

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION**

Full Committee
Wednesday, September 20, 2023, at 10:00 A.M.

REPUBLICAN QUESTIONS FOR THE RECORD

COVER PAGE
Andrew Ferguson

RANKING MEMBER TED CRUZ (R-TX)

In questions at the hearing regarding FTC's advanced notice of proposed rulemaking on commercial surveillance and data security, you said you would be willing to table the rule.

1. What did you mean by that?

Our system of government depends on each branch of the federal government exercising only the powers the Constitution assigns to them. Congress makes the laws, and the executive branch—including the FTC—executes those laws. The executive branch cannot make law, and it is critically important that agencies of the executive branch exercise only those powers Congress has given them. The FTC should bring enforcement actions where consumer data is used to facilitate unfair methods of competition or unfair or deceptive acts or practices. But I have reservations about the rule contemplated by the advanced notice of proposed rulemaking; it may exceed the authority conferred on the FTC by Congress. Moreover, I am firmly of the view that congressional action is the only way to address data privacy and security comprehensively. Prudence suggests that the FTC should be slow to enact regulations which risk disrupting Congress's ongoing consideration of comprehensive privacy legislation.

My reservations notwithstanding, if I were confirmed I would consider the comments submitted in response to the advanced notice of proposed rulemaking and the text of any draft rule with an open mind. I would base any decision regarding that rule exclusively on the law as Congress has written it.

SENATOR JOHN THUNE (R-SD)

Question 1. Mr. Ferguson and Ms. Holyoak, earlier this year, the FTC issued a “Request for Information” on franchising which included many questions about private franchise contracts and franchisors’ association with franchisee employees. If confirmed, would you agree that the FTC should proceed with caution and not create any rules or obligations that would unravel or threaten the franchise model in the United States and the survival of the 800,000 franchise businesses and their workers across America?

Response: The franchise model has been a boon to the American economy. Because I have not yet been confirmed, I am unfamiliar with the record underlying the FTC’s request for information. If confirmed, I would work with FTC staff to get up to speed on the request for information. The FTC should not take any action in any industry, including franchises, that is inconsistent with its statutory mandate.

Question 2. As you know, I am one of the authors of the TRACED Act that was passed into law in 2019, creating, among other things the registered traceback consortium. We’ve seen some progress since then, including a decline in illegal and fraudulent robocalls. If confirmed, will you commit to continue to prioritize FTC efforts to stop illegal robocalls?

Response: Yes. Robocalls are a plague from which no consumer is immune, and if confirmed I would work with my colleagues to make this a top priority for the FTC.

SENATOR JERRY MORAN (R-KS)

1. Data Privacy: FTC Acting Without Congress

I was disappointed the FTC chose to pursue a Section 18 rulemaking on data privacy and security. No directive was given to the FTC or Congress to pursue such a rulemaking, as the issue is a matter of ongoing and active debate in Congress, and this Committee in particular.

Last year, the U.S. Supreme Court in *West Virginia v. EPA* reaffirmed the principle that federal agencies must operate within their statutory boundaries, emphasizing the need for a clear grant of authority under the "major questions doctrine" for rulemaking. Since that decision was issued, the FTC has pursued rulemaking on a number of issues, including data privacy.

How should the FTC apply the *West Virginia v. EPA* decision when considering rulemaking projects? Can significant rulemaking projects be undertaken, even if the FTC has no clear grant of authority from Congress to pursue the rulemaking?

If confirmed, I would follow Supreme Court precedent, including *West Virginia v. EPA*, and abide by the limits Congress has imposed on the FTC's authority. Our system of government depends on each branch of the federal government exercising only the powers the Constitution assigns to them. Congress makes the laws, and the executive branch—including the FTC—executes those laws. The executive branch cannot make law, and it is critically important that agencies of the executive branch exercise only those powers Congress has given them. The FTC cannot undertake any rulemaking project—significant or insignificant—unless Congress has unambiguously conferred upon it the authority to do so. The major-questions doctrine, which is central to the Supreme Court's holding in *West Virginia v. EPA*, safeguards this important separation-of-powers principle.

2. Data Privacy: Preemption of State Laws

What are the potential consequences to small businesses if a federal comprehensive data privacy law does not preempt the patchwork of state data privacy laws? Do you believe a federal comprehensive data privacy law should preempt state laws? Why or why not?

In the absence of federal privacy legislation, the States have stepped in to protect their citizens' data. That is consistent with our constitutional system built on federalism. The many approaches taken by the States run the risk of creating a regulatory patchwork, which creates uncertainty and unpredictability for both regulated entities and consumers. Addressing the patchwork problem may require preempting some state laws. Congress should, however, respect the States' longstanding role as the principal protector of the rights of consumers, and preempt no more State law than necessary to accomplish Congress's objectives.

3. FTC "Zombie" Votes

Last November, Politico reported that Commissioner Chopra submitted as many as 20 votes on his last day at the FTC that, thanks to the FTC voting rules, would allow those votes to be used for Commission business for up to 60 days.

Allowing Commissioners' votes to count after they depart their post seems counter to common sense and good governance principles. This is why I introduced the FTC Integrity Act, which would ensure this practice would not continue. An amendment version of this bill received unanimous support in this Committee last Congress.

Regardless of whether Commissioner Chopra's votes comported with the Commission's rules at the time, do you believe that Commissioners should be able to vote after leaving the FTC?

Permitting a Commissioner to vote on matters that are not decided by the FTC until after that Commissioner has departed is inconsistent with principles of sound deliberation and collective decision making. It denies sitting Commissioners the opportunity to debate the departing Commissioner's views and undermines transparency.

4. Staff Morale at the FTC

An April 2023 study found that staff morale at the FTC has decreased dramatically since 2020, when the Commission was the highest-ranking federal agency in terms of employee satisfaction. Particularly concerning are scores pertaining to FTC employee satisfaction with Commission leadership, which fell from 84.3 in 2020 to 46.6 in 2022.

In general, what factors contribute to high employee satisfaction? How can organization leaders impact the morale of staff?

It is my experience that employees are satisfied with their work if they have a clear sense of their mission, and have leaders who insist on excellence in the execution of that mission, and who work to promote a culture of excellence.

If confirmed by the Senate, how would you work to increase employee satisfaction at the Commission?

I would meet with the FTC staff to understand what concerns they have, how they understand their mission, what I can do to support them in its execution, and to solicit input on how to promote a culture of excellence within the agency.

5. Motor Vehicle Dealers Trade Regulation Rule

Last summer, the FTC noticed the Motor Vehicle Dealers Trade Regulation Rule, which would add requirements for dealerships to follow and change the way Americans purchase vehicles. I understand the FTC did not pursue an Advanced Notice of Proposed Rulemaking in this case, which would have given stakeholders an additional opportunity to provide the FTC information on the car buying process.

Generally speaking, do you believe the FTC should pursue all available information-gathering avenues and conduct thorough cost-benefit analyses before acting to implement a significant rule, like the Motor Vehicle Dealers Rule?

I generally believe that more information is better than less, and that regulations premised on a comprehensive understanding of markets, consumer behavior, and potential costs and benefits are better than those that are not premised on a comprehensive understanding.

SENATOR CYNTHIA LUMMIS (R-WY)

1) Last year, the FTC issued an Advanced Notice of Proposed Rulemaking (ANPR) for the Trade Regulation Rule on Commercial Surveillance and Data Security. I expressed my concerns in a letter that this rulemaking would only add to the regulatory uncertainty that businesses face when complying with data privacy regulation and potentially increase costs. I additionally voiced my concerns that the FTC was exceeding its authority by proposing a broad rulemaking action that would have large-scale impacts on the U.S. economy.

a) Do you believe that the FTC overstepped its authority in issuing the ANPR for the Trade Regulation Rule on Commercial Surveillance and Data Security?

Response:

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My reservations notwithstanding, if I were confirmed I would consider the comments submitted in response to the advanced notice of proposed rulemaking and the text of any draft rule with an open mind. I would base any decision regarding that rule exclusively on the law as Congress has written it.

b) Do you believe that the FTC should wait for Congress to enact comprehensive data privacy regulation before issuing rules on data privacy?

Response:

I believe that Congress alone possesses the authority to address data privacy comprehensively, and that the FTC should not exercise its authority in a way that would exceed its statutory authority or which might interfere with the development of comprehensive privacy legislation by Congress.