



Office of the Chair

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

December 14, 2021

The Honorable Richard Blumenthal
United States Senate
Washington, D.C. 20510

Dear Senator Blumenthal:

Thank you for your letter encouraging the Federal Trade Commission (“FTC” or “Commission”) to begin a rulemaking process to protect consumer privacy, promote civil rights, and set clear safeguards on the collection and use of personal data in the digital economy. I share your concerns about commercial surveillance and am committed to ensuring the FTC is using its full suite of tools to protect Americans from unfair or deceptive practices online.¹

Evidence suggests that the current configuration of commercial data practices do not actually reveal how much users value privacy or security.² This is true for a host of reasons, including the fact that users often lack a real set of alternatives and cannot reasonably forego using technologies that are increasingly critical for navigating modern life.³ The use of dark patterns and other conduct that seeks to manipulate users only underscores the limits of treating present market outcomes as reflecting what users desire or value.⁴ A growing recognition that the “notice-and-consent” framework has serious shortcomings further highlights the need to consider a new paradigm.⁵

¹ Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security, Commission File No. P065401 (Oct. 1, 2021), <https://www.ftc.gov/public-statements/2021/10/statement-chair-lina-m-khan-regarding-report-congress-privacy-security>.

² See, e.g., Daniel Solove, *The Myth of the Privacy Paradox*, 89 GEO WASH L. REV. 1, 22-32 (2021).

³ Bhaskar Chakravorti, *Why It’s So Hard for Users to Control Their Data*, HARV BUS. REV. (Jan. 30, 2020), <https://hbr.org/2020/01/why-companies-make-it-so-hard-for-users-to-control-their-data> (noting that “even if users wanted to negotiate more data agency, they have little leverage. Normally, in well-functioning markets, customers can choose from a range of competing providers. But this is not the case if the service is a widely used digital platform.”); see also Solove, *supra* note 2 at 29 (“In one survey, 81% of respondents said that they had at least once ‘submitted information online when they wished that they did not have to do so.’ People often are not afforded much choice or face a choice between two very bad options.”).

⁴ The FTC recently brought a case against Age of Learning, Inc., an educational subscription service that the FTC alleged utilized dark patterns to scam millions of dollars from families. See Stipulated Order for Permanent Injunction and Monetary Judgement, *Federal Trade Commission v. Age of Learning, Inc.*, No. 2:20-cv-7996 (C.D. Cal Sept. 8, 2020); see also Solove, *supra* note 2, at 5 (“Individual risk decisions in particular contexts indicate little about how people value their own privacy.”); Zeynep Tufekci, *The Latest Data Privacy Debacle*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/opinion/strava-privacy.html> (“Data privacy is more like air quality or safe drinking water, a public good that cannot be effectively regulated by trusting in the wisdom of millions of individual choices.”).

⁵ Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC (Mar. 1, 2012), <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies->

Given the urgency of these issues, I believe the Commission must consider deploying its full set of tools, including rulemaking. As you know, Congress in 1975 passed the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act,⁶ authorizing the Commission to promulgate “Trade Regulation Rules” to protect consumers amid changing market conditions and evolving business practices. The Commission initially responded to this grant of authority by initiating more than a dozen rulemakings, but since 1980 the Commission has effectively abandoned Section 18 rulemaking. This past July, the Commission revised its rulemaking procedures to remove extraneous procedures that were not required by statute, realigning Commission practice with statutory requirements.⁷ These streamlined Section 18 rules still provide significant transparency, process, and opportunity for participation; notably, the procedural requirements are notably greater than those provided under the Administrative Procedure Act.

The Commission is considering initiating a rulemaking under section 18 of the FTC Act to address lax security practices, data privacy abuses, and algorithmic decision-making that may result in unlawful discrimination.⁸ Rulemaking may prove a useful tool to address the breadth of challenges and harms that can result from commercial surveillance and other data practices. Critically, rules could establish clear market-wide requirements and address potential harms on a broader scale.

The digitization further hastened by the pandemic makes this a particularly urgent and opportune time for the Commission to examine how we can best use our tools and update our approach in order to tackle the slew of data privacy and security challenges we presently face. I look forward to working with my colleagues on the Commission, as well as with you and other lawmakers, to meet the moment and deliver.

If you or your staff have additional questions on these matters or wish to share additional information with us, please do not hesitate to contact me or have your staff call Jeanne Bumpus, the Director of our Office of Congressional Relations, at 202-326-2195.

[you-encounter-in-a-year- would-take-76-work-days/253851/](https://www.ftc.gov/press-release/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger) (“Of course, no one is actually going to read all those privacy policies. What that massive number tells us is that the way we deal with privacy is fundamentally broken. The collective weight of the web’s data collection practices is so great that no one can maintain a responsible relationship with his or her own data. That’s got to change.”); FTC, *Protecting Consumer Privacy in an Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, at 19 (Dec. 2010) (“In recent years, the limitations of the notice-and-choice model have become increasingly apparent. Privacy policies have become longer, more complex, and, in too many instances, incomprehensible to consumers. Too often, privacy policies appear designed more to limit companies’ liability than to inform consumers about how their information will be used.”).

⁶ 15 U.S.C. §§ 2301-2312.

⁷ See Press Release, Fed. Trade Comm’n, FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct (July 1, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-votes-update-rulemaking-procedures-sets-stage-stronger>.

⁸ See *Trade Regulation Rule on Commercial Surveillance*, Reg. Identifier No. 3084-AB69 (Fall 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3084-AB69>.

Sincerely,

A handwritten signature in black ink that reads "Lina Khan". The signature is written in a cursive, flowing style.

Lina M. Khan
Chair, Federal Trade Commission