

Before the
Federal Trade Commission
Washington, D.C.

In re

Petition of Accountable Tech for Rulemaking
to Prohibit Surveillance Advertising

File No. R207005

Docket No. FTC-2021-0070

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

In response to the Request for Comment published in the Federal Register at 86 Fed. Reg. 73206 (Dec. 27, 2021), the Computer & Communications Industry Association (“CCIA”)¹ submits the following comments.

I. Introduction

The Petition for Rulemaking filed by Accountable Tech (the “Petition”) asks the Commission, pursuant to Section 5 of the FTC Act, 15 U.S.C. § 45, to “initiate rulemaking to prohibit surveillance advertising as an unfair method of competition.” Petition at 64.² The Petition rests only on the Commission’s power under the “unfair methods of competition” clause in Section 5 and requests relief that is absolute, unlimited in breadth, and would permit no exceptions. For the reasons explained herein, the Petition should be denied.

II. Discussion

The Petition rests on unsteady statutory ground because it incorrectly assumes the FTC

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at <https://www.cciagnet.org/members>.

² See also Petition at 3 (“to initiate rulemaking to prohibit the anticompetitive practice of surveillance advertising”).

is authorized to adopt the legislative “blanket ban” (Petition at 62) on behavioral advertising³ that Petitioners seek. On the contrary, federal agencies may do only what Congress authorizes them to do—and it is far from clear that the Commission can adopt legislative rules under the “unfair methods of competition” clause of Section 5.

Further, the Petition does not sit comfortably on the rubric of antitrust law. It attempts to invoke antitrust law in order to redress an alleged injury that is not the product of anticompetitive conduct, and thus the relief it seeks is not an appropriate antitrust remedy.

Finally, the Petition admits that legislation — including draft legislation already proposed in Congress — is the better tool for addressing the conduct of which it complains. Indeed, questions surrounding the agency’s rulemaking authority strongly counsel that reliance be placed on our federal legislators to consider the issues that Petitioners raise.

As explained herein, the Commission would be unable to grant the relief Petitioners seek on the basis of the law and analysis that they employ, and would wreak grave and unwarranted harm on the digital marketplace if the “ban” that Petitioners seek were adopted. For these reasons, the Petition should be denied.

A. The Petition invites overreach of the agency’s authority.

The Petition relies on Section 5 of the FTC Act in asking the Commission to adopt a rule “to prohibit the anticompetitive practice of surveillance advertising.” Petition at 3. But the Petition does not show persuasively that the Commission has authority to adopt that rule.

³ The pejorative “surveillance advertising” refers to a business model commonly known as “personalized” or “behavioral” advertising, which the FTC has heretofore long referred to as “online behavioral advertising,” *e.g.*, FTC Staff Report, *Self-Regulatory Principles for Online Behavioral Advertising* (Feb. 2009). For the sake of clarity and to be consistent with previous FTC statements on the topic, these comments will discuss the business practice challenged in the Petition as “behavioral advertising.”

“Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety and Health Admin.*, No. 21A244, *et al.*, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022); *see also Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (“an agency literally has no power to act ... unless and until Congress confers power upon it”). The Petition does not persuade that Congress authorized the Commission to adopt legislative competition rules pursuant to Section 5’s prohibition on unfair methods of competition.

The Petition admits that **“the FTC has only ever deployed its antitrust rulemaking powers once, in 1967[.]”** Petition at 8 (emphasis added). Those concededly unique rules were adopted in *Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry*, 32 Fed. Reg. 15584 (1967), pursuant to the Clayton Act, 15 U.S.C. § 12, *et seq.*, not the FTC’s unfair methods of competition authority, and were never enforced as they were overtaken by the Supreme Court’s suggestion in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) that the FTC instead issue general guidelines (not rules). This singular instance of the agency’s abandoned foray into antitrust rulemaking under a different statute over a half-century ago does not provide solid ground on which to adopt Petitioners’ flash-cut “blanket ban” on behavioral advertising. First, it was conducted pursuant to the Clayton Act, not Section 5 of the FTC Act. Second, it was employed as a last resort once the Commission had already attempted a case-by-case adjudication involving an extensive factual investigation. Finally, the *Men’s and Boys’ Tailored Clothing Industry* rules were not a “blanket ban” imposed on the entire clothing industry, but rather only a small submarket of tailored clothes for males. Those rules and that rulemaking bear almost no resemblance to the instant Petition.

The Petition also fails to consider that the FTC’s prior reticence to engage in antitrust

rulemaking is ultimately instructive on its ability to do so. In the recent *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, the Supreme Court stated, “In construing § 13(b), it is helpful to understand how the Commission’s authority (and its interpretation of that authority) has evolved over time.” 141 S. Ct. 1341, 1346-47 (2021). An agency’s longstanding view that it lacks the authority to take a certain action is a “rather telling” clue that the agency’s newfound claim to such authority is incorrect. *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (Kavanaugh, J.) (“In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect.”); *see also Fin. Planning Ass’n. v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007) (“[A]n additional weakness exists in the SEC’s interpretation: it flouts six decades of consistent SEC understanding of its authority under [the statute].”).

Petitioners’ only other support for the action they request is that, in 1973, the D.C. Circuit held that the FTC could adopt “Trade Regulation Rules” under Section 5. Petition at 8 (citing *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 698 (D.C. Cir. 1973)). But it is an unassailable truth that the Commission has never adopted antitrust rules under Section 5 in the 50 years since that decision. And, as explained above, only Congress — not an Article III court — can enlarge an agency’s authority. *E.g., Louisiana Pub. Serv. Comm’n*, 476 U.S. at 374. No such enlargement has occurred here.

The Petition acknowledges, as it must, the proscriptions of Magnuson-Moss.⁴ Petition at 9. In that legislation, Congress authorized the Commission to adopt trade regulation rules implementing the “unfair or deceptive acts or practices” clause of Section 5. Here, as stated in Section I above, the Petition rests solely on the “unfair methods of competition” clause, and thus

⁴ Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301, *et seq.* (1975).

Magnuson-Moss is of no help in proving that the agency can adopt legislative rules in the antitrust sphere. Petitioners gamely attempt to sweep away this obvious distinction by noting that Magnuson-Moss's focus on "unfair or deceptive acts or practices" means that Congress "left the Commission's UMC [unfair methods of competition] authority unmodified." Petition at 9.

This incorrect reading of Magnuson-Moss would be highly incongruous given that *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), dealt with both the FTC's unfair methods of competition and unfair and deceptive acts and practices authority, and yet Congress' reaction was to create Magnuson-Moss, which provides specific unfair and deceptive acts and practices rulemaking authority and expressly takes no position on unfair methods of competition rulemaking. Combined with the fact that the FTC has never attempted to promulgate an unfair methods of competition rule in the years following Magnuson-Moss, the Act is properly viewed as Congress declining to endorse the FTC's unfair methods of competition authority (and the FTC implicitly, through inaction, agreeing to that interpretation).

And if the Petition seeks to parse the tea leaves of Congressional intent, it fails to consider the multiple occasions on which Congress has directed the FTC to use informal notice-and-comment rulemaking, through statutes that provide the agency with detailed guidance on rulemaking topics and goals and that specifically provide exemptions from the procedures for Magnuson-Moss rulemaking. For example, such specific instruction has been given for the Telephone Disclosure and Dispute Resolution Act of 1992, the Children's Online Privacy Protection Act of 1998, and the Telemarketing and Consumer Fraud and Abuse Prevention Act. In these instances, Congress has made a clear grant of authority to the FTC, with detailed guidance on rulemaking topics and goals. If Magnuson-Moss was not intended to outline the scope of the FTC's rulemaking authority, these Congressionally-permitted exceptions would not

be necessary. And, notably, no such Congressional directive has been given to the FTC to engage in unfair methods of competition rulemaking.

The Petition also relies on “repeated” affirmations from the Supreme Court about the FTC’s authority to promulgate substantive competition rules. Petition at 12. However, the cases cited in the petition confirm the FTC’s ability to bring unfair methods of competition enforcement actions, not to issue rules. This is unsurprising given that the Supreme Court has had no occasion to review the FTC’s unfair methods of competition authority because, again, the FTC has not attempted to promulgate such rules since the enactment of Magnuson-Moss almost fifty years ago.

The Petition describes *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), as “outlin[ing] a far-reaching articulation of UMC authority.” In fact, the Court’s decision in *Sperry* upheld the FTC’s ability to issue cease-and-desist orders restraining practices as unfair methods of competition but says nothing about the agency’s ability to issue rules.

In any event, agencies, being “creatures of statute,” 2022 WL 120952, at *3, cannot expand their own authority to cover subjects that Congress has not entrusted to them. For the same reason, Petitioners’ reliance on the Commission’s 2019 press release about an antitrust workshop⁵ as purported authority to adopt their requested “blanket ban” is wholly unpersuasive.

The agency should not commence a rulemaking that is not within the agency’s authority to conduct, particularly when its longstanding authority to investigate potentially anticompetitive activity on a case-by-case basis remains available. The inadvisability of a sweeping prohibition

⁵ Petition at 8 (quoting Press Release, “FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts” (Dec. 5, 2019) (“Should the FTC consider using its rulemaking authority to address the potential harms of non-compete clauses, applying either UMC or UDAP principles?”)). This press release says nothing to the fundamental question of the agency’s authority to take the action requested in the Petition. First, it is not a binding statement of federal law. Second, it regards a subject matter completely different from behavioral advertising. Third, the press release covers both clauses of Section 5, and thus, in contrast to the Petition, does not make clear that the agency believes it has “unfair methods of competition” rulemaking authority.

is certainly inappropriate when, as here, the Petition provides merely anecdotal evidence about only a few firms.⁶ Employing an *ultra vires* legislative rulemaking for the entire Internet marketplace would not be sensible when a clearly authorized, routinized means of case-by-case review, which benefits from the continued evolution of economic and industrial learning, is the more tested, sure, and tailored approach if truly anticompetitive conduct were discovered.

Competition rulemaking of the type advocated for by Petitioners would result in overbroad prohibitions that lack nuance and are unable to pivot and adapt to rapidly changing industry dynamics and new technological developments. This is particularly critical when seeking to govern a practice that, per the Petition, has seen its current structure coalesce only in the past six years. Petition at 5.

B. Behavioral advertising is a vital component of the online ecosystem.

Digital advertising generates hundreds of billions in revenue per year in the United States. In 2020, an estimated \$350 billion was spent globally on digital ads;⁷ the Petition states (p. 5) that the U.S. share of that revenue was \$140 billion. According to Magna Global, digital advertising accounted for 57% of ad spending in 2021.⁸ It is thus evident that online marketing and advertising has become a crucial mainstay of the U.S. economy. The “blanket ban” requested in the Petition would be a dagger struck through the core of this sector of the advertising industry.

Behavioral advertising is commonplace in the digital space because it is useful to

⁶ The Petition relies on alleged instances of tying, monopoly leveraging, and monopolization in the markets for applications and ad purchasing, implying that this alleged conduct is further evidence of anticompetitive “exclusive dealing” with regard to behavioral advertising. Much of the discussion relies on news articles. Petition at 53-57.

⁷ *Global Digital Advertising and Market Report 2020: Market to Reach \$786.2 Billion by 2026*, Yahoo! Finance (Nov. 22, 2021), <https://finance.yahoo.com/news/global-digital-advertising-marketing-market-141300439.html>.

⁸ *Agencies Agree; 2021 Was a Record Year for Ad Spending, with More Growth Expected in 2022*, Forbes (Dec. 8, 2021), <https://www.forbes.com/sites/bradadgate/2021/12/08/agencies-agree-2021-was-a-record-year-for-ad-spending-with-more-growth-expected-in-2022/>.

advertisers, publishers, *and* consumers. Customizing ad displays helps advertisers reach interested consumers at lower costs, and increases the value of publishers' online advertising "real estate" associated with their digital content. In addition, personalization increases the odds that, when consumers see advertising, those ads pertain to products and services that are actually meaningful to them. Rather than presenting users with ads for products for which they have no use, behavioral advertising enables firms to display the items that are far more relevant to the consumer. And that consumer, rather than being deluged with ads for items she does not use or need, will see a sensible array of products and services that she is more likely to care about. In a word, behavioral advertising saves time and increases value.

The Petition requests a "blanket ban" on those benefits. Petition at 62. It asks the Commission not to permit any firm, anywhere, to use behavioral advertising in any online environment touching the United States. *Id.* at 63-64. Thus, it would end online advertising as we know it and undermine the free and open Internet: stripping hundreds of billions in revenue from the online ecosystem, upsetting the revenue streams of an untold number of small businesses, and hobbling independent publishers nationwide. For this additional reason, the relief Petitioners request is imprudent.

C. The Commission's antitrust authority is not the appropriate tool for addressing behavioral advertising.

The Petition does not find traction among the tenets of antitrust law on which it attempts to stand. First, the conduct of which Petitioners complain is not, according to their own definition of "surveillance advertising," dependent on or born of market dominance or collusive activity. Second, the proposed "blanket ban" (Petition at 62) on targeted advertising is not relief of the type that antitrust law is meant to employ. Even if all targeted advertising were harmful — and the evidence presented in Section II.A above demonstrates that it is not — this is not a

matter for antitrust law.

The Petition states that “surveillance advertising has become a highly lucrative business model dependent upon pervasive tracking and profiling for the purpose of selling hyper-personalized ads.” Petition at 3-4. It defines “surveillance advertising” as “consist[ing] of two major elements: 1) an information or communication platform collecting personal data and 2) targeting advertisements at users, based on that personal data, as they traverse the internet, including other digital platforms.” Petition at 60. By the plain language of Petitioners’ own definition, the conduct of which they complain requires no nexus to or basis in anticompetitive behavior. Any firm acting alone can satisfy both criteria of this definition and thus, in Petitioners’ view, engage in behavioral advertising, which would inflict, according to Petitioners, a harm to consumers so grave that only a “blanket ban” on the practice will suffice. This definition in itself reveals that the Petition sounds not in antitrust law, but rather in general consumer-protection policy.

The antitrust theory that the Petition posits is “exclusive dealing.” Petition at 51-52. The “exclusive dealing” label refers to how a few firms “collect and monetize more user data,” *id.* at 52, and how they “deny rivals access to the essential chokepoints [of data collection] they control.” *Id.* at 51. But what is odd is that Petitioners do not want *anyone* to use the consumer data in advertising, a practice that they condemn as “extract[ing] profits from users in increasingly ruthless ways without consequence.” *Id.* at 7. If we are to construct for Petitioners the requisite market analysis on which antitrust review depends, the product market affected by the alleged exclusive dealing is the market for mining, sharing, and employing of consumer data for use in advertising.

Therefore, under Petitioners’ antitrust theory, the question becomes why a few firms’

alleged refusal to share “essential chokepoints” is a harm that warrants Commission action. In attaching the antitrust label of “exclusive dealing” to behavioral advertising, Petitioners unwittingly are asking the Commission *to help* firms share and use consumer data in order to customize their advertising. It is that conundrum which demonstrates why Petitioners’ reliance on antitrust theory is ill-suited to their cause, rendering the requested rulemaking not only an *ultra vires* action but an inevitably fruitless exercise.

Finally, and aside from the Petition’s internal discord of seeking to protect competitors’ ability to use a business practice that the Petition flatly condemns, the attempted application of antitrust theory to Petitioners’ allegations must fail because it is at odds with itself: if the entire online ecosystem is engaged in the same practice, such that the practice must be prohibited, then no antitrust harm is being inflicted. In brief, if all firms can do it, then the market is functioning properly. And as such, the Commission has no need to step in. The Petition has in a sense mooted itself.

D. As the Petition acknowledges, Congressional action is underway, which would be the more appropriate forum in which to consider the value of behavioral advertising.

Petitioners, in attempting to buttress their cited authority for banning all behavioral advertising, refer to action “proposed in other contexts” for the online marketplace. Petition at 62. Those “other contexts” are bills that presently are pending in the U.S. House of Representatives. *Id.* n.231 (citing H.R. 3451, H.R. 3816, H.R. 3825, H.R. 3826, H.R. 3843, H.R. 3849). In this vein, it bears mention that just last week H.R. 6416, entitled “Banning Surveillance Advertising Act of 2022,” was introduced. Thus, members of Congress are already discussing exactly the business practices that the Petition is challenging.

These references to proposed legislation concede that the relief sought in the Petition is

better presented to Congress than to the Commission. As already explained herein, there remain fundamental questions as to whether Congress has authorized the Commission to take the requested action; bringing this matter to Congress is the only feasible way to answer those questions.

III. Conclusion

The Commission should deny the Petition for Rulemaking.

Respectfully submitted,

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January 26, 2022