of Management and Budget and public comment only when ten or more firms are surveyed. See 5 C.F.R. § 1320.3(c) (collection of information is "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit").

¹¹ The PRA approval process can also be triggered when there are less than 10 entities, if the recipients represent "all or a substantial majority of an industry". 5 C.F.R. § 1320.3(c)(4)(ii).

¹² Office of Information and Regulatory Affairs, *A Guide to the Paperwork Reduction Act*, <https://pra.digital.gov/about/>.

¹³ The authors of the Marketing Violent Entertainment to Children report used this process to excellent effect. See Comment Request, 64 Fed. Reg. 46392, Aug. 25, 1999; Submission for OMB Review, Comment Request, 64 Fed. Reg. 63045, Nov. 18, 1999; Submission for OMB Review, Comment Request, 65 Fed. Reg. 17658, Apr. 4, 2000.

¹⁴ See Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, Exec. Order No. 13892, 84 Fed. Reg. 55239, Oct. 9, 2019.

¹⁵ 6(b) order, Specification 12, in part (emphasis added).

Such a request would be suited to an antitrust investigation. But as part of an inquiry ostensibly aimed at consumer privacy practices, it amounts to invasive government overreach.¹⁶ And that is just *one* of the order’s 50-plus specifications.

The biggest problem is that today’s 6(b) orders simply cover too many topics to make them likely to result in the production of comparable, usable information—yet another feature proper oversight and public comment could have flagged. Rather than a carefully calibrated set of specifications designed to elicit information that the agency could digest and analyze as a basis for informing itself, Congress, stakeholders, and the public, these 6(b) orders instead are sprawling and scattershot. Their over 50 specifications, most with numerous and detailed subparts, address topics including, but not limited to: advertising (reach, revenue, costs, and number and type); consumer data (collection, use, storage, disclosure, and deletion); as noted above, all strategic, financial, and research plans; algorithms and data analytics; user engagement and content moderation; demographic information; relationships with other services; and children and teens (policies, practices, and procedures).

Recipients of 6(b) orders typically negotiate to limit their productions, to tailor them in light of their specific business models and business practices. Perhaps the Commission will push back on attempts to do so, devoting additional lawyers to litigating the orders and having a federal judge oversee them, rather than OIRA. Or negotiation may reduce the burdens. But if that happens, each recipient will be responding to a different set of negotiated specifications. That certain of the companies in question have very different business models makes this even more likely. The end result of that is, say, the agency learning a lot about one recipient’s advertising practices, but not as much about its algorithms. For another recipient, the agency might receive information about privacy practices but very little about its plans to expand. Each of the nine recipients will produce differing, if any, amounts of information to each of the 50-plus specifications.

The final result? A process that undercuts the agency’s ability to report publicly on its findings. Because the Commission cannot reveal nonpublic information procured from the recipients, the agency historically has reported on business practices in an anonymized fashion, by grouping practices together and reporting in a way that preserves anonymity. Here, however, the resultant document productions are unlikely to be conducive to such an “apples to apples” comparison of the various recipients’ practices. We will be able to say we are asking about privacy, or business plans, or content curation, etc.; but the public may not learn much.

Aside from the public burden, precious agency resources must be devoted to the mass of information the 6(b) orders seek. Best suited to evaluate privacy practices of the recipient companies are, of course, the staff of our Division of Privacy and Identity Protection, and others who work with them on privacy enforcement and rulemaking. I have confidence in their abilities, to be sure. But these are the same individuals charged with enforcing the bulk of federal privacy law, and they are hardly legion. While the FTC privacy staff are the most impactful privacy enforcers in the world, their numbers pale next to those in countries like France, Ireland, and the

¹⁶ Three of the companies ordered to produce documents, Facebook, WhatsApp, and Twitch, are or are affiliates of the massive companies colloquially described as “Big Tech”. Fans of this effort will no doubt cheer their inclusion and dismiss concerns about burden outright. But not every company so ordered is so large, for example, Reddit and Discord. The burden for them will be very real.

United Kingdom. That is why this Commission, unanimously and repeatedly, has urged Congress to increase their ranks so that they can take on more casework.¹⁷ Those requests ring somewhat more hollow today, as we redeploy the same people to enforce, negotiate, and litigate these orders, after which they will devote themselves to reading, analyzing, and reporting on the terrific volume of information that the 6(b) orders seek. We are trading an effective enforcement program for, well, something very different.

Of all the 6(b) orders issued by this set of commissioners, by far, those issued today appear aimed more at their issuance than the painstaking but important process of gathering information important to advancing public policy. They could have used the salutary oversight and review of the PRA process. They did not receive it. The result is a broad set of often invasive specifications aimed at a grouping of recipients that lacks obvious logic.

The Section 6(b) Orders are Untethered to the Stated Purpose of the Underlying Resolution Authorizing Them: Consumer Privacy

It is unclear to me whether several of the 6(b) order specifications actually serve the stated purpose of this project: to compile data concerning the privacy policies, procedures, and practices of the recipients, including the method and manner in which they collect, use, store, and disclose information about users and their devices. Standing on their own, most are reasonable topics for inquiry, perhaps warranting a separate 6(b) study. But they do not stand alone, and, as explained above, by doing them all together we weaken our ability to study any one.

One example is the searching inquiry into business strategy and financial plans. Another is the set of specifications asking questions about content moderation. Content moderation at scale is a tremendously difficult policy question, which has been the subject of a number of recent and high-profile congressional inquiries and one presidential Executive Order.¹⁸ A third is a list of

¹⁷ See, e.g., *Oversight of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 116th Cong. 11 (2020) (Prepared Statement of the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf; Fed. Trade Comm'n, *FTC Report on Resources Used and Needed for Protecting Consumer Privacy and Security* (2020), <https://www.ftc.gov/system/files/documents/reports/reports-response-senate-appropriations-committee-report-116-111-ftcs-use-its-authorities-resources/p065404reportresourcesprivacydatasecurity.pdf>.

¹⁸ See, e.g., *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 116th Cong. (2020), <https://www.commerce.senate.gov/2020/10/does-section-230-s-sweeping-immunity-enable-big-tech-bad-behavior>; *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020), <https://www.judiciary.senate.gov/meetings/breaking-the-news-censorship-suppression-and-the-2020-election>; Preventing Online Censorship, Exec. Order 13925, 85 Fed. Reg. 34079, May 28, 2020.

In response to that Executive Order, Commissioner Wilson called for a study of technology companies, including social media platforms. Christine S. Wilson (@CSWilsonFTC), Twitter, June 9, 2020, <https://twitter.com/CSWilsonFTC/status/1270442869183168512>. These 6(b) orders reflect that call, including examination of the recipient's content moderation practices. Chairman Simons, who supports this order, testified to the Senate Committee on Commerce, Science, and Technology that content moderation questions were governed by the First Amendment and thus fell outside the jurisdiction of the Commission. *Oversight of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 116th Cong. (2020) (Oral

specifications intended to elicit information about the costs of inaccurate information on users of the recipients' services, and how the recipients have remediated those costs. On and on.

One set of specifications that is more clearly directed at the nominal subject of this project is the one regarding data collected from children. A number of stakeholders sought such an inquiry soon after the agency announced its advanced notice of proposed rulemaking to evaluate the rule promulgated under the Children's Online Privacy Protection Act (COPPA).¹⁹ As it happens, the agency has received a historic level of feedback to that inquiry, nearly two hundred thousand submissions very much related to this inquiry. Staff presently are evaluating that input, raising the question why, already rich with information, we are going back for more.

Gaining information about social media and video streaming services is important to our mission to protect consumers. That is not, however, an excuse to forego thoughtfulness and restraint in doing so. The orders issued today will allow the Commission to say it is asking a large number of important questions of a number (nine) of high-profile companies. At the end of the day, however, these orders make us unlikely to be able to answer those questions.

Testimony of Chairman Joseph Simons), <https://www.commerce.senate.gov/2020/8/oversight-of-the-federal-trade-commission>.

¹⁹ See, e.g., Institute for Public Representation et al., Comment Letter on Request for Public Comment of the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, Dec. 5, 2019, <https://www.regulations.gov/document?D=FTC-2019-0054-112443>; Institute for Public Representation et al., Comment Letter on Request for Public Comment of the Federal Trade Commission's Implementation of the Children's Online Privacy Protection Rule, Dec. 11, 2019, <https://www.regulations.gov/document?D=FTC-2019-0054-117343>.