

FTC Taking a Sweeping, Fresh Look at Consumer Protection, Privacy and Competition in Tech

June 21, 2018

On June 20, the Federal Trade Commission (FTC) announced it was taking public comment and plans to hold a series of hearings in 2018 and into 2019 on *Competition and Consumer Protection in the 21st Century*. This will shape agency thinking on issues critical to the digital economy. This massive effort is being initiated by almost entirely new FTC leadership, while controversial federal policy issues swirl. This is not by accident. Senior policymakers are trying to develop thoughtful federal approaches to 21st century challenges and White House officials have privately and publicly urged participation to shape priorities.

The FTC maps out an aggressive agenda. It raises topics of current interest that go to the long term enforcement strategy of the agency. By demonstrating federal action, the FTC may help shape state agendas on issues that seemed dormant at the federal level. Thoughtful consideration and evidence-gathering by the nation's chief consumer protection agency may take the wind out of some efforts to push ahead with premature regulation or investigations.

From privacy hearings on the Hill, global pressure on the United States' tech sector, and questions about market concentration and competition, this proceeding comes at a critical time. We recently explained in a webinar that the "new" FTC faces significant policy issues. The FTC is casting a wide net. It asks about intellectual property, how to promote innovation, and about some of the most important new technologies. Of keen interest to the tech sector are questions about algorithmic decision making, artificial intelligence and predictive analytics, topics that the White House and senior

Authors

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law
Scott D. Delacourt
Partner
202.719.7459
sdelacourt@wiley.law

Practice Areas

Telecom, Media & Technology

policymakers have been starting to consider, for example at a recent White House Summit on AI. Past FTC activity has included staff reports on emerging technology, some of which, like “Big Data: A Tool for Inclusion or Exclusion?” were somewhat skeptical. This proceeding can be a fresh start, particularly with a new Chairman and new Commissioners.

As the new Chairman, Joe Simons, said in announcing this effort, the FTC plans to engage in “serious reflection and evaluation” so that the agency is “better able to promote competition and innovation, protect consumers, and shape the law, so that free markets continue to thrive”

Comments are due by August 20. The topics on which the FTC seeks comment are:

1. The state of antitrust and consumer protection law and enforcement, and their development, since the 1995 hearings held by then-Chairman Robert Pitofsky;
2. Competition and consumer protection issues in communication, information, and media technology networks;
3. The identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct or conduct that violates the consumer protection statutes enforced by the FTC, in markets featuring “platform” businesses;
4. The intersection between privacy, big data, and competition;
5. The Commission’s remedial authority to deter unfair and deceptive conduct in privacy and data security matters;
6. Evaluating the competitive effects of corporate acquisitions and mergers;
7. Evidence and analysis of monopsony power, including but not limited to, in labor markets;
8. The role of intellectual property and competition policy in promoting innovation;
9. The consumer welfare implications associated with the use of algorithmic decision tools, artificial intelligence, and predictive analytics;
10. The interpretation and harmonization of state and federal statutes and regulations that prohibit unfair and deceptive acts and practices; and
11. The agency’s investigation, enforcement, and remedial processes.

Who Should Care?

To be glib, everyone. The FTC has been addressing parts of the foregoing topics in disparate enforcement activity, staff letters, reports, workshops, guidance and blog posts. Some of the issues are on the bleeding edge of technology and are ripe for regulatory overreach if policymakers act before they have evidence.

Others touch on pending proceedings, like agency work on Informational Injury.

On a more practical level, several types of organizations should consider participating.

- Companies that make or deploy technology that touches consumers should care about this effort, which asks several questions about the agency's power over private behavior. The FTC asks about its remedial authority to police privacy and data security, which is particularly salient after the LabMD decision by the 11th Circuit invalidated its consent decree as vague and unenforceable. The FTC also asks about harmonization with state law, presenting an opportunity to urge simplification and uniformity.
- Platform providers are explicitly called out for scrutiny, as is the entire communications, information and media ecosystem.
- Innovators developing and deploying predictive analytics and AI also have skin in this game and should be eager to help the FTC understand the issues and avoid action borne of fear or skepticism. Past FTC reports on big data, for example, were quick to identify potential problems and relatively light on the immense potential benefits of new technologies. Enterprise users of these technologies may also want to help the FTC understand their beneficial uses and avoid disruption.
- By asking about "the competitive effects of corporate acquisitions and mergers" the FTC is opening the door to critiques and suggestions about how it should approach transactions across the board.

Companies should seriously consider directly participating or forming coalitions to offer views to the FTC. Trade associations are critical as well, to offer the government broad perspectives. Consumer groups and civil society are likely to participate in force, and the agency should receive practical, real world input from the innovation base and private sector to help chart the next phase of FTC activity.

What Comes Next?

Comments are due August 20 on the above topics. The FTC then will have a series of hearings in the fall and into 2019. This presents an opportunity to contribute and help educate the FTC and other policymakers. Companies should be thinking about how they want to shape the FTC's approach and agenda – including through comments, meetings, and representation at the various field hearings – as it considers a range of practical and prosaic technology issues.