

**Before the
Federal Trade Commission
Washington, DC 20580**

In the matter of

Competition and Consumer Protection
in the 21st Century Hearings

Project Number P181201

COMMENTS OF PUBLIC KNOWLEDGE

11. The agency's investigation, enforcement and remedial processes.¹

Consumer protection, fairness, and competition policy in today's digital economy require substantially stronger enforcement of antitrust law, more aggressive use of existing regulatory powers and new laws to fill in important policy gaps. Public Knowledge commends the FTC for launching this proceeding and a series of public hearings to examine competition and consumer protection in the 21st century, and today offers some initial observations and ideas to consider on the topics the Commission has identified as central to its inquiry. We will augment these ideas through our participation in Commission workshops and through follow up filings as the Commission refines the focus of its efforts.

The recent explosion in internet distribution of goods and services, growing dependence of democratic processes on nondiscriminatory and open digital communications platforms, and ongoing market dominance of entrenched media and communications companies makes it imperative for the FTC to become more vigilant and assertive to protect incipient and potential competition, to apply all qualitatively relevant elements to its consumer welfare analysis, and to update its consumer protection enforcement to reflect the complexities of the digital marketplace. As an expert agency with a specific mandate from Congress, it is also important for the FTC to inform lawmakers and the public of market imperfections and problems it lacks the tools and resources to address

¹ Public Knowledge staff John Bergmayer, Allie Bohm, Ryan Clough, Harold Feld, Meredith Rose, Kory Gaines, Dylan Gilbert, and Gus Rossi contributed to the comments filed in this proceeding.

and to propose policy adjustments that would more effectively address inequities in the oversight of today's economy.

Today, we are highlighting a number of the complexities and issues regarding application of FTC authority to the digital economy and the exploding internet economy in response to the Commission's request for comment. Rather than delineate precisely what deserves treatment under antitrust, consumer protection or some new legal authority, we instead highlight many of the problems that deserve careful attention, definition, further analysis and refinement before precise policy action should be considered. We offer this as a first step because we believe:

- the explosion of the digital market calls first for understanding precisely what is going wrong and therefore deserves fixing;
- identifying what are the best policy tools available to fix the problems;
- evaluating how best to apply existing policy tools; and
- proposing new policy tools to address problems that fall between the gaps under existing law.

This document contains our comments relating to the agency's investigation, enforcement and remedial processes.

We look forward to working with the FTC and all other stakeholders to flesh out the details of the concerns raised in our comments and propose meaningful policy adjustments and enforcement practices to help the Commission fully protect competition and consumers in the digital marketplace.

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From a consumer standpoint, the FTC's existing process for receiving and processing complaints leaves much to be desired. As professional advocates, Public Knowledge has found the process a frustrating, confusing black box. To be clear, while the FTC has useful tools for *filing* a complaint, the agency does little to let consumers know what happens next. Furthermore, even after significant events such as the Equifax data breach become known, the public can remain in the dark on whether the FTC is acting as an aggressive "cop on the beat" for consumers.

Unless the FTC decides to initiate a complaint that produces a public document such as consent decree or complaint, the public never learn whether or not the FTC has decided to take action. For example, members of the public still have no idea whether the FTC is investigating Equifax, if the Commission has concluded that Equifax did nothing that violates the FTCA, or if the Commission ever seriously commenced an investigation in the first place. For individuals, filing an FTC complaint can prove an extremely disheartening experience as their complaint is neither dismissed or resolved.

This does more than undermine confidence in the agency and discourage consumers from filing complaints. Consumers and advocates have no means of ascertaining what is necessary to include in a complaint to trigger an investigation, and what responses from the subject of the complaint the FTC considers adequate to resolve the matter without further investigation. If the FTC does not move forward, does that mean that the consumer failed to include adequate details to support the complaint? Does it mean the business in question provided an explanation? If the later, shouldn't the customer complaining to the FTC have the opportunity to provide some kind of rebuttal? Or is it simply that the FTC takes no action because it lacks sufficient resources to act on this complaint? This situation makes it impossible for either consumers or businesses to enjoy certainty. Consumers need to know what the FTC expects them to provide in a complaint, and deserve to have some idea as to how the FTC process works and how long it will take. For their part, businesses need to have an idea as to what defenses to raise and what evidence to provide to avoid a complaint where one is not warranted.

Going forward, the FTC should provide some basic explanation to complainants and some sense of how long any given stage of the process is likely to take. If the FTC decides not to move forward with a complaint, it should issue some sort of notification to the complainant and to the public so that others can learn from the proceeding. In cases of national importance, the FTC should provide the public with some regular reassurance that the investigation remains active and ongoing, or that the FTC has decided to terminate the investigation. Additionally, if the complaint is better addressed by another agency, such as the FCC or the FDA, the FTC should forward the complaint to the relevant agency and notify the complainant of the referral.

Above all else, the public should not be left wondering whether the FTC is taking their complaints seriously or whether they should seek help elsewhere. At the moment, filing a complaint with the FTC can feel much the same as throwing a coin in a wishing well. One hopes for the best, but even if the wish comes true you can never be certain why. There are many reasons why the FTC may decide not to prosecute a complaint – including that the behavior may fall outside the jurisdiction of the FTC. Transparency and finality for consumers filing complaints will provide consumers with a better experience and will build public confidence in the agency.

Respectfully submitted,
Public Knowledge
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