

October 27, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Civil Rights and Privacy Rulemaking

Dear Chair Khan,

We, the undersigned organizations, write to express our support of the Senators' request that the Commission initiate a rulemaking "to protect consumer privacy, promote civil rights, and set clear safeguards on the collection and use of personal data in the digital economy."¹

How data is collected, processed and shared has a direct impact on civil rights and economic opportunities and falls squarely within the Commission's authority.² Companies use personal data to enable and even perpetuate discriminatory practices against people of color, women, members of the LGBTQIA+ community, religious minorities, persons with disabilities, persons living on low income, immigrants and other marginalized groups. Companies also use personal data to track, confuse, trick, and exploit individuals for commercial gain.

It is well documented that discriminatory and abusive data practices are prevalent, indicating a widespread pattern of unfair or deceptive practices across all major spheres of everyday life of

¹ Senator Blumenthal, *et al.*, Letter to Federal Trade Commission Chair Lina Khan (Sept. 20, 2021); *see also* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (2021) (urging the Commission "to exercise the FTC's statutory rulemaking authority" with respect to "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy").

² *See* U.S. Senate Committee on Commerce, Science, & Transportation, "Protecting Consumer Privacy," Hearing (Sept. 29, 2021). "The FTC has authority to push and to force companies to not engage in biased activity online...[t]hose problems would be under the unfairness jurisdiction of the FTC, and the FTC has done some but probably not enough work in that space." Senator Warnock, *Senator Warnock Emphasizes Urgent Need for Consumer Privacy Protection in Senate Commerce Hearing*, YouTube (Sep. 29, 2021), https://www.youtube.com/watch?v=T_EuN1f3Y9Q (advance video to 1:30).

commerce, including employment³, finance⁴, healthcare⁵, credit⁶, insurance⁷, housing⁸, and education⁹. These practices are embedded in every sector of society and especially harm historically disadvantaged communities.

A rulemaking that addresses the entire life cycle of data—collection, use, management, retention, and deletion — will provide people with significant protection from discrimination and related data harms. The FTC has a history of working and advising on complex privacy issues and has expressed interest in addressing the civil rights impacts of unfair data practices.¹⁰ The PrivacyCon workshop series has been part of the FTC calendar since 2016, and the FTC has published influential reports on Big Data¹¹, data brokers¹², as well as the privacy and security

³ Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn (Dec. 2018) <https://www.upturn.org/reports/2018/hiring-algorithms/>.

⁴ Kristin Johnson, Frank Pasquale, & Jennifer Chapman, *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 Fordham L. Rev. 499, 505 (2019) <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5629&context=flr>.

⁵ Heidi Ledford, *Millions of black people affected by racial bias in health-care algorithms*, Nature (Oct. 26, 2019), <https://www.nature.com/articles/d41586-019-03228-6>.

⁶ Persis Yu, Jillian McLaughlin & Miranda Levy, *Big Data: A Big Disappointment for Scoring Consumer Credit Risk*, Nat'l Consumer Law Ctr. (May 2014), <https://www.nclc.org/images/pdf/pr-reports/report-big-data.pdf>.

⁷ Julia Angwin et. al., *Minority Neighborhoods Pay Higher Car Insurance Premiums Than White Areas With the Same Risk*, ProPublica (April 5, 2017) <https://www.propublica.org/article/minority-neighborhoods-higher-car-insurance-premiums-white-areas-same-risk>.

⁸ Cyrus Farivar, *Tenant Screening Software Faces National Reckoning*, NBC News (Mar. 14, 2021), <https://www.nbcnews.com/tech/tech-news/tenant-screening-software-faces-national-reckoning-n-1260975>.

⁹ Benjamin Herold, *Schools Are Deploying Massive Digital Surveillance Systems. The Results Are Alarming*, EducationWeek (May 30, 2019) <https://www.edweek.org/leadership/schools-are-deploying-massive-digital-surveillance-systems-the-results-are-alarming/2019/05>.

¹⁰ *Aiming for truth, fairness, and equity in your company's use of AI*, Fed. Trade Comm'n (Apr. 19, 2021), <https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>.

¹¹ *Big Data: A Tool for Inclusion or Exclusion?*, Fed. Trade Comm'n (January 2016) <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf>.

¹² *Data Brokers: A Call for Transparency and Accountability*, Fed. Trade Comm'n (May 2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

annual update¹³ for Congress. We support the FTC’s call for increased funding to ensure that the Commission has the expertise and infrastructure necessary to respond to and prevent data harms. Yet even before it may obtain such additional resources, we are asking that the FTC use its substantial existing knowledge, as well as its experience in bringing diverse communities together, to begin the rulemaking process.

The FTC’s rulemaking authority is particularly well suited to respond to the range of data harms.¹⁴ A rulemaking will enable the Commission to establish clear rules against discriminatory and abusive data practices through an open, participatory process.¹⁵ In addition to identifying and defining unfair and deceptive data practices, the Commission can also use a rulemaking to establish comprehensive “requirements prescribed for the purpose of preventing such acts or practices.”¹⁶ These could include requirements that follow specific restrictions based on the types of personal data involved, the particular uses of the data, and the entities utilizing and sharing the data.

We urge the Commission to comprehensively address discriminatory and abusive data practices in a privacy rulemaking proceeding and set standards to protect all consumers.

Respectfully Submitted,

Free Press
Access Humboldt

¹³ *Federal Trade Commission 2020 Privacy and Data Security Update*, Fed. Trade Comm’n (May 2021),

https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf.

¹⁴ See Fed. Trade Comm’n, *FTC Report to Congress on Privacy and Security* (Sept. 13, 2021), https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf (“Given the serious harms stemming from surveillance practices and the absence of federal legislation, the Commission should deploy all of its tools to protect Americans’ privacy. For example, Section 18 of the FTC Act authorizes the Commission to promulgate trade regulation rules to address prevalent unfair or deceptive practices, and to seek civil penalties against those who violate them with actual knowledge or with knowledge fairly implied.”); Lina Khan, Chair, Fed. Trade Comm’n, *Statement Regarding the Report to Congress on Privacy and Security* (Oct. 1, 2021) (“Moreover, the fact that competition alone is not sufficient to safeguard data privacy and security is exactly why the Commission must explore using its rulemaking tools to codify baseline protections.”).

¹⁵ Rebecca Kelly Slaughter, Comm’r, Fed. Trade Comm’n, *Keynote Address to National Advertising Division: Disputing the Dogmas of Surveillance Advertising* (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597050/commissioner_slaughter_national_advertising_division_10-1-2021_keynote_address.pdf.

¹⁶ 15 U.S.C. § 57a(a)(1)(B).

Access Now
Action Center on Race & the Economy (ACRE)
American Civil Liberties Union
Asian Americans Advancing Justice (AAJC)
Center for American Progress
Center for Countering Digital Hate
Center for Democracy & Technology
Center for Digital Democracy
Center on Privacy & Technology at Georgetown Law
Common Cause
Consumer Action
Consumer Federation of America
Consumer Reports
Decode Democracy
Demand Progress Education Fund
Electronic Frontier Foundation
Electronic Privacy Information Center
Fairplay
Fight for the Future
Friends of the Earth
Kairos Action
Liberation in a Generation
Media Alliance
Media Matters for America
MediaJustice
Muslim Advocates
National Consumers League
National Hispanic Media Coalition
National Latinx Psychological Association
Next Century Cities
NTEN
NYU Cybersecurity for Democracy
Open Markets Institute
Open MIC (Open Media and Information Companies Initiative)
Open Technology Institute
PEN America
Privacy Rights Clearinghouse
Public Knowledge
Ranking Digital Rights
SumOfUs

The Greenlining Institute
UltraViolet
Upturn

cc: Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson