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Subcommittee on Innovation, Data, and Commerce

Federal Trade Commission Practices: A Discussion on Past Versus Present

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Chairman Bilirakis, Ranking Member Schakowsky, and distinguished Subcommittee members. I am grateful for the privilege to appear before you today and offer my insights on the evolution of Federal Trade Commission practices. I earnestly hope our discussion will illuminate pathways to refine and elevate these practices, fostering an environment where our digital economy can flourish with vitality and integrity. The transformative power of technology in our society underscores the critical importance of striking the right balance between consumer protection and innovation. As we navigate this complex landscape, your consideration of these matters is appreciated and essential for shaping a prosperous and equitable digital future for all Americans.

I'm Shane Tews, a Non-Resident Senior Fellow at the American Enterprise Institute. I am before you today in my role as a tech governance policy expert and my time in the private sector. I have spent over twenty years watching the digital economy grow into the driver of our overall economy. One area in which I have seen recent growth in technology governance is the role of the Federal Trade Commission (FTC.)

The FTC plays a pivotal role in safeguarding consumer interests while fostering innovation and economic growth. To effectively fulfill this role, the FTC should return to an approach that maximizes consumer welfare, including promoting economic efficiency that encourages innovation and competition, mainly where technological advancements and new business models flourish in today's digital economy.

Instead, I have watched the growing European influence on the thinking of our administrations and regulatory agencies regarding digital market regulations. Europe has spent the last decade focused on regulating the tools that drive the digital economy,

which has crowded out the idea of technical innovations and their positive market effects.

Companies collaborating with market partners to implement and deploy innovative digital tools generate network effects and spur further innovation. Ideally, these positive dynamics would be recognized and factored into policy discussions. However, there's growing concern that regulators are taking an overly government driven approach, introducing restrictive policies before fully understanding the benefits and complexities of digital markets. This precautionary stance risks stifling innovation and disrupting the natural evolution of technologies and business models. Policymakers may spread their distrust in digital markets by defaulting to regulation to address perceived issues, hampering progress and potentially depriving society of valuable advancements. A more market-driven approach that fosters innovation while addressing legitimate concerns could lead to better outcomes for all stakeholders.

The regulatory landscape for the digital economy is undergoing significant changes, particularly in Europe, with the introduction of the Digital Markets Act (DMA), The Digital Service Act (DSA), and continued implementation of the General Data Protection Regulation (GDPR.) These new European laws caught the attention of policymakers, including former White House adviser Tim Wu and the federal agencies that aim to promote competition through regulation. However, it has raised concerns about potential overregulation and its impact on innovation. Critics argue that the approach of 'breaking up and breaking into' platforms disregards legitimate innovation arguments and property rights considerations. As a result, companies and their legal counsel find themselves in a dynamic enforcement environment. This necessitates the development of new,

proactive strategies to navigate the evolving review processes successfully. This shift in regulatory approach presents a constant challenge between cultivating competition and avoiding stifling innovation through excessive intervention.

Along with recommending a drastic change in competition and antitrust enforcement, The FTC Chair has also imposed a gag order on the knowledgeable career staff. This stifles their ability to share their educated professional opinions, which are crucial for consumers and businesses to understand how rules and regulations are reviewed and implemented at the agency. Providing resources and expert staff informational briefings is essential to the FTC's mission.

We have witnessed an intellectual “brain drain” of experienced longtime FTC personnel departing the agency due to a reported lack of maintaining high standards of honesty, integrity, and trust. This “brain drain” has significant implications for the agency’s future and should be a cause for concern for all stakeholders.

Consumer protection and consumer welfare cases have declined, as have rigorous economic-based policy work towards government-shaped economic views over free-market economic principals, including a change in antitrust enforcement policy that chooses to ignore decades of court rulings. My colleague Dr. Mark Jamison has described the transition “to condemning business conduct that can be labeled with nefarious adjectives “coercive, exploitative, abusive, restrictive.” in a change of policy to an “I know it when I see it” policy of vagueness that violates due process and the rule of law. That enables political opportunism, creating excessive legal costs and depressed business investment.

A Positive Focus for The Federal Trade Commission's Role in Protecting Consumers in the Digital Economy

Consumer Education:

The FTC could be more helpful to consumers by enhancing consumer education, which would help the public make informed choices and recognize unfair practices. The FTC can enhance consumer protection by taking two proactive steps: providing resources on emerging scams and issuing public alerts about new fraudulent schemes. These actions would empower consumers with the knowledge to safeguard themselves against potential threats better. Furthermore, by leveraging data-driven insights on scam patterns and consumer behavior, the FTC can bolster its ability to protect consumer interests more effectively in today's increasingly complex marketplace. This combination of public education and data analysis allows the FTC to stay ahead of evolving threats and maintain a robust defense for consumers.

The FTC needs to enable timely alerts to the public to emerging scams and empower consumers to protect themselves. Combined with data-driven economic insights, these efforts allow the FTC to safeguard consumer interests more effectively in an increasingly complex marketplace, providing a sense of security and protection to the public.

Data Collection/Privacy

Another positive focus for the FTC is to help adapt our regulations towards flexible and agile data collection and privacy regulations. As data collection, storage, and sharing continue to increase—especially for use in artificial intelligence and large language models—it's crucial for consumers to understand and for businesses to establish clear guidelines on sharing personal information. Transparency and accountability are the two most significant factors in achieving data collection and privacy success. The approach of acknowledging that data-enabled products and services offer tremendous advantages to consumers, including personalization and enhanced fraud protection, is critical.

Data collection and privacy rules must consider the context of data use, accommodate variations in consumer preferences, account for different risk profiles associated with various data uses, and avoid blanket restrictions that could cause more harm than good for consumers.

Any new data collection/privacy law should start with Congress. The FTC should focus on transparency and data analytics to protect consumers and enhance decision-making. Improving transparency through more straightforward business guidelines and increased public awareness of consumer rights would be ideal.

The FTC could strengthen enforcement against fraudulent data-sharing practices and improve data privacy regulations. Data protection and privacy governance should evolve through targeted enforcement actions and guidance rather than comprehensive, one-size-fits-all regulations. An incremental data protection approach allows industry

and regulators to adapt to technological advancements, changing market dynamics, and evolving consumer expectations regarding data flows and retention. This flexibility enables the protection of consumer data protection throughout its lifecycle while balancing businesses' legitimate needs for data use, reducing the risk of stifling innovation in rapidly evolving sectors, and accommodating legal obligations for services.

Cost-Benefit Analysis

Cost-benefit analysis is crucial in consumer protection, particularly for regulatory agencies like the FTC. This systematic approach evaluates the impact of regulatory actions by weighing the benefits to consumers, such as improved safety or privacy, against the costs to businesses and, indirectly, to consumers. By applying this lens to all aspects of consumer protection, the FTC can make more informed decisions about which actions will provide the most significant overall benefit while minimizing unintended negative consequences.

Cost-benefit analysis enables the FTC to create effective regulations that protect consumers without unnecessarily burdening legitimate businesses. This balanced approach, which actively avoids stifling innovation, guides the agency in determining which enforcement actions, guidance, and advocacy efforts will be most impactful and economically sound.

Ultimately, implementing cost-benefit analysis in consumer protection aims to maximize consumer benefits while carefully considering the costs imposed on businesses. This approach ensures that regulatory actions are effective in protecting consumers and

economically justified. By consistently applying this methodology, the FTC can balance robust consumer protection and a healthy, competitive business environment.

Market Studies:

Market studies could inform policy decisions, identify areas needing intervention, and identify areas where the market is growing and changing the market dynamic to the consumer's interest without government intervention.

In conclusion, the FTC should use its authority to protect consumers in the digital economy. The FTC can strengthen trust in the digital marketplace by taking a balanced approach that fosters innovation while safeguarding individual rights. As for businesses, newcomers and industry veterans want clear guidelines and open communication regarding the FTC's regulatory framework. They desire a transparent understanding of the boundaries between compliance and permissible practices.

Thank you for your attention. I welcome any questions from the committee.